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V. J. LEBARRON, APPELLANT, V. CITY OF HARVARD, APPELLEE.

FILED JULY 12, 1935. No. 29268.

1. **Municipal Corporations**: CONTRACTS. After the due passage of an appropriation bill by a city of the second class, its power to lawfully contract is determined by the amounts carried in such bill, added to the amount on hand of previous levies and appropriations at the date of making such engagement. *Campbell Co. v. City of Harvard*, 123 Neb. 539. This power to contract is in no manner diminished by the failure of the corporate authorities to assess to the extent actually authorized.
2. **Stipulations.** Where a trial is had on a formal, judicial stipulation of facts, not limited by its terms, made in open court, and the judgment rendered on that trial is reversed and the cause remanded, on a subsequent trial such stipulation is admissible in evidence.
3. ———: SIGNING. It is not necessary that an agreed statement of facts, admitted by the parties to be true in open court, should be signed by them or their attorneys.
4. ———. Parties will not be relieved from formal, judicial stipulations unless the application for such relief is seasonably made, with diligence, upon due notice, and good cause is shown for granting it.
5. ———: CONCLUSIVENESS. A formal, judicial stipulation by the parties as to facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise.
6. **Appeal**: REVERSAL: PROCEDURE. In a case such as this, where the trial court sought to correct a supposed error in failing to sustain a motion for a directed verdict by vacating the verdict returned and then by dismissing the action, this court will, upon reversing the judgment of dismissal, if no other error is presented by the record, proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for that purpose.

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

Sterling F. Mutz, Cloyd L. Stewart and *Robert S. Stauffer*, for appellant.

D. B. Massie, H. G. Wellensiek and *John M. Paul, contra.*

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

EBERLY, J.

This is the second appearance of this case in this court. The titles differ, however. At the former hearing the issues on appeal were presented as O. M. Campbell Company v. City of Harvard, and the disposition thereof is reported under that title in 123 Neb. 539. After reversal and remand, V. J. LeBarron acquired the interest of O. M. Campbell Company, and, as its successor, was substituted as party plaintiff in an amended petition filed with leave of court. The amended petition, in addition to setting forth the acquirement of the cause of action by LeBarron as assignee, pleaded substantially the same cause of action as was relied upon in the original petition. To this amended petition the defendant filed its answer which included affirmative defenses, and plaintiff then replied denying generally the allegations of the answer.

The case was tried to a jury.

Accepting the recital in defendant's brief as a summarization of the record, it appears that, "At the close of the evidence, appellee (City of Harvard) moved for a directed verdict in its favor. The trial court reserved its ruling on this motion and submitted the case to the jury. * * * After the jury returned a verdict in favor of appellant (in the amount as prayed), the appellee filed a motion for new trial and for judgment notwithstanding the verdict. On the hearing of these motions, the trial court sustained the motion for a directed verdict made at the close of the evidence, and the motion for judgment notwithstanding the verdict, for the reason that the appellee, City of Harvard, failed to make an appropriation, and did not have *on hand an unexpended and unappropriated balance* out of which the consideration of the contract sued upon could be paid."

Accepting the resumé quoted as substantially accurate, in the light of the jury's verdict, the conclusion is that a formal contract in writing was honestly made and entered

into by the Campbell Company with the City of Harvard for a certain audit of its records, at a definite price, and was in all respects properly performed and carried out; and recovery was denied by the trial court solely because the unused and unappropriated money in the general fund and the annual appropriation of 1929 were insufficient to meet the expense necessitated by the contract sued on.

This forms the crux of the case now presented to this tribunal. In this opinion the parties will be designated as in the trial court.

On the former hearing this court determined, upon the record then before it, that the making of a contract for an audit of the records of the city of Harvard was within its corporate powers. It was also held:

"Unused and unappropriated money in a city treasury in the general fund at the time a contract for a necessary city audit is executed may, for the purposes of the contract, be available for payment of the auditor's stipulated compensation.

"Where unused and unappropriated money in a city treasury in the general fund and the annual appropriation therefor are sufficient to meet the expense of a necessary city audit and are available for that purpose at the time the contract for the audit is executed, subsequent depletion of the fund would not make the contract void.

"In absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed." *Campbell Co. v. City of Harvard,* 123 Neb. 539.

The foregoing principles thus announced constitute the law of the case on the second appeal.

On such second appeal, this court affirmed the action of the trial court in directing the entry of a judgment against the plaintiff in *LeBarron v. City of Harvard,* 127 Neb. 899. By his motion for rehearing and brief in support thereof, plaintiff challenges the correctness of this affirmance, on the following grounds in substance: That in view of certain facts clearly established by the record, the controlling statutes have been improperly construed or wrongfully ap-

plied; that the exclusion by the trial court of a stipulation previously entered into by the parties as to the existence of a fund of $1,111.11 in possession of the city treasurer at the time of the making of the contract, made up from moneys previously appropriated and unexpended, constituted a vital error.

"As a starting point for the consideration of the question presented, we may adopt the language of Judge Dillon, that a municipal corporation 'possesses, and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.'" *Christensen v. City of Fremont,* 45 Neb. 160.

The following statutory provisions appear to control or shed light upon the proper determination of the questions involved in this appeal, in so far as the question of corporate powers is concerned, viz., sections 17-566, 17-429, 77-1201, 77-1801, 77-1803, Comp. St. 1929.

In connection with these statutory provisions the undoubted principles of construction appear to be:

"All statutes upon the same general subject are to be regarded as part of one system, and later statutes are to be considered as supplementary or complementary to those preceding them upon the same subject.

"Statutes *in pari materia* should be construed together." *State v. Omaha Elevator Co.,* 75 Neb. 637.

See, also, *State v. Searle,* 86 Neb. 259; *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111.

"The fiscal and municipal year of each city and village shall commence on the first Tuesday of May each year in so far as revenue and fiscal management are concerned, and on the last Tuesday in April in so far as organization and legislation are concerned." Comp. St. 1929, sec. 17-566. It was enacted in its present form in 1927. Laws 1927, ch. 46.

In 1887 there was duly enacted the following provision conferring powers on cities of the second class and villages: "To levy taxes for general revenue purposes, not to exceed twenty-five mills on the dollar in any one year, on all property within the limits of said cities and villages taxable according to the laws of the state of Nebraska, the valuation of such property to be ascertained from the books or assessment rolls of the assessor of the proper precinct or township." Comp. St. 1929, sec. 17-429. See, however, sec. 77-1201, Comp. St. 1929.

In addition, we have the following statutory provisions which are pertinent to the present controversy:

Section 17-569 provides, in part: "The city council of cities and board of trustees in villages shall, within the first quarter of each fiscal year, pass an ordinance, to be termed 'the annual appropriation bill,' in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during that year; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose."

By section 17-570 it is provided: "Before such annual appropriation bill shall be passed, the council or trustees shall prepare an estimate of the probable amount of money necessary for all purposes to be raised in said city or village during the fiscal year for which the appropriation is to be made, including interest and principal due on the bonded debt and sinking fund, itemizing and classifying the different objects and branches of expenditures, as near as may be, with a statement of the entire revenue of the city or village for the previous fiscal year, and shall enter the same at large upon its minutes, and cause the same to be published four weeks in some newspaper published or of general circulation in the city or village."

Section 17-572 provides: "No contract shall be hereafter

made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditures shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

Section 77-1803 reads as follows: "The proper authorities of cities, villages, * * * shall annually on or before the first Monday in June, certify to the county clerk the several amounts which they severally require to be raised by taxation, including all amounts due upon legal and valid bonds outstanding against such corporation; Provided, school district taxes shall be certified to the county clerk on or before the first Monday in July."

In view of the language employed in the statutes quoted, it is quite obvious that the power of enacting assessment ordinances conferred by section 17-429, and the power and purpose of adopting appropriation ordinances or appropriation bills vested in cities of the second class by sections 17-569 and 17-570, derived from distinct grants of power and finding their respective sources in separate legislative provisions, are mutually independent and unrelated save and except as section 17-572 expressly provides to the contrary.

While these statutes fairly contemplate that the appropriation bill shall in order of time precede the levy of the municipal tax if such levy be required, it is not enjoined that a tax assessment, levy or ordinance shall constitute a part of the same or be enacted contemporaneous therewith. Indeed, we might well take judicial notice of the fact that, in at least one of the municipalities within this state, tax levies for municipal purposes are wholly unnecessary, yet even in this unusual situation the enactment of an appropriation bill might well be deemed to properly answer the requirement of the statutes. So, by the express provisions under consideration the exercise of the power to contract

by cities of the second class is expressly and solely conditioned on the fact that the requisite appropriation therefor shall have previously been made, "except as otherwise herein provided," which exception includes, as this court has determined, the addition of unexpended funds of previous levies formerly appropriated.

True, certain statutory requirements must be met in the adoption of the annual appropriation bill. An estimate, as provided by section 17-570, is directed. So, also, the amount carried by the annual appropriation bill is limited to an amount not exceeding in the aggregate the amount of the tax authorized to be levied during that year. "Authorized," as here employed, agreeable to the definition of lexicographers, expresses the thought, viz., "possessed of or endowed with authority."

The authority of a city of the second class to levy taxes, as to aggregate amount, is clearly determined by the due application of three separate statutory provisions, viz.: (1) Section 17-429 prescribing the maximum rate permitted; (2) chapter 77, Comp. St. 1929, providing for the valuation of the property within the corporate boundaries subject to assessment; and (3) section 17-570, setting forth the terms of an estimate of the probable amount of money needed. In other words, the amounts carried by the appropriation bill are not limited to the taxes actually assessed, but rather are determinable by the taxes which may be lawfully assessed.

It therefore follows that, after the due passage of the appropriation bill by a municipality, its power to lawfully contract is determined by the amounts carried by such bill, added to the amount on hand of previous levies and appropriations at the date of making such engagement, as heretofore determined by this court. *Campbell Co. v. City of Harvard*, 123 Neb. 539. This power to contract is in no manner diminished by failure of the corporate authorities to assess to the extent actually authorized.

It also follows that the appropriation bill here before us, in the amounts carried, did not exceed the amount of tax

authorized to be levied by the city of Harvard during the fiscal year beginning May 1, 1929, and therefore such amounts may not be reduced because of the terms of the assessment ordinance in determining the contractual powers of that city relating thereto.

The present record discloses that at the second trial of this case in the district court a jury was impaneled and sworn, and the production of testimony commenced. Plaintiff then offered in evidence exhibit 3. This exhibit is disclosed by the bill of exceptions to be a stipulation entered into in open court at the time of the first trial of this cause between the plaintiff and defendant.

It was as follows: "Stipulation: It is hereby stipulated and agreed by and between the parties hereto that exhibit 1 being the annual appropriation ordinance No. 150 was the only appropriation made by the defendant city for the municipal year ending April 30, 1930, and that the same may be received in evidence and a copy furnished for the record.

"It is further stipulated that at the beginning of the fiscal year beginning May 1, 1929, and ending May 1, 1930, there was in the general fund unexpended from the preceding fiscal year the sum of $1,111.11.

"It is further stipulated that on October 22, 1929, the date of the execution of the contract, there was in the general fund of the city of Harvard the sum of $2,287.96."

Upon the formal offer of exhibit 3 the following occurred:

"Mr. Wellensiek: Objected to as incompetent, irrelevant, immaterial, not the best evidence and for the further reason that such stipulation was entered into in the former trial for the purpose of presenting to the court the legal propositions involved herein, and for the further reason that said stipulation was entered into upon the representations of the plaintiff and his counsel that the statement therein was correct, and which we are now prepared to show was not correct, and that the defendant entered therein relying upon that statement of plaintiff and coun-

sel and that none of the officers of the city were present to prove its correctness. The Court: Let me see it. (Done) Mr. Wellensiek: And we object for the further reason that the stipulation is not binding on the defendant. The Court: I think the objection is good. A stipulation made at a former trial, except by agreement of the parties, is not binding and is not competent evidence in this trial. Mr. Mutz: I was under the impression that a stipulation entered into in open court was binding unless set aside. The Court: It is binding as far as that trial is concerned. Mr. Mutz: But this stipulation, exhibit 3, is part of the bill of exceptions which was settled in the first trial of this case. * * * The Court: Proceed."

Without setting forth the details of the record, it may be said that all questions of foundation were eliminated, and the point fairly presented by this record is whether the stipulation made and used at the first trial was competent evidence and binding at the second trial. LeBarron, it is true, had been substituted for the O. M. Campbell Company, as assignee of that corporation, but he succeeded to whatever rights, if any, were vested by the terms of the stipulation in the O. M. Campbell Company. It will be noted that defendant's objection to the admission of the stipulation in evidence is not, in terms or effect, an application to be relieved therefrom through the exercise of judicial discretion by the court, but is an unconditional challenge to the validity and binding force of the stipulation itself.

Before us here is a stipulation of the parties made in open court at the time of the first trial. Its terms contain no express limitation that it is intended for use at the first trial only, neither does it expressly provide that it shall be binding in the event of a second trial, but it is a solemn assertion of the existence of certain facts in their nature unchangeable.

The principles of law and procedure embodied in the following authorities seem in point:

"An express waiver, made in court or preparatory to

trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn —*i. e.* ceremonial or formal—or *judicial admission,* or *stipulation.* It is, in truth, a substitute for evidence, in that it does away with the need for evidence. This judicial admission is sharply marked off from the ordinary or quasi-admission—which indeed does not deserve to bear the same name. The latter is merely an item of evidence, available against the party on the same theory on which a self-contradiction is available against a witness." 5 Wigmore, Evidence (2d ed.) 604, sec. 2588. See, also, *Flansburg v. Shumway,* 117 Neb. 125; *Ayres v. Barnett,* 93 Neb. 350.

Where a trial is had on a written statement of facts, not limited by its terms, and admitted to be true in open court, and the judgment rendered on that trial is reversed and the cause remanded, on a subsequent trial that statement is admissible in evidence. *Prestwood v. Watson,* 111 Ala. 604; 1 Greenleaf, Evidence (13th ed.) sec. 186; 60 C. J. 84.

It is not necessary that an agreed statement of facts, admitted by the parties to be true in open court, should be signed by their attorneys. *Prestwood v. Watson,* 111 Ala. 604.

But if by their terms the stipulations are not limited, and are unqualified admissions of facts, the limitation is not implied and they are receivable in any subsequent trial between the parties. *Doe d. Wetherell v. Bird,* 7 Car. & P. (Eng.) *6; *Langley v. Earl of Oxford,* 1 Mees. & W. (Eng.) *508; *Holley v. Young,* 68 Me. 215; *Central B. U. P. R. Co. v. Shoup,* 28 Kan. 394; *Harris v. McArthur,* 90 Ga. 216; *Johnson v. Wright,* 19 Ga. 509.

"A stipulation allowing the evidence in a certain case to be read 'on the trial' of another case applies to any trial

of the case, whether first or second, so long as neither party is relieved from the obligation by an affirmative application to the court, and notwithstanding notice by one of the parties after a first trial that the party will no longer consider itself bound." *Herbst v. Vacuum Oil Co.*, 22 N. Y. Supp. 807. See, also, *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 225.

In *McCarthy v. Benedict*, 90 Neb. 386, this court say, in part: "There is no doubt that, when stipulations of fact in an action are improvidently made by mistake of the parties, the court has discretion to relieve the parties from the consequences thereof. In such case the parties *should act promptly* and call the attention of the trial court to the mistake of fact in the stipulation, and, when that mistake is clearly found *with a proper showing of diligence*, the courts generally correct such mistake." (Italics ours.) In the *McCarthy* case relief from the stipulation, however, was denied.

The rule well supported by authority is that delay in asking that relief may defeat the application. *Northern P. R. Co. v. Barlow*, 20 N. Dak. 197; *State v. Superior Court*, 151 Wash. 413.

A stipulation by the parties as to the facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise. *City of Chicago v. Drexel*, 141 Ill. 89; *Ward & Co. v. Industrial Commission*, 304 Ill. 576; 5 Wigmore, Evidence (2d ed.) 605, sec. 2590; *Andrews v. Olaff*, 99 Conn. 530.

Parties will not be relieved from stipulations in the absence of a clear showing that the matter stipulated is untrue, and then only if the application for such relief is seasonably made, and good cause is shown for granting it. 25 R. C. L. 1099, sec. 6; *Smith v. Smith*, 90 Fla. 824; *Muller v. Dows*, 94 U. S. 277; *United States v. Davison*, 1 Fed. (2d) 465; *Brown v. Cohn*, 88 Wis. 627; *Franklin v. National Ins. Co.*, 43 Mo. 491; *Holley v. Young*, 68 Me. 215; *Hutchings v. Buck*, 32 Me. 277.

A motion addressed to the court for relief, sustained by

proper proof, with due notice to opposing party, has been recognized as proper practice. *Ish v. Crane,* 13 Ohio St. 574; *In re Reed,* 117 Fed. 358. The opposing party must be given due notice of the proposed application for relief. *Carnegie Steel Co. v. Cambria Iron Co.,* 185 U. S. 403.

The stipulation here in question establishes the existence of a certain fact. The truth of this fact was necessarily disclosed by the city's books, which were continuously in possession of defendant and subject to its inspection. The stipulation was solemnly made in open court and, under the record here presented, without qualification as to its use. A judgment was entered in the district court at the first trial for the defendant city. On July 12, 1932, the judgment so entered was reversed by this court, expressly on the ground that it was stipulated that at the beginning of the fiscal year, beginning May 1, 1929, and ending May 1, 1930, there was in the general fund unexpended from the previous fiscal year the sum of $1,111.11, which, together with the amounts carried by the appropriation bill for 1929-1930, was sufficient to support the contract here in suit. So far as disclosed by the present record, no application was ever made by the defendant city to be relieved from the terms of the formal, solemn, judicial stipulation, the legal effect of which was so adjudicated by this court. Though amply warned by the history of the litigation to which it was a party, there is no evidence that any diligence whatever was exercised in this matter by defendant, and indeed we must conclude that the first information received by the plaintiff herein of defendant's intention to refuse to be bound by its solemn agreement was when its objection to the reception in evidence of what had been agreed to was lodged, after the case had been called for trial a second time in the district court and after a jury had been duly impaneled and sworn. Even then defendant's challenge was limited in effect to the competency of the stipulation as evidence, based on the theory that it had no binding force beyond the first trial. Such challenge as made in no manner invoked the discre-

tion and powers of the district court on the subject of defendant's right to withdraw from the solemn and binding judicial stipulation it had admittedly made. As disclosed by the record quoted, the defendant's objection was sustained on the sole ground that the stipulation was not binding on the second trial. In the light of the authorities hereinbefore cited, our conclusion is that the trial court thereby erred. The stipulation objected to was conclusive on the parties, at least until they were properly relieved therefrom. Further, we cannot consider defendant's objection, in fact though not in form an application for relief from the terms of its agreement. Obviously, if such trial practice, under the circumstances of this case upon the theory suggested, be countenanced, the oral statements of counsel submitted in support of, and as part of, its objection made, in so far as they related to the facts embraced in the stipulation and surrounding the making thereof, imperatively suggest the necessity of due and proper notice to plaintiff, the assumption of the burden of proof, and the according of reasonable opportunity to adduce evidence for the consideration of the court relating to the claims so made by the objector. True, solely due to the fundamental error of the trial court in denying the reception in evidence and the controlling effect of the stipulation, the introduction of parol evidence on the subject covered by that agreement was, notwithstanding the protests and exceptions thereto by plaintiff, introduced, improperly considered, and formed the only basis in the record for the order and judgment of the district court appealed from, viz., setting aside the verdict of the jury in favor of plaintiff and dismissing his action. Under the circumstances mirrored in this record, parol evidence was not admissible to contradict or qualify the formal judicial stipulation actually made.

It follows that the order and judgment appealed from are not sustained by, but are in contravention of, the competent evidence in the record; and that upon return of the verdict in the district court at the second trial the plaintiff was entitled to judgment in accordance therewith.

In view of the conclusions herein expressed, the rule of practice announced in *Netusil v. Novak*, 120 Neb. 751, and the provisions of section 20-1926, Comp. St. 1929, directing that this court, where judgment is reversed, "shall proceed to render such judgment as the court below should have rendered," etc., it is ordered that the judgment of affirmance heretofore entered in this court in this cause be rescinded and set aside; that the order and judgment of the district court appealed from be reversed; that the verdict of the jury for plaintiff in the second trial, as returned and received in the district court, be reinstated; and that judgment be entered thereon for plaintiff and against the defendant for the sum of $627, together with interest as provided by law, and for costs of suit.

REVERSED AND JUDGMENT ENTERED.

STATE, EX REL. PAUL F. GOOD, ATTORNEY GENERAL, APPELLANT, V. NATIONAL OLD LINE LIFE INSURANCE COMPANY, APPELLANT: M. L. DONOVAN, INTERVENER, APPELLEE.

FILED JULY 12, 1935. No. 29467.

1. **Constitutional Law**: INSURANCE COMPANIES: INSOLVENCY: LIQUIDATION. Where the liquidation of an insurance company is conducted in a court of equity pursuant to law, the proceeding is judicial and not executive.
2. **Insurance**: RECEIVERS. Where the state department of insurance is appointed receiver of an insurance company for the purpose of liquidation under section 44-204, Comp. St. 1929, it becomes for that particular purpose an arm of the court, and, as such, is subject to its orders rather than the governor's.
3. ———: TRUST FUNDS. The assets of an insurance company in the process of liquidation are trust funds for the payment of debts.
4. ———: ATTORNEY FOR RECEIVER. The attorney for the receiver, in such a case is an officer of the court, and not a subordinate employee of the department of insurance, subject to appointment and removal by the head of the department or by the governor, under the provisions of section 1, art. IV of the Constitution.

5. **Appeal.** The order of a trial court relative to the replacement of an attorney for its receiver will not be disturbed, unless an abuse of discretion is shown.

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

Sterling F. Mutz and *Robert S. Stauffer,* for appellants.

L. R. Doyle, W. W. Wenstrand and *M. L. Donovan, contra.*

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

DAY, J.

This is a proceeding in the nature of intervention in the receivership of the National Old Line Life Insurance Company and the Indemnity Company of America. The controversy arose over the discharge by the receiver of an attorney. The trial court ordered the attorney reinstated.

M. L. Donovan represented a client who was the owner of some "contractual notes" of the National Old Line Life Insurance Company and had filed an action on her behalf against the company and Rees Wilkinson, the president. The Indemnity Company of America was another Wilkinson company and was closely connected with the National company by his management and control. In his work for his client, Donovan discovered evidence of irregularities in the affairs of Wilkinson and these two insurance companies. This information he communicated to the insurance department of the state of Nebraska. Acting largely upon the information furnished by Donovan, the department refused to renew the companies' permits to operate. The insurance department requested the attorney general to file suits against the companies that a receiver might be appointed to liquidate the companies. The district court for Lancaster county, in these cases in which Donovan intervened, appointed the state department of insurance as receiver. The department appointed Fred E. Mockett as its liquidating agent. April 18, 1934, the de-

partment appointed Donovan attorney for the receiver, notice of which was given in the following letter:

"Dear Mr. Donovan:

"This is to inform you that you have been appointed attorney for Mr. Fred Mockett, special agent in charge of the liquidation of the National Old Line Life Insurance Company of Lincoln, Nebraska. * * * I must advise you as I did before, that you will have to look for your fees to such assets as you can find belonging to these two companies.

"Very truly yours,
"(Signed) Lee Herdman
"Director of Insurance."

Donovan immediately began to work for the liquidating agent of the receiver. Thereafter, on April 26, 1934, his appointment was revoked by the following letter from the department:

"Dear Mr. Donovan:

"I regret very much that I must advise you that your appointment as attorney for the special agent in the matter of the liquidation of the Rees Wilkinson companies has been revoked.

"The pressure from Lincoln lawyers and Wilkinson's mother has been too great to withstand.

"I will be in Omaha Saturday and will endeavor to see you.

"Respectfully yours,
"(Signed) Lee Herdman
"Director of Insurance."

On September 18, 1934, Donovan filed his petition of intervention in this case for the purpose of securing an order from the court reinstating him as attorney for the receiver. The court, having jurisdiction of the receivership, ordered Donovan reinstated.

The state department of insurance was appointed receiver of these insurance companies under authority of section 44-204, Comp. St. 1929. This provides for a judicial receivership. Similar statutes provided for the liquidation

of insolvent banks and that the secretary of the department of trade and commerce should be the sole receiver of such banks. In *State v. State Bank of Minatare,* 123 Neb. 109, this court held: "Where liquidation of an insolvent state bank is conducted in a court of equity pursuant to law, the proceeding is judicial and not executive." This same rule is pertinent to the liquidation of an insurance company under the statutes applicable.

Furthermore, subsection 4, sec. 44-204, Comp. St. 1929, purports to give the department of trade and commerce the power to employ such counsel as shall be deemed necessary. The language of the section provides for judicial approval of compensation and expenses. It also provides for judicial approval of rules and regulations made by the department for liquidating an insurance company. This confirms us in our opinion that the legislature provided for a judicial receivership.

In such a case, the department of insurance becomes for the purpose of the liquidation in a particular case an arm of the court, and, as such, it is subject to the orders of the court and not to the governor or the legislature. In *State v. Nebraska State Bank,* 124 Neb. 449, this court considered the nature of a judicial receivership. See, also, *State v. State Bank of Minatare,* 123 Neb. 109. The property and assets of an insurance company in the process of liquidation, like a bank, are trust funds for the payment of debts.

The attorney for the receiver in such a case is not a subordinate employee of the department of insurance subject to appointment and removal by the head of the department or by the governor, under the provisions of section 1, art. IV of the Constitution. He was an employee of the receiver, an agency of the court. Neither the legislature nor the governor has the right to dictate whom the court shall appoint as its referee or assistants. *In re Supreme Court Commissioners,* 100 Neb. 426. Ordinarily, a court will not interfere with the discretion of its receiver as regards employees necessary for the purpose of the receivership,

unless an abuse is shown. High, Receivers (4th ed.) sec. 175.

In the instant case, the receiver at the suggestion of the governor replaced Donovan as its attorney by another. At the time, Donovan had been performing services for the receiver for more than a week. There is no question that his professional ability and experience and personal character qualified him to perform these services. No proper reason was given for his discharge. The trial court after a hearing ordered that he be restored as attorney for the receiver. Upon the court devolves the final responsibility for the conduct of the receivership. The order of the trial court relative to the replacement of an attorney for its receiver will not be disturbed, unless an abuse of discretion is shown. *Adler v. Seaman*, 266 Fed. 828. No such abuse of discretion is revealed by the record in this case. The important consideration is the efficient management of the liquidation of the assets of the company for the benefit of all the creditors. Other considerations mentioned in the argument and reflected by the record are not worthy of notice by a court of equity.

AFFIRMED.

HERBERT V. DORLAND, TRUSTEE, APPELLEE, V. CITY OF HUMBOLDT, APPELLANT.

FILED JULY 12, 1935. No. 29547.

1. **Limitation of Actions.** When a taxpayer has voluntarily paid special assessments in an improvement district, and seeks to recover them from the city on the ground that they are illegal, the statute of limitations begins to run from the time of the payment of such special assessments.
2. **Taxation.** When a voluntary payment of special assessments is spoken of, the word "voluntary" is not used in its ordinary sense, for many such payments are held to be voluntary which are made unwillingly.
3. **Constitutional Law.** The legislature cannot remove a bar or limitation which has already become complete.

4. **Limitation of Actions.** When defendants voluntarily paid special assessments, not knowing they were illegal, it is too late to recover them in an action brought more than four years after such payments.

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

J. J. Brown and *Perry, Van Pelt & Marti,* for appellant.

F. A. Hebenstreit and *John E. Leyda, contra.*

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

PAINE, J.

This is an action at law against the city of Humboldt, by a trustee acting for many taxpayers, to recover assessments paid by them which were held to have been illegal and void. The trial court directed a verdict in favor of plaintiff on more than 20 of the causes of action, and dismissed other causes of action. The city of Humboldt has appealed.

In this case an amended petition of 21 pages was filed, setting out 30 separate causes of action. Exhibit A, attached to this amended petition, is an assignment to Herbert V. Dorland, trustee, by 30 owners of property in improvement district No. 2 of the city of Humboldt. The evidence discloses that in 1928 the city of Humboldt formed said improvement district for the purpose of graveling, curbing, and guttering Central avenue and portions of two other streets in the city of Humboldt. On December 22, 1928, the city council, sitting as a board of equalization, levied special assessments against the property therein. An appeal was taken from the action of the city council to the district court for Richardson county, which held the action of the city council, in levying such special assessments against the property involved, for the purpose of paying for such street improvements, to be legal and valid. Appeal was taken to this court, and the

judgment of the trial court was reversed and the cause remanded in an opinion released July 9, 1930, entitled *Garver v. City of Humboldt,* 120 Neb. 132, for the reason that, under the law in question, being section 17-432, Comp. St. 1929, it provided: "Third. The council or board of trustees shall have power by a three-fourths (3-4) vote of all members of such council or board of trustees to enact an ordinance creating a paving, graveling, or other improvement district, and to order such work to be done without petition upon any main thoroughfare that *connects with or forms a part of the state highway system.*" This court held that the authority of a city to perform such acts is strictly construed, and will not be extended beyond the plain import of the language of the charter, and that as Central avenue, Sixth street, or Nemaha street, portions of each of which streets were included in said improvement district No. 2, neither connected with nor formed a part of state highway No. 4, which ran a quarter of a mile north of the north boundary line of the city of Humboldt, the city council did not have the power to improve these streets under that law. This decision of our court, therefore, held the entire proceedings in reference to improvement district No. 2 were wholly void, and canceled all assessments against the property, holding that such assessments were wrongfully levied and could not be collected.

In the case at bar, the trial court, upon motion, dismissed all the causes of action which were based upon payments of taxes made after the opinion was rendered in the case of *Garver v. City of Humboldt, supra.*

In each of the 30 separate causes of action it is alleged that these taxes were paid on an illegal assessment against the property involved, and the amounts were paid under a mistake of law and fact to the city of Humboldt, and that claims were filed against the city council in the full sum of $4,537.01; that payment thereof was refused on July 16, 1934, and the plaintiff, as trustee, asks a judgment against the city of Humboldt in the amount due.

The defendant filed a demurrer to the amended petition,

which was argued and overruled. Thereupon, answer was filed, admitting that the assessments were levied against the property that was benefited.

The defendant contends that the plaintiff was without authority to bring this action; that in so far as said section was amended by the 1933 Session Laws (Laws 1933, ch. 136) it was illegal and void, in so far as it attempted to grant retroactive rights to the plaintiff to take property of the defendant city without due process of law. It is further insisted by the defendant that, at the time of the levy of the assessment for these improvement district taxes, the statutes of Nebraska prescribe a procedure for the payment of taxes under protest, and for an appeal therefrom, or filing suits for the recovery thereof, and that plaintiff and his assignors failed to avail themselves of the plain, statutory remedy of paying such taxes under protest, and are thereby barred, estopped, and precluded from maintaining this action.

We find that this action was instituted on July 7, 1934, and that in each of the 30 causes of action there is set out the number of the tax receipt, the amount paid, and also the date when such taxes were paid, and that all of the tax receipts which are involved in the causes of action appealed in the case at bar had been issued more than four years prior to the filing of the petition.

We find in the case at bar no evidence to the effect that any of these taxes were paid involuntarily. Section 77-1923, Comp. St. 1929, provides that if any person claims his taxes are invalid he may pay the taxes under protest and the county treasurer, or other proper authority, shall give a receipt showing that fact, and further provides that within 30 days after the payment of the taxes such person shall file a statement in writing, duly verified, with the county board, setting forth the amount of the tax paid under protest, and the grounds of the protest, and shall attach the receipt thereto, and the county board at its first meeting thereafter shall inquire into the matter and if the property was not liable for taxation, or has been twice

assessed, an order shall issue to the county treasurer to refund the taxes. If the county board find the grounds of the protest not true, they shall issue an order to the county treasurer to dispose of the money the same as if the taxes had not been paid under protest.

Appeals can be taken from the action of the county board in the allowance or disallowance of such claim, in which case the county treasurer shall retain the taxes until the appeal is finally determined, and if the decision of the county board is reversed a new order shall be issued to the county treasurer by the county board, conforming to the decree of court, in which case the county treasurer shall refund such taxes and write opposite such taxes in the tax list the words, "Erroneously taxed—refunded."

It is clearly the purpose of the legislature, in making this law, to provide a method by which a taxpayer may pay a tax which he considers illegal under protest, and that such payment shall be earmarked and retained until the final determination of the courts as to legality, and if the tax is found to be illegal, then the identical sum so paid by the taxpayer is returned to such taxpayer. But the evidence shows that not one of these payments was made under protest.

In determining whether this action is barred by the statute of limitations, we find the case of *Monteith v. Alpha High School District,* 125 Neb. 665, closely in point. In that case the Alpha High School District was organized under a provision of our statute which required that the rural high school district should hold its annual school meeting on the first Monday of June, but in the year in which the levy was made the annual meeting was held on the second Monday of June, and was therefore void. The fourth paragraph of the syllabus in the case held: "As between a taxpayer and a school district or county, from which a recovery is sought, the statute of limitations begins to run from the time of the payment of the tax, and it is not postponed until the illegality of the tax has been judicially decided."

Again, in the *Monteith* case cited above it is said: "The law is settled in this state that where a person assessed, voluntarily and without compulsion, pays taxes, they cannot be recovered back in an action at law unless there is some constitutional or statutory provision expressly or impliedly giving the taxpayer such right." The *Monteith* case also holds: "We are obliged to hold, therefore, that when plaintiff failed to demand repayment within 30 days from the date of payment of the taxes claimed to be void, in accordance with section 77-1923, Comp. St. 1929, he was forever barred."

The decisions are uniform in holding that the statute of limitations commences to run upon the payment of the taxes, and the fact that this court did not determine the illegality of the tax for some years thereafter does not change the rule. *Welton v. Merrick County*, 16 Neb. 83. Therefore, when the assignors of the plaintiff in this case failed to pay the taxes under protest and to demand repayment within 30 days from the date of the payment of the taxes claimed to be void, their recovery thereof was forever barred, so far as the remedy provided in section 77-1923, Comp. St. 1929.

"Voluntary payments. That a tax or assessment voluntarily paid cannot be recovered back, the authorities generally agree. And it is immaterial in such a case that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it back." 2 Cooley, Taxation (3d ed.) 1495.

"Mistake of fact can scarcely exist in such a case except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform

himself what the records show, or do not show, as are the public authorities." 2 Cooley, Taxation (3d ed.) 1498.

"When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are made unwillingly and only as a choice of evils or of risks." 2 Cooley, Taxation (3d ed.) 1501.

The plaintiffs, however, insist that their cause of action is not barred by the statute of limitations, because, while they did not protect their payments under the general law as found in said section 77-1923, they are now seeking to recover their special taxes under a new amendment, found in chapter 30, Laws 1933, which amended section 17-567, Comp. St. 1929, by adding a section providing generally that, when any such city or village has levied special assessments for the cost of any public improvement, which assessments have been finally held by the courts to be invalid and unenforceable, and if the defects rendering such assessment invalid are of such character that they cannot be remedied by reassessment, and if said special assessments have been paid under mistake of law or fact prior to such final holding, the mayor and council shall appropriate an additional amount annually, sufficient to refund and repay over a period of consecutive years such special assessments erroneously paid, without interest; provided further, that nothing herein contained shall authorize an additional annual levy for the purpose aforesaid beyond three mills on the dollar of actual valuation of all the taxable property within the corporate limits of such city or village in any one year; but said additional levy shall be continued only for as many years as may be necessary to raise the total amount required for such purpose.

Plaintiff argues that this amendment is supplemental to the general tax laws, and, while admitting the statute of limitations commences to run from the time of the payment of the money under the general tax laws, that in the amendment in said chapter 30, Laws 1933, the time does not commence to run until a court of final resort holds that

such assessment is invalid, and, therefore, claims the statute did not commence to run until the mandate was filed in the district court on August 20, 1930. With this statement we do not agree. The plaintiff attempts to recover upon this 1933 amendment on the theory that it attempts to grant a retroactive remedy. All of the payments of taxes set out in the causes of action appealed in the case at bar had been made prior to the date when this amendment, as found in said chapter 30, went into effect, and each of said payments was barred by the 30-day statute of limitations on taxes, and each of the causes of action appealed was also barred by the four-year statute of limitations at the time the suit was filed.

In the early case of *Horbach v. Miller,* 4 Neb. 31, it was held, in quoting from an earlier case of *Bigelow v. Bemis,* 2 Allen (Mass.) 496, that it is competent for the legislature to change statutes prescribing limitations to actions, but that the legislature cannot remove a bar or limitation which has already become complete, and it has been held in other cases that a curative act which attempts to take away property rights already vested is void. To hold with the plaintiff's contention that the legislature can set aside the bar of the statute of limitations and permit the recovery of illegal taxes, it would mean that the legislature has opened the door and will permit the recovery of other taxes paid years before.

In *Gould v. Board of County Commissioners,* 76 Minn. 379, it was said: "If a party could recover back from the public whenever there was some illegal or irregular action on the part of public officers in the assessment or levy of the tax, merely because he was ignorant of such illegality or irregularity at the time he paid the tax, the public finances would be thrown into chaos, and frequently municipalities would be reduced to utter bankruptcy. Municipalities do not guarantee the taxpayers correct action on part of their officers."

Commissioners v. Rosche Bros., 50 Ohio St. 103, is in point so far as the amendment seeks to cover past trans-

actions. In this case raw materials were listed for taxation, on a blank form provided by the county auditor, by Rosche Brothers, tanners in Cincinnati, and the tanners paid the taxes levied thereon. It was later held that this raw material was not taxable. Claims were filed for the refund of the taxes, and refund refused. Some years thereafter an act was passed by the legislature of Ohio providing that taxes so paid, which should not have been listed, shall be held to have been paid involuntarily. The court of Ohio, in discussing whether the statute was retroactive, examined a great many cases, and held: "Therefore when the defendants in error voluntarily, though erroneously, listed their property, and voluntarily paid the taxes assessed upon it, neither by statute nor by any principle of the common law * * * was an obligation imposed upon the county of Hamilton to refund the money received. * * * The obstacle in the way of the defendants in error was not inadequate methods of procedure, but the absence of a law vesting in them a right of recovery. This want the statute under consideration attempted to supply. * * * Counsel contend that the statute is in furtherance of natural justice, and that the clause of the Constitution under consideration does not prohibit retroactive laws of that character. * * * To uphold a statute on this ground, where it seeks to create a liability upon a past transaction, where none existed when it occurred, if it can be done at all, the natural justice of the object sought to be accomplished should be indisputable. * * * The money that they now seek to recover from the county was voluntarily paid to the treasurer who was bound to receive it."

To summarize the case at bar, the city of Humboldt made an improvement district which it did not have the right to do under the law; the improvements were all put in, and greatly benefited the property abutting thereon. A portion of these special assessments was voluntarily paid before this court ruled that they were illegal. It may be said that these taxpayers, on moral grounds, might be entitled to have these taxes illegally assessed paid back to

them. But their money was not earmarked and held by the county treasurer, as it would have been if they had taken the precaution to have paid under protest, as the law provides, and it can only be paid back, as the plaintiff demands, by requiring all of the taxpayers of the city to pay in taxes for the benefit of the property owners in this improvement district to refund a part of the costs of worthwhile improvements installed alongside their property. It is our opinion that this action was barred by the statute of limitations at the time the petition was filed, and, therefore, the judgment of the trial court is reversed, and the action is dismissed at the costs of plaintiff.

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. WESTERN STATE BANK, APPELLANT: DEPARTMENT OF TRADE AND COMMERCE, INTERVENER, APPELLEE.

FILED JULY 12, 1935. No. 29438.

1. **Subrogation.** The right of subrogation cannot be enforced in proceedings to which those whose equities are affected are not parties.
2. **Banks and Banking.** A personal liability existing against the depositors of an insolvent bank cannot be enforced by action against the receiver of the bank.
3. ———. Where payments of money are made through a mistake of law by the officer in charge of the depositors' final settlement fund to the individual depositors of an insolvent state bank, the said officer cannot maintain an action against the receiver of the bank to recover it back.

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

F. C. Radke and *Clarence G. Miles,* for appellant.

William H. Wright, Attorney General, and *Edwin Vail, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

CARTER, J.

This is an appeal from the judgment of the district court for Saline county granting the department of trade and commerce of Nebraska, intervener, full payment of a claim for $1,321.90 from the assets of the insolvent Western State Bank of Western, Nebraska. The claim in question represents funds paid to certain creditors of the depositors' final settlement fund in May, 1930, who became creditors of the fund by reason of their being depositors in the Western State Bank at the time the bank closed. The receiver of the Western State Bank brings the case to this court for review.

At the special session of the legislature in 1930, an act was passed by which the legislature purported to transfer certain funds belonging to the depositors' guaranty fund to a new fund designated as the depositors' final settlement fund. Laws 1930, ch. 6, sec. 1, subds. (b) and (c). Under the law, as interpreted by the then secretary of the department of trade and commerce, the aggregate amount payable to the depositors of the Western State Bank amounted to $1,321.90, an amount equivalent to 2 per cent. of the total deposits of the bank. The secretary of the department of trade and commerce thereupon distributed said sum of $1,321.90 to the depositors of the Western State Bank by causing individual checks to be sent directly to each depositor. Subsequent to the distribution of the fund, it was determined by this court that the funds in question were bound by prior liens and were not transferred from the depositors' guaranty fund to the depositors' final settlement fund by virtue of the 1930 act of the legislature hereinbefore mentioned. *Bliss v. Bryan,* 123 Neb. 461. It appears, therefore, that the funds were wrongfully paid out by the secretary of the department of trade and commerce under an erroneous interpretation of the law and that the depositors of the Western State Bank received the sum of $1,321.90 from funds on which they had no claim and which in fact belonged to others. This claim was filed by the department of trade and commerce

to recover back from the receiver of the Western State Bank the sums so paid to the depositors of that bank under the mistake of law heretofore mentioned.

It will be noted that the receiver alone was made a party defendant. The depositors who actually received the funds in question are not parties to the litigation. The primary liability, if there be any liability at all, rests upon the parties wrongfully receiving the fund. The receiver of the bank is an officer of the court and not a general agent of the depositors in the sense that he may be called upon to defend against their personal obligations. In *Flynn v. Furth,* 25 Wash. 105, an action was brought against the receiver of a partnership to recover a liability against the individual partners. The receiver, being sued alone, demurred. The court said: "The receiver alone is sued in this action; the members of the partnership are not made parties. The suit is based upon an alleged personal liability of said firm. The members of the firm are certainly not bound by this proceeding. Neither is this suit a bar to another action directly against the members of the partnership. The receiver is the holder of the property and effects of the partnership pending the determination of the action in which he was appointed, and subject to the direction of the court. But he is not called upon to defend suits which can only be determined when the partners who are primarily liable are brought into court. Even if the receiver should be deemed a proper party, the demurrer should have been sustained on the ground of defect of parties defendant; for under no principle do we conceive that the matters involved could be finally determined without the joinder of the partners upon whose liability, if any exists, a judgment must be finally entered." We are convinced that a suit cannot be maintained by a third party against the receiver of an insolvent bank to collect obligations due him by the depositors of the bank. When we consider the fact that the depositors are not parties to the suit, the effect of the suit is to obtain a judgment against the individual depositors and a garnishment of any funds

belonging to them in the hands of the receiver without making them parties and without notice of any kind.

The fact that the payment by the receiver of the amount claimed to be due would operate equitably upon the bank's depositors and indirectly pay the alleged liability of each cannot change the rule. The funds in question never came into the hands of the receiver. They never augmented the assets of the insolvent bank. The suit at bar is just as foreign to the interests of the receiver as if the persons receiving the funds had not been depositors of the Western State Bank. There can be no theory of subrogation invoked because the persons to whose rights the intervener desires to be subrogated are not parties to the suit. The payment of the amount to the depositors of the bank being by mistake, the action of the department of trade and commerce, if any there be, must be directed against those receiving the funds. The payment of these funds by an independent agency in no way connected with the receivership could not lessen the claim of any depositor receiving it to his proportionate share in the assets in the bank.

The depositors who received the amounts constituting the fund may have a defense thereto. The judgment entered between the department of trade and commerce and the receiver of the Western State Bank would not be conclusive upon the depositors of the Western State Bank in a suit against the receiver thereof, or the sureties on his bond, to account for assets of the trust paid out in compliance with the judgment. There is no rule of equity that would require the receiver to assume the burdens of such a dilemma.

We conclude therefore that the trial court was in error in allowing the claim in question as a claim to be paid in full from the assets of the Western State Bank. For the reasons herein set out, the judgment of the trial court is reversed and the petition in intervention is dismissed.

REVERSED AND DISMISSED.

CARROLL LEWIS, ADMINISTRATOR, APPELLEE, V. CHARLES FORREST MCADAMS, APPELLANT.*

FILED JULY 12, 1935. No. 29409.

Homestead. Where a husband by will gives his wife a fee simple title to real estate, occupied by both during his lifetime as a homestead and at his death occupied by his surviving wife as a homestead, at her death her heir takes a homestead interest in such real estate exempt from debts of either the husband or the wife, which are not liens thereon, as provided by section 40-101, Comp. St. 1929.

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

William Niklaus and *John E. Mockett,* for appellant.

William G. Rutledge, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and MESSMORE and RYAN, District Judges.

MESSMORE, District Judge.

This is an appeal from the district court for Nemaha county, wherein that court found as a matter of law that certain real property was not exempt as a homestead from sale by the administrator for the payments of debts of the deceased and costs of administration and ordered the real estate sold.

The pertinent facts, briefly stated, are as follows: The administrator of the estate of Florence N. McAdams made application to the district court for Nemaha county for the sale of certain real estate belonging to said estate, including lots 8 and 9, block 143, original town of Peru, for the purpose of paying debts of said estate and costs of administration; that Charles Forrest McAdams, appellant herein, an adult son of deceased, claimed a homestead interest in said described lots; that the real estate in question was formerly owned by Otis F. McAdams, father of appellant, and occupied by him and the said Florence N. McAdams, his wife, until his death; that the title to said real estate descended by devise under the will of the said

*Opinion vacated. See 130 Neb. ——.

Otis F. McAdams to the said Florence N. McAdams, who continued to occupy the same as a homestead until her death.

The record discloses that the total indebtedness was about $4,000, consisting of claims allowed in the county court, claims filed but unadjusted, and for costs of administration, and that the personal assets of the estate in the sum of $110 had been reduced to possession by the administrator.

Appellant contends that the cases of *Judson v. Creighton,* 88 Neb. 37, and *In re Estate of Freling,* 119 Neb. 605, are decisive of this case.

In *Judson v. Creighton, supra,* this court held: "Where a homestead is selected during the lifetime of both husband and wife, and after the death of one the survivor resides upon the premises during his or her life, the real estate is not subject to sale for the satisfaction of the debts of either, which are not a lien thereon, nor to pay the costs of administering the estate of such survivor; but, if the title holding spouse dies intestate, the title descends to his or her heirs, whether direct or collateral, exempt from such debts."

This case interprets section 3272, Comp. St. 1901, which reads as follows: "If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

The only distinction between that section of the 1901 statute, just quoted, and section 40-117, Comp. St. 1929, relating to the same subject-matter is that, where the

section of the 1901 statute read "in his or her heirs forever," the latter section uses the words "in decedent's heirs forever."

Section 40-117, Comp. St. 1929, provides further: "That in case the surviving spouse wilfully fails to provide a suitable home and maintenance for the minor children of the deceased during their minority or elects to partition the homestead premises, the homestead right of the survivor shall then terminate and the homestead premises shall then descend as other real property of which the deceased died seized." This provision of the statute applies to the use of the homestead as a protection for the minor children, or in the event of an election to partition the homestead, and consequently does not apply in the instant case.

In *In re Estate of Freling, supra,* an interpretation was made of section 2832, Comp. St. 1922, which is identical with section 40-117, Comp. St. 1929. In this case the case of *Judson v. Creighton, supra,* is cited with approval. Lizzie Freling inherited an undivided one-half interest in a lot in an addition to the city of Omaha of the value of $1,700 from her husband, and later died, devising her interest in said lot by will to an adopted son. At her death she owed certain debts, funeral expenses, etc., and it was sought to have the property sold to satisfy such debts. This court held that the undivided fee simple interest in said lot owned by her at the date of her death was exempt from sale by the executor or by a creditor of the estate to satisfy the expenses of funeral and burial of the deceased.

In *Brichacek v. Brichacek,* 75 Neb. 417, this court held, citing the provisions of the statute then in force: "A homestead, which was the separate property of the wife, at her death, vests in her surviving husband for life, and the wife has no power to limit or dispose of the life estate of the survivor by will." This holding sustains the proposition, not directly but surely in point, that by virtue of the existing law relative to homesteads and the right of Florence N. McAdams as the surviving spouse to the homestead interest, Otis F. McAdams, giving his wife the fee simple

title to the premises in question by will, did not have the power to dispose of his wife's estate in the property by such will and therefore could not divest her of her statutory homestead right. In other words, Otis F. McAdams could not repeal the provisions of the statute by his will. Should he have left the real estate in question to some other person or persons by his will than his wife, it could not be said that she did not have the right to hold said real estate as a homestead. Therefore, from this reasoning, the fact that she received the real estate by the will of her husband is no different than had he made no will as far as the homestead is concerned. *In re Estate of Guthrie,* 183 Ia. 851.

Appellee contends that the value of said lots 8 and 9, block 143, original town of Peru, is $3,000. Under section 40-101, Comp. St. 1929, defining the homestead and exemptions, we believe appellant is entitled to an exemption not exceeding $2,000 in value as a homestead interest in said lots.

The decree of the district court should be and is reversed and the cause remanded, with instructions to enter a decree preserving to appellant, Charles Forrest McAdams, his homestead interest in said lots not exceeding in value the sum of $2,000.

REVERSED.

B. F. GENTRY, TRUSTEE, APPELLEE, V. HARLAN BURGE ET AL., APPELLANTS.

FILED JULY 12, 1935. No. 29005.

1. **Evidence:** ADMISSIONS. Admissions or statements of a party with reference to the acquisition and disposition of his real and personal property made before a referee in bankruptcy are admissible against him in an action in the district court when the good faith of such acquisition and disposition is in issue.
2. **Fraudulent Conveyances:** CONVEYANCE AMONG RELATIVES: BURDEN OF PROOF. In an action to set aside transfers of property where it is claimed that such transfers were made to members of one's own family for the purpose of defrauding creditors, the

burden is on the transferees to show that such transfers were not fraudulent.

3. **Evidence:** ADMISSIONS. The general rule of law is that the admissions of a party are admissible in evidence against him, but will not affect others unless a joint interest or privity of design between them is shown to exist.
4. ———: ———. If, as the evidence shows in this case, there is and was a joint interest and also a privity of design in disposition and acquisition of property to place such property beyond the reach of creditors, then the admissions of one of the parties before a referee in bankruptcy are admissible as against the other parties.
5. **Appeal:** TRIAL DE NOVO. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson*, 110 Neb. 511.

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

Olsen & Olsen, for appellants.

William H. Heiss, contra.

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

YEAGER, District Judge.

This is an action brought by B. F. Gentry, who is trustee in the matter of Harlan Burge, bankrupt, against Harlan Burge, the bankrupt, Gertrude Burge, his wife, Cleo Burge, his son, Gladys Burge, his son's wife, and Burge Cash Grocery and Produce Company, a corporation, the object and purpose of which is to set aside transfers of real estate and other property by Harlan Burge to his wife, his son, and the defendant corporation, claimed to have been made in fraud of creditors of the said Harlan Burge.

After a lengthy trial and the introduction of much evidence, the court found in favor of the plaintiff in the fol-

lowing particulars: That lot 2, block 6, original town of Gering; an undivided interest (apparently an undivided one-third interest) in lot 3, block 6, original town of Gering; all of lots 10, 11 and 12, block 4, original town of Gering; and an undivided one-third interest in a part of the northwest quarter of section 2, township 21 north, range 55 west of the 6th P. M., which lands are, in the decree, described particularly by metes and bounds, was the property, in fact, of Harlan Burge, and that Gertrude Burge held the title to the same only as trustee for the said Harlan Burge;

That the plaintiff recover from Gertrude Burge the sum of $1,450, with interest at 7 per cent. per annum from March 23, 1922, this being the proceeds of a note which she had collected and which the court found was in fact the property of Harlan Burge, but which was taken in the name of Gertrude Burge for the purpose of defrauding creditors, and which is referred to as the Matthews note;

That Gertrude Burge deliver to the plaintiff 59 shares of stock in the Burge Cash Grocery and Produce Company, or in lieu thereof that she pay the value of such stock as of February 17, 1925, with interest at 7 per cent. per annum from February 17, 1925, for the reason that she was not the true owner, but only trustee for Harlan Burge;

That the plaintiff have and recover from Cleo Burge and Gladys Burge, his wife, a one-half interest in the Burge Cash Grocery and Produce Company, *"and such property as may have been placed of record in their names since the commencement of this action."*

The creditor's claim which is the basis of this action was that of one Arthur P. Bressler on account of a deficiency judgment rendered on October 10, 1929, for $5,025.62, with interest at 10 per cent. per annum from the date of the rendition of judgment. This claim is not disputed by the defendants.

From the decree, the substantial particulars of which have been set out, the defendants have appealed and are seeking a reversal on all points of the decision.

The appellants rely for a reversal on five separate assignments of error. The second, third and fifth must stand or fall with the first and fourth.

On the hearing before the referee in bankruptcy, the defendant Harlan Burge testified at length with reference to business transactions covering a long period of years, and particularly with reference to the properties and business transactions concerning which proper and exhaustive inquiry was made on the trial of the issues in this case. As the first step in the introduction of evidence in this case, the plaintiff offered in evidence exhibit 1, being a transcript of the evidence given by Harlan Burge before the referee in bankruptcy. The defendants objected to the introduction of the exhibit on the ground that it was incompetent, irrelevant and immaterial. No separate objection was made by the defendants. The objection was overruled. No other objection was made to parts or portions of the exhibit. The offer, the objection and the ruling appear on page 6 of the bill of exceptions. An examination of the testimony contained in the exhibit is replete with statements which were in the nature of admissions against interest which were pertinent to this inquiry and therefore admissible without question as to the defendant Harlan Burge.

It is a well-settled rule that admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party. *German Nat. Bank v. Leonard*, 40 Neb. 676; *Lowe v. Vaughan*, 48 Neb. 651; *Carlson & Hanson v. Holm*, 2 Neb. (Unof.) 38; *Young v. Kinney*, 79 Neb. 421. There are many other authorities to the same effect. There was no error, therefore, in the admission of exhibit 1 as against the defendant Harlan Burge.

We then must inquire as to whether or not the admission of the exhibit was proper as against the other defendants. It is undisputed that Gertrude Burge was the wife of Harlan Burge, Cleo Burge his son, and Gladys Burge

his daughter-in-law. If the theory of the plaintiff has been sustained, or, more properly, if the theory of the plaintiff has not been overcome by the evidence of the defendants, the other defendants became the objects of the bounty of Harlan Burge in a manner fraudulently prejudicial to the plaintiff.

To outline the various transactions involved in this case would drag this opinion out almost interminably and would serve no good purpose. The evidence, however, in brief, discloses a large number of transactions in many places over a long period of years. It has been the purpose of the plaintiff to establish that the original source of the funds which went into the properties described in the decree was Harlan Burge, and along the line, when he saw insolvency facing him, he made transfers to his wife and son without consideration, so that when the "crash" came and creditors sought to make recovery his property would be out of reach. It therefore became necessary to examine into all of the transactions.

The law is well settled in this state that, in an action to set aside transfers of property where it is claimed that such transfers were made to members of one's own family for the purpose of defrauding creditors, the burden is on the transferees to show that such transfers were not fraudulent. *Christensen v. Smith*, 123 Neb. 388; *Buckner v. McHugh*, 123 Neb. 396; *Clermont Cravat Co. v. Eckhard*, 122 Neb. 416; *Heffley v. Hunger*, 54 Neb. 776; *Bartlett v. Cheesbrough*, 23 Neb. 767.

In the light of the record in this case, it is clearly shown that, with regard to all of the transactions which were involved, there existed both a joint interest and a privity of design as between Harlan Burge and the other defendants. In this light we must then conclude that this evidence taken before the referee in bankruptcy, being in the nature of admissions against interest by the grantor and transferor to the grantees and transferees, was admissible as against all defendants.

The general rule is that the admissions of a party are

admissible in evidence against him, but will not affect others unless a joint interest or privity of design between them is shown to exist. *Dawson v. Hall,* 2 Mich. 390; *Cunningham v. Fuller,* 35 Neb. 58. These authorities contain the rule of law which we think should apply to this situation. This conclusion disposes of error number one.

Under the fourth assignment of error it is contended that the judgment is contrary to the evidence. The evidence on the important point in controversy is irreconcilable and very conflicting. The conflict, however, in the main has not been as to witnesses produced by plaintiff as against witnesses by the defendants. The great conflict is furnished by the testimony of the defendant Harlan Burge, given before the referee in bankruptcy and the testimony of the same defendant and the other defendants given orally in this case. The trial judge had before him all the evidence and all the witnesses and had the opportunity to make observations and draw conclusions denied of necessity and of course to this court. In that light he had to weigh all the evidence and decide in accordance with what appeared to carry the greater weight, or, as in this case, to decide in favor of plaintiff unless it appeared that the evidence preponderated in favor of the defendants. We cannot, from an examination of the record, say that he erred. This is a trial *de novo* in this court, and "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson,* 110 Neb. 511. See *Yardum v. Evans,* 120 Neb. 699. An examination of the record, therefore, leads to the conclusion that, except as to some minor aspects, the decree is right and should be affirmed. In that portion of the decree where it recites "an undivided interest in lot 3, block 6, original town of Gering," the

wording should be corrected to read "an undivided one-third interest in lot 3, block 6, original town of Gering." The language, "and such property as may have been placed of record in their names since the commencement of this action," appearing in paragraph "D" of the decree, should be eliminated and deleted, since it is apparent that this language would attach the decree to any property procured by the named parties coming from any source and it has no direct application to any particular property or the proceeds from any property involved in this litigation.

It is therefore the opinion of this court and it is ordered that the decree be amended and corrected as indicated herein and that as amended and corrected the decision of the district court be and is

AFFIRMED AS MODIFIED.

J. H. DRURY, APPELLEE, V. SAMUEL F. HICKINBOTHAM: FRANCIS LELAND HICKINBOTHAM ET AL., APPELLANTS.

FILED JULY 19, 1935. No. 29325.

1. Wills: DEVISE: ENCUMBRANCE. A condition contained in a will that the life estate in the devised property shall not be mortgaged or encumbered by the beneficiary is valid and enforceable.
2. ———: ———: TIME OF VESTING. Whenever it is possible, a future interest in real estate will be construed as vested, and hence alienable and devisable by the remainderman.
3. ———: REMAINDERS: TIME OF VESTING. Where there is a person in being capable of taking the remainder at the termination of a life estate, the remainder is vested in interest although it must wait the termination of the life estate before it can vest in possession.
4. ———: ———. "It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder." *Schuyler v. Hanna*, 31 Neb. 307.
5. ———: ———. Where in a will a devise of real estate is

made to H. for life and the remainder to his "then oldest son" at the termination of the life estate, H. having a son living at testator's death, the remainder vests at the same instant and by the same grant as the life estate, and although the remainderman cannot enter upon the possession, use or enjoyment of the property until the termination of the life estate, yet the fee, less the life estate, is in him and may be aliened by him, subject to being defeated by his death prior to that of H.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed in part and reversed in part.*

Edward J. Kubat and *F. L. Bollen,* for appellants.

C. R. Stasenka, contra.

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

CARTER, J.

This is an action to foreclose a tax certificate on a quarter-section of land in Saline county. The appellant Alexander McFarlane filed a cross-petition for the foreclosure of a mortgage executed by the appellants Francis Leland Hickenbotham and Jesse Hickinbotham, who in turn filed a joint answer and cross-petition praying for the construction of the last will and testament of Samuel F. Hickinbotham, deceased, in order that the rights of the mortgagee in the land might be determined. A decree foreclosing the tax lien was entered on January 16, 1934. On May 23, 1934, the trial court entered a second decree finding that the mortgage held by appellant McFarlane was not a valid lien against the land in question. On May 24, 1934, the court refused to confirm the sale held under the decree of January 16, 1934, for the reason that the price was inadequate. The appellants McFarlane, Francis Leland Hickinbotham and Jesse Hickinbotham bring the case to this court for a review of the decrees of the trial court entered on May 23, 1934, and May 24, 1934.

The record shows that Samuel F. Hickinbotham became the owner of the land in question in 1878. Samuel F.

Hickinbotham died in 1902 leaving a will which was duly admitted to probate and a final decree entered. The last will and testament of Samuel F. Hickinbotham contained the following provisions:

"I devise to my son, Francis Leland Hickinbotham, a life estate in the following described real estate, to wit: The southwest quarter (SW¼) of section numbered seven (7), in township eight (8), range number one (1), containing one hundred sixty acres (160A) of land more or less according to a government survey, all on the sixth P. M., in Saline county, Nebraska. Upon the death of my son Francis Leland Hickinbotham I give, devise and bequeath the last described real estate to the then oldest living son of Francis Leland Hickinbotham, absolutely. My said son Francis Leland Hickinbotham, shall have no power or authority to mortgage or encumber said real estate in which he is devised a life estate.

"All the rest of the residue and remainder of my property, both personal and real, I give, devise and bequeath to my son George H. Hickinbotham, absolutely and without reserve."

On May 10, 1932, the appellants Francis Leland Hickinbotham and Jesse Hickinbotham executed and delivered to McFarlane a mortgage upon the lands described in the will of Samuel F. Hickinbotham upon which there remains due the sum of $2,400. The question first raised is whether the mortgage is a valid lien against the interest of Francis Leland Hickinbotham, the owner of the life estate.

In this respect it will be noted that the will provided that Francis Leland Hickinbotham "shall have no power or authority to mortgage or encumber said real estate in which he is devised a life estate."

This court has held that a condition providing that property devised to trustees for a term of years should not be aliened or encumbered by the beneficiary during that term was not invalid. *Weller v. Noffsinger,* 57 Neb. 455. We have also held that such a restraint imposed upon a life estate was valid. *Albin v. Parmele,* 70 Neb. 740. In *Hiles*

v. Benton, 111 Neb. 557, this court said: "Regardless of the English rule, past or present, we hold in this case that a testator may convey or devise land for the benefit of his son in such wise that the latter may have all of the rents and profits of the same for life, and yet provide that it may neither be sold by his son, nor by his son's creditors, for debt or for any other purpose." We therefore conclude that the devise to Francis Leland Hickinbotham vested in him a life estate to the property described in the will; that the inhibitions against mortgaging or encumbering the property are effective, and that the mortgage under which McFarlane claims is not a lien on the interest of Francis Leland Hickinbotham in the land involved herein.

McFarlane, in taking the mortgage, had constructive, if not actual, notice of the public records of Saline county. It is not alleged that he was misled or deceived by anything except his own want of caution. There is, therefore, nothing shown in the record that would call for the interposition of equity in his behalf.

The appellant McFarlane contends, however, that the mortgage is a valid lien against the interest of Jesse Hickinbotham, the other of the two mortgagors. Jesse Hickinbotham is the oldest living son of Francis Leland Hickinbotham. It was clearly the intention of the testator that the oldest living son of Francis Leland Hickinbotham was to inherit the fee title to this land on the death of Francis Leland Hickinbotham. In construing the will as a whole, we further conclude that Francis Leland Hickinbotham was the owner of the life estate and Jesse Hickinbotham, as the oldest living son, was the owner of the remainder, subject to the conditions hereinafter mentioned. It is the contention of the appellant McFarlane that the interest of Jesse Hickinbotham in this real estate was a vested interest that could be encumbered. It is the contention of the appellants Jesse Hickinbotham and Francis Leland Hickinbotham that the owner of the remainder was not yet determined; that it was a contingent remainder and therefore not a vested interest subject to alienation.

The record shows that Francis Leland Hickinbotham is 78 years of age and that Jesse Hickinbotham is his only son. The record further shows that George H. Hickinbotham, now deceased, is the residuary legatee under the will. It is also shown that the three children of George H. Hickinbotham conveyed their interests in the land in question to Francis Leland Hickinbotham, the owner of the life estate. It is therefore quite apparent that if Jesse Hickinbotham should die before Francis Leland Hickinbotham and if another son should be born to Francis Leland Hickinbotham, this second son would be entitled to inherit the land under the terms of the will. It is the fact that there is a possibility that some person other than Jesse Hickinbotham might, at the time of the death of Francis Leland Hickinbotham, be the beneficiary under the will that forms the basis for the contention that the beneficiary is contingent and the remaining interest not vested. To this, however, we cannot agree.

"Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman. It is not so much the certainty or the uncertainty of the enjoyment of the fee in remainder after the life estate ends as the uncertainty of the person who has a present right to enjoy the future estate if the particular estate came to an end now, which determines the character of the remainder. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. The fact that his enjoyment is postponed, and, on a certain event, as on his death, may never take place at all, does not make the remainder contingent. But where there is no person now in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the particular estate were to terminate, the remainder is contingent." 2 Underhill, Law of Wills, sec. 860.

In 2 Alexander, Commentaries on Wills, sec. 1005, it is said: "It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty

of the right of future possession or enjoyment if the remainderman who is ascertained lives until the determination of the preceding estate. Where the devise is to the remainderman 'from and after' or 'after' or 'at' or 'on' the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders."

In *Schuyler v. Hanna*, 31 Neb. 307, it was held: "It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder." It is quite clear that Jesse Hickinbotham as the oldest son of Francis Leland Hickinbotham is capable of taking the remainder at the termination of the life estate, and the remainder is, therefore, vested in interest although it must wait the termination of the life estate before it can vest in possession. See *Hickox v. Klaholt*, 291 Ill. 544.

The next question is whether the vested interest of Jesse Hickinbotham is absolute and indefeasible during the existence of the life estate, or whether it is defeasible.

"There is a class of gifts occupying an intermediate position between absolute gifts and contingent gifts which vest in the beneficiary subject to being divested by the happening of a contingency or the exercise of a power. Until the contingency happens or the power is exercised this gift has all the incidents of an indefeasible interest. If the contingency never happens or the power is never exercised the gift becomes absolute. The most common example of this class of gifts is where a remainder is vested subject to be divested on the death of the first taker leaving children, or the birth of issue of another." Thompson, Wills, sec. 258.

In *Case v. Haggarty*, 91 Neb. 746, the will of the testator gave a life estate to testator's wife and the remainder to his three daughters, and in the event of the death of any one of the daughters before the death of the wife, then the daughter's share to go to her children, if any, and if not, then to the surviving sisters or their heirs. One of the daughters, Rose Kline, mortgaged her interest in the premises during the lifetime of her mother and predeceased her mother, leaving children. In determining the status of the mortgage given by the daughter, the court said: "By the language used, it seems clear that it was the intention of the testator that the fee title should vest in the three living children, only upon the condition that they should outlive their mother, and, in case of their not doing so, the title should go to their children by force of the will; that whatever interest the daughter would have should terminate at her death, if that event occurred before the death of the widow, and upon such death the interest she would have had should go to her children. If this is the proper construction, not only the interest of Rose Kline but that of her mortgagee was terminated by her decease." This court has held that an estate in remainder may vest in a devisee subject to defeasance. *Wilkins v. Rowan*, 107 Neb. 180; *Davis v. Davis*, 107 Neb. 70. In the case of *DeWitt v. Searles*, 123 Neb. 129, Eberly, J., in discussing a similar case, very ably considered the principles involved herein which sustain the contention of the mortgagee that Jesse Hickinbotham had a vested, alienable interest in the lands in question.

We therefore hold that Jesse Hickinbotham had a vested interest in the remainder which he could lawfully mortgage. The mortgagee could take, however, only what the mortgagor had to give. Francis Leland Hickinbotham had a life estate and Jesse Hickinbotham had a vested estate in the remainder, subject to defeasance. Should Jesse Hickinbotham predecease Francis Leland Hickinbotham, his death would defeat his vested interest. Any interest that Jesse Hickinbotham might have conveyed to a grantee,

during the existence of the life estate, would be defeasible by his death occurring prior to that of Francis Leland Hickinbotham, the holder of the life estate. We therefore conclude that the trial court should have entered a decree of foreclosure of the mortgage as against the vested interest of Jesse Hickinbotham and ordered the same sold. The cause will therefore be reversed and remanded, with instructions to enter a decree of foreclosure on the mortgage against the interest of Jesse Hickinbotham in accordance with this opinion.

Complaint is also made of the action of the trial court in refusing to confirm the sale of the land under the decree obtained on the tax sale certificates. The record is undisputed that the sale price was $1,040, and that the value of the land was $12,000. On this condition of the record, the trial court did not err in ordering a resale of the premises. The order setting aside the sale and awarding a resale of the premises is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

IN RE STATE BANK OF ELKHORN.
CHARITY HANGER ET AL., APPELLEES, V. E. H. LUIKART, RECEIVER, APPELLANT.

FILED JULY 19, 1935. No. 29351.

1. **Banks and Banking: TRUST FUNDS.** The payment of interest on a deposit is a strong, though not conclusive, indication that title to the funds deposited has passed to the bank and that the relation between the bank and the depositor is that of debtor and creditor.
2. ———: ———. In order to assert successfully a claim for a trust fund in the distribution of the assets of an insolvent bank, a depositor must establish title to the deposit he has made. If title to the fund deposited has passed to the bank, he becomes a creditor and, as such, has no valid claim for the allowance of the claim as a trust fund.
3. ———: ———. Where a trustee makes a general deposit of trust moneys in an apparently solvent bank, neither he nor his

cestui que trust, in case of the failure of the bank, is entitled to any preference over other general depositors of the bank merely because the deposit was a trust fund to the knowledge of the bank.

4. ———: SPECIAL DEPOSIT. To create a special or specific deposit, the depositor and the bank, at the time the deposit is made, must intend and agree, expressly or by implication, that such deposit shall remain segregated and not be commingled with or made a part of the general funds of the bank, or be subject to its use or control in the usual and customary course of its banking business.

5. ———: TRUST FUNDS. The title to a fund deposited in a bank, designated by a trust agreement as trustee, on interest, with directions to pay the interest to two third persons, or the survivor of them, so long as either shall live, then the whole fund to be repaid to the trustors, necessarily passes to the bank with the result that the fund is not entitled to be allowed as a trust fund when the bank becomes insolvent.

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

F. C. Radke, Barlow Nye and *Sam E. Klaver*, for appellant.

Robins & Yost, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY and CARTER, JJ., and MESSMORE and REDICK, District Judges.

CARTER, J.

This is an appeal by E. H. Luikart, superintendent of banks, from a decree of the district court for Douglas county, in which interveners were awarded preference of payment to them on a claim of $4,000 for which a trust was impressed against the assets of the State Bank of Elkhorn, an insolvent state bank.

The record shows that Henry Winterburn and Eliza Winterburn deeded 80 acres of land to each of their children at the time their youngest son became 21 years of age, each subject to a charge of $160 a year to be paid to the grantors for the term of their natural lives. One child of the Winterburns, a daughter, died in 1913, leav-

ing two children, Charity Hanger and Harry Hanger. The 80 acres of land that was to have been the deceased daughter's share was sold for $14,000 and the amount placed in the care of John E. Winterburn and John N. Wyatt as joint trustees, who by the trust agreement were directed to deposit the funds in the State Bank of Elkhorn upon interest bearing certificates of deposit for the benefit of the Hanger children. The interest was used for the maintenance and support of Charity and Harry Hanger during their minority.

On March 26, 1931, Harry Hanger, the younger of the two children, became of age. On that date each of the two children received $5,000 from the trustees of the fund. In addition thereto, under the terms of another trust agreement of that date, each deposited $2,000 in the State Bank of Elkhorn with the understanding that the interest thereon was to be for the benefit of Eliza Winterburn and Henry Winterburn, or the survivor of them. It was clearly the intention of the parties to set aside a sufficient amount of money to provide an annual income for the named beneficiaries equal to that paid by the other children of Eliza and Henry Winterburn.

The provisions of the trust agreement relative to the issues of this case are as follows:

"First. The said sum of $4,000 shall be deposited in the State Bank of Elkhorn upon two separate certificates of deposit in the sum of $2,000 each, said certificates of deposit to be registered in the name of the State Bank of Elkhorn, trustee, and said certificates of deposit to bear interest at the rates provided for by the rules and by-laws of said bank.

"Second. The interest on said deposits is to be paid by the State Bank of Elkhorn to the said Eliza Winterburn and Henry Winterburn or the survivor of them so long as the said Henry Winterburn and Eliza Winterburn or the survivor of them shall live.

"Third. The said trust shall terminate upon the death of the survivor of the said Henry Winterburn and Eliza

Winterburn and upon the termination of said trust the sum of $2,000 each is to be paid by the State Bank of Elkhorn as trustee to Charity Frances Hanger and Harry Lunsford Hanger."

The sole question is whether, under the facts and circumstances herein set out, the fund of $4,000 is a trust fund or a general deposit.

There is no contention made that the agreement was not freely signed by Charity and Harry Hanger. No charge of fraud or misrepresentation is made. The question resolves itself into one of determining the nature of the fund viewed in the light of the trust agreement and the surrounding circumstances.

The contention is made by the appellees that the deposit was one made for a specific purpose and that the same is therefore a trust fund. In the case of *Officer v. Officer,* 120 Ia. 389, "special" and "specific" deposits were defined as follows: "A special deposit is created where the money is left for safe-keeping and return of the identical thing to the depositor. And a specific deposit exists when money or property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose." The deposit made in the case at bar was not a special one. The bank did not receive it on the promise to keep the identical money and to return it to the trustors when the purposes of the trust agreement had been fulfilled. It was not specific for the bank had the right to mix the funds with other money received by it. The bank merely obligated itself to return the fund in kind to the trustors at the death of the beneficiaries.

In *Doty v. Ghingher,* 166 Md. 426, two partners entered into an agreement to deposit $5,000 each upon 4 per cent. interest account, they to receive the interest accruing therefrom, the said deposit to be subject to the control of the trust company with which it was deposited pending the liquidation of the affairs of the said firm and until all accounts, claims and charges held by said trust company

against the partners had been fully satisfied. Whenever all of the claims were satisfied, the fund was to be returned to the partners with whatever interest that had accrued. The trust company failed and the partners claimed a trust fund. The court said: "There is here not only nothing in the agreement expressly providing that the funds shall be kept separately, but the fact that the bank was to pay interest on the deposit indicates that it was intended it should have the use of the money for its own purposes. * * * The only designated purpose of the deposit was to protect the bank. It became the debtor of the depositor for the amount deposited, subject to mutual offsets. The account was virtually assigned as collateral. The depositor is entitled to an offset, but is not a preferred creditor as to any balance."

In Restatement, Trusts, Tentative Draft No. 1, p. 44, sec. 15, comment h, it is said: "If money is deposited in a bank for a special purpose, the bank is a trustee or bailee of the money if, but only if, it is the understanding of the parties that the money deposited is not to be used by the bank for its own purposes."

A deposit in a bank is general or special, depending upon the contract of the parties at the time the deposit is made. It is presumed to be a general deposit in the absence of an agreement to the contrary. In the case at bar, the moneys involved were placed in the form of certificates of deposit, bearing interest at 4 per cent. The trustees, in so placing the fund, acted as directed in the trust agreement which provided that the certificates of deposit should bear interest at the rate provided by the by-laws of the bank. The purpose of the agreement was to create a fund that would raise the sum of $160 a year for Henry and Eliza Winterburn, so long as either should live. Clearly, the very purpose of the trust agreement was to make the amount deposited earn the $160 a year that Charity and Harry Hanger were morally obligated to pay. It is true that the bank was directed to pay the interest to Henry and Eliza Winterburn as it became due, and as to the in-

terest the bank may have been a trustee of a specific deposit, but there is no claim for interest in this action. The claim is for the principal which was still in the bank when it closed its doors. The trust agreement provided for the return of the fund by the bank to the Hanger children when the trust agreement was terminated by the deaths of Henry and Eliza Winterburn. Clearly, the fund was not to be kept separate from the other funds of the bank. In order to earn the interest contemplated, the fund of necessity must be used and loaned by the bank. If the bank was required to hold the money intact and at the same time pay interest upon it, the amount of the interest paid would be a net loss to the bank. While the payment of interest on a deposit is not conclusive proof that a deposit is general, it is strong evidence of that fact. In the case at bar, the specific direction of the trust agreement was that the bank should pay interest to the beneficiary. This certainly presupposes the use of the fund by the bank as its own in order to earn the interest and the trustors must have so intended. The bank would of necessity have to convert the money to its own use for the purpose of earning and paying the interest provided for. Under these circumstances, with the bank thus authorized to treat the money as its own, the fund, strictly speaking, would not belong to the trustors and would not become trust property.

In *Bair v. Snyder County State Bank,* 314 Pa. St. 85, the court said: "But the bank through its cashier retained the certificates for the particular reason, as he states, that decedent wanted interest. The bank agreed to pay it and that was the only way, the cashier states, it could be accomplished. Interest in a fixed amount was to be paid by the bank to decedent. This is a circumstance that must not be lost sight of in determining the intention of the parties, for interest is ordinarily the charge demanded for the use of money. *Pittsburgh Nat. Bank v. McMurray,* 98 Pa. St. 538. Its imposition implies a debtor-creditor and not a trustee-beneficiary relation."

Appellees rely upon the case of *State v. American State Bank*, 126 Neb. 34. In our judgment there are distinguishing features in the facts of that case from those in the case at bar. In addition thereto, that case has been severely criticized by this court in *State v. South Omaha State Bank, ante*, p. 43, in the following language by Good, J.: "We are of the opinion that the court went to the extreme limit in that case in sustaining the claim of the deposit as a trust fund. While the cashier was, no doubt, liable as a trustee, we are now inclined to the view that it is very doubtful whether the court did not exceed the limits of propriety in holding that the bank was also a trustee." We, at least, are not willing to follow this case under the facts and circumstances disclosed by the record in the case at bar.

The contention is made that the fact that the certificates of deposit were made payable to the "State Bank of Elkhorn Trustee for Charity Frances Hanger" and "State Bank of Elkhorn Trustee for Harry Lunsford Hanger" tends to prove that the deposit was a special or specific deposit. To this we cannot agree. In *Wasserman v. Broderick*, 250 N. Y. Supp. 84, the court said: "Nothing is shown which justifies a finding that a trust relationship was established which deprived the bank of the right to use the funds so deposited as it used its general deposits. * * * And the fact that a depositor, after his name, adds words descriptive of the capacity in which he holds the funds, such as executor, administrator, trustee, guardian, and the like, does not make the deposit a special deposit. * * * Moreover, the presumption is that a deposit is general and not special. * * * And the burden of proof is upon the one who asserts that a deposit is special. * * * Under the general rules above stated, I think the deposit here involved must be deemed to be a general and not a special deposit. The bank was entitled to use the fund as it used the funds of its general depositors, and the relation of debtor and creditor only existed between petitioner and the bank."

The contention is next made that, as the bank was the trustee of the fund and deposited it in its own bank, it is holding the fund for a specific purpose as trustee. The trust agreement designates the State Bank of Elkhorn as the depository of the fund. Even if the bank was the trustee of the fund, the contention of appellees is without merit. In the case of *Andrew v. Presbyterian Church,* 216 Ia. 1134, the facts were as follows: Mary M. Elliot died leaving a will containing a clause that gave $2,000 to the Helmer & Gortner State Bank as trustee for the use and benefit of the Presbyterian Church Society of Mechanicsville, Iowa, to be perpetually held by the bank on interest bearing "savings deposit," the interest to go to the trustees of the church. The fund was deposited on savings account in the said bank in an account designated as "Mary M. Elliot Trust Fund Presbyterian Church." The bank failed and the Presbyterian Church claimed a trust fund. The court said: "We are constrained to hold that the deposit of the fund in question, under the terms of the Mary M. Elliot will, was a general deposit and not special or specific. And that claimants have no greater rights in the cash or assets of the insolvent bank than other general depositors. The fund was rightfully deposited, and was to be held by the bank in its savings account 'perpetually.' The only specific direction or obligation arising was that the bank should pay interest thereon. There was no violation of any specific or special agreement. It is our judgment that the order of the trial court, allowing the claim as a deposit claim only, was right, and an affirmance follows."

We therefore conclude that the funds in question in the case at bar constitute a general fund and not a special or specific fund. The trial court therefore erred in allowing the claims of interveners as trust funds payable in full from the assets of the State Bank of Elkhorn. The judgment of the trial court is therefore reversed and the petition of intervention dismissed.

REVERSED AND DISMISSED.

ARTHUR E. WALTER ET AL., APPELLEES, V. W. A. GILLAN ET AL., APPELLANTS.

FILED JULY 19, 1935. No. 29299.

1. **Appeal.** Where the decree of the trial court requires the execution of a conveyance, the trial court may for the purpose of appeal prescribe a bond to be executed conditioned for the performance of the decree, or the party so required may, in lieu thereof, execute the required conveyance and deposit it with the clerk of the court to abide the judgment of the appellate court. Comp. St. 1929, secs. 20-1916, 20-1917.
2. ———. When the requirements for supersedeas on appeal have otherwise been met and such conveyance, with the approval of the trial judge and clerk of the court, so deposited, the power of the trial court to proceed in the case becomes thereupon suspended until disposition of the appeal is made.
3. **Record** examined and finding and judgment permitting redemption by leasehold owner, providing for cancelation of title of defendant and requiring transfer of lease and leasehold rights to plaintiffs, approved. Conditions modified.
4. **Time** fixed for redemption.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

John J. Ledwith, I. D. Beynon and *Willis R. Hecht,* for appellants.

John L. Mattox and *Minor & Minor, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This is an appeal from the district court for Lancaster county wherein the action was commenced by the plaintiffs, the owners of the improvements on, and lease of, a section of school land in Buffalo county. The petition prayed for cancelation of an assignment and transfer of such property made to defendant Gillan and alleged to have been fraudulently procured by him with the assis-

tance of defendants Barney and Lunger. The petition also prayed for the recovery of damages.

It is suggested in appellants' brief that the action was for both rescission and damages, which remedies are inconsistent and cannot both be followed. *Rasmussen v. Hungerford Potato Growers Ass'n*, 111 Neb. 58. The correctness of the proposition may be conceded, but no objection on this ground appears to have been made in the trial court, it is not within the assignments of error in this court, the parties proceeded to trial and judgment as in equity and the case will be so considered here.

The decree of the trial court provided for cancelation of the instruments executed by plaintiffs in connection with the transaction, and that upon payment by plaintiffs to defendant Gillan, within 60 days, of $501.10 in reimbursement for a like amount paid by him to the commissioner of public lands and buildings, and the delivery of their note for $1,011.20, to be substituted for Gillan's note with the commissioner, and representing delayed payments on the school land lease, the new lease procured by Gillan be by him assigned to plaintiffs and Gillan divested of any further right or title thereto. The decree further provided that if defendant Gillan should fail to do the things so required of him, or if he should transfer the lease to any innocent holder, then the plaintiffs should have judgment against him in the sum of $2,500, in lieu of any and all other rights decreed to them. This decree was entered March 27, 1934.

Thereupon defendants duly filed a motion for new trial which was denied April 21, 1934. May 11, 1934, defendants executed and deposited with the clerk of the court an assignment by Gillan to plaintiffs for the school land lease, with notice that it was so done in lieu of a supersedeas undertaking pursuant to section 20-1917, Comp. St. 1929, and the same bore the indorsement and approval of both the trial judge and the clerk; objections thereto being overruled. This was followed by notice of appeal and the filing of the usual cost bond.

Meantime, upon motion and affidavit filed by plaintiffs May 23, 1934, showing was made to the effect that they had on May 14 and 21, within the time provided by the court, tendered to defendant Gillan the $501.10 and offered to do the things required of them by the decree, but that the said defendant refused to accept the same or assign the lease. Thereupon plaintiffs applied for rendition of the alternative judgment of $2,500 in their favor provided for in the decree, which application was granted and entry made of such judgment June 2, 1934. This was followed by amended notice of appeal by defendants June 22, 1934, and an additional bond of $5,000.

It is now contended that the trial court was without authority to grant or render the second or supplemental judgment for $2,500 on June 2, and with this contention we agree. The statute (Comp. St. 1929, sec. 20-1917) provides for the filing of such an instrument instead of the bond prescribed by the court. This instrument had received the approval of the trial judge as a supersedeas, no contention is made that it was not sufficient for that purpose, no attempt was made to have it vacated, but with that assignment resting in the files the plaintiffs successfully sought to have the later refusal of defendants to execute and deliver another assignment to them made the basis of a money judgment. We know of no justification for such procedure. The decree of March 27, 1934, had been duly superseded and the power of the district court to proceed in the case was suspended. *Carroll v. Polfus*, 98 Neb. 657. The judgment entered June 2, 1934, for $2,500 is therefore vacated and set aside.

This leaves the case to be considered upon the original issues of fraud. Herein the situation shown by the record without material dispute is: Plaintiffs were record owners of a school land lease issued on behalf of the state covering all of section 16, township 10 north, range 14, in Buffalo county, were in actual occupancy thereof, and were owners of improvements thereon consisting of buildings, fences, windmill, etc., to the value estimated at from $1,500

to $4,000. Their lease purchase had been made from the Gilcrest Lumber Company in January, 1926, on which a cash payment of $1,000 had been made and notes given for a balance of $5,500 of the purchase price, for security of which the Gilcrest company held an assignment of the lease. All the notes were past due and unpaid except two payments indorsed on the one $500 note, and coupons detached from the others indicating interest payments up to September, 1928, to have been made. Payments of $230.40 due each January and July to the state were delinquent for the years 1931, 1932 and 1933 in the amount of those payments. The transactions complained of here took place in the last of June and first part of July, 1933. The crops of that and previous two years had gone with the general drought conditions of the locality. Walter had been notified of the delinquency and prospective cancelation of his lease rights by the land commissioner's office. He had taken this up with the Gilcrest company by correspondence and was trying to find some way to hold on. His lease expired by its terms January 1, 1933. He had certain statutory rights to a renewal of his lease if he could make up the delinquencies. He suggested in his letter of January 22, 1933, to Mr. Robinson of the Gilcrest company the possibility of obtaining assistance from the regional loan board to try to put it in good standing and get a renewal of his lease. He wrote August 24, 1933, in a letter introduced by defendants, "I supposed we had two years to pay that school taxes in as the clipping you sent me said, so when Mr. Barney came to me saying our time expired at midnight I was surprised." He had learned of the "school land moratorium" (Laws 1933, ch. 143), one of the many emergency measures, state and national, enacted during the time for relief of drought sufferers, and was trying to find means to secure the application of its benefits to this school land holding. The act provided that on the refinancing being made July 1, 1933, the note to be given for delinquencies should mature December 31, 1934.

Beset by these conditions he was approached by Gillan

and Barney. Gillan had provided himself with a list of delinquent leases from the office of the land commissioner and was looking for an attractive investment. June 30 Gillan saw Barney. July 1 Barney saw Walter. Gillan impressed on Barney that the matter must be closed that day. They learned that the Walter lease was up with the Gilcrest company on an assignment as collateral to a debt of $5,500, and that the Gilcrest company was bankrupt. On telegraphic communication Gillan and Barney arranged the purchase of the Gilcrest company's notes of $5,500 and assignment of the lease, all for the sum of $100. Gillan left the money with Barney, $50 in cash and $50 in check. He knew the assignment he could get from the Gilcrest company was one not recorded and given as security only. Gillan then went to the county treasurer, told him he had bought the Walter lease and gave him a check for $501.10 intended to cover the necessary cash payment to take advantage of the moratorium. The treasurer told him he could not give him a receipt until he brought in the assignment. It was approximately July 10 that Barney received the Gilcrest company's notes and assignment. He telegraphed Gillan, who came to Kearney, and on the following day the documents in question were executed, the assignment by Walter having been antedated to June 30, and all certified by Barney as notary.

The foregoing recited facts appear in the record without substantial dispute. There was an agreement on this July 11 for the holding as in escrow of certain of the documents until further understanding was had between the parties. Plaintiffs testify that it was as to their ultimate rights to hold on or whether they were unqualifiedly out and subject to dispossession after midnight of July 1. Defendants testify that it had to do only with the question whether Gillan should receive a crop rental share for the current year. It is certain that the lease assignment was delivered at once to defendant Gillan, who then completed his transactions with the county treasurer and proceeded to Lincoln and secured to himself a new state lease for the premises.

The notes, farm lease and bill of sale were still held by Barney.

The plaintiffs claim and testify to statements and representations concerning their rights; that they were to be sold out in ten days; that the lease assignment was also to be held and not delivered; that the son Orville would lose his place rented of defendant Lunger's brother if he did not sign up, and other matters of an urgent and coercive nature. This was denied by defendants. The trial judge had the advantage of both seeing and hearing the witnesses as the testimony was given—a material factor in determining the value of the testimony. He evidently placed more reliance on the testimony on plaintiffs' behalf. A careful reading of the record is convincing that he was right in so doing. Whatever else may be open to argument it is certain that Walter still held possession, not only of the improvements that were on the land and for which no compensation was provided, but the one essential thing without the transfer of which the plans, payments and other acts of the defendant Gillan would avail him nothing —the owner's title to the school land lease. To secure this the full and final pressure was brought to bear, and under the distress of drought and financial conditions, strengthened by sharp business practice, wrongful representations and a species of coercion, the plaintiffs were overreached and defrauded of their leasehold rights. The decree of the trial court was right in undertaking to restore the same.

To remove any possibility of resulting injustice, it is enough if defendant Gillan be reimbursed for his actual outlay which will redound to the benefit of plaintiffs in connection with the leasehold estate. This was the sum of $501.10 originally paid to the county treasurer, and the amount of the note, $1,011.20, given in the land commissioner's office for delinquencies under the act of 1933, and $100 paid on account of the Gilcrest company's notes. The Gilcrest company appears to have parted with these notes voluntarily, but, under the circumstances of the case, a court of equity cannot sanction the holding or application

of them in behalf of defendant Gillan for more than the amount of his actual investment therein. He should be well satisfied to receive a return of that. This item of $100, having been omitted from the provisions of the decree of the trial court, and the time of maturity of the $1,011.20 as fixed by the act of 1933 having expired, requires a modification of that part of the decree to the effect that plaintiffs be given a reasonable time for redemption of said premises by the payment of said sums with accruing simple interest from the time of the payments, respectively, at 5 per cent. into court to and for the benefit of defendant Gillan and in satisfaction of the debt to the state if not heretofore paid, and of any additional accrued leasehold payments due to the state, whereupon they shall be entitled to an assignment from Gillan to plaintiffs, Arthur E. and Orville L. Walter, of the lease executed in the name of defendant Gillan, the decree to stand as such assignment if not otherwise made, and the title as owners of the leasehold be fixed and quieted in said plaintiffs as against all other parties to the suit or any person claiming through any of them.

The court fixes December 31, 1935, as such reasonable time, and that part of the decree as so modified is affirmed. In the event of failure of plaintiffs to so redeem within the time fixed, their rights thereto shall become at once concluded and the title to the leasehold shall thereupon be confirmed in the defendant Gillan.

In accordance with the views here expressed, the judgment of the trial court is reversed in part, modified and affirmed in part, and remanded, with directions to enter a decree in accordance herewith.

AFFIRMED IN PART, AND REVERSED IN PART.

ISABELLE SWEENEY, APPELLEE, V. MIDWEST LIFE INSURANCE COMPANY, APPELLANT.

FILED JULY 19, 1935. No. 29306.

1. **Evidence**: WITNESSES: CROSS-EXAMINATION. Where a medical witness, who in testifying to his examination of the subject shortly after a fall, makes frequent reference to his memorandum of the case history as told to him by the subject and of his findings, and testifies on direct examination to some of the statements of the subject concerning her physical condition, it is not error to permit him on cross-examination to be asked as to other pertinent statements made to him at the time by the subject concerning the fall.
2. **Pleading**. "Generally, a plaintiff is only required to bring his case within the terms appearing on the face of the contract in suit, and need not negative conditions and exceptions indorsed thereon." *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235.
3. **Insurance**: ACTION: DEFENSE: QUESTION FOR JURY. Where in a suit to recover on an accident insurance policy it clearly appears that the insured suffered a fall, and there immediately followed disability of paralysis, and shortly death, and it was presented as a defense that the fall and death were caused by disease and not by accident, the question was properly submitted to the jury.
4. **Instructions** examined, and *held* free from error.

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

J. W. Kinsinger, H. C. Henderson and *H. J. Lutz*, for appellant.

Rosewater, Mecham, Shackelford & Stoehr and *Reginald C. Miller, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This action was commenced in the district court for Douglas county to recover the death benefit provided in an accident insurance policy, upon the ground that the insured had come to her death by accidental means, within the terms of the policy.

The petition alleged that on October 19, 1931, the deceased slipped and fell over a stool which also slipped as she was engaged in her work, falling and striking her head, left arm and hip and other parts of her body in the fall, and that prior thereto she was physically fit and able to work and was working steadily, that said fall resulted in almost immediate paralysis and in her death on December 2, 1931. The defendant, appellant, defended upon the ground that the deceased had at the time of her application for insurance and for many years prior thereto, as she well knew, a chronic and organic heart disease of a serious and advanced nature, that said heart disease caused and resulted in her death. The answer further alleged that in her application for the insurance the insured had made false answers in reference to the state of her health in the matters pertaining to said heart disease. The issuance and delivery of the policy, the death of the insured, proof of plaintiff's claim and refusal of the defendant to pay it were admitted. The reply denied the making of any false answers in the application, alleged that the deceased had fairly disclosed all information she had concerning the matters inquired about, and denied that she had a chronic heart disease or that it was the cause of her death. These issues were submitted to the jury upon the evidence, and a verdict was returned for the plaintiff, upon which judgment was rendered for the amount of the policy claim.

The case is submitted in this court upon three principal assignments on the part of the appellant, to the effect that (1) the evidence was not sufficient to support a verdict or judgment in the plaintiff's favor, (2) that the evidence showed fraud on the part of the insured in procuring the policy, and (3) that there was error in the court's instructions by which the case was submitted to the jury. There is an additional assignment concerning the admission of testimony on the cross-examination of one of the witnesses for the defendant.

It is apparent that this was the ordinary action to re-

cover upon an accident insurance policy and that no new or novel features are involved in it. The record of the trial, as embodied in the bill of exceptions, consists of 201 typewritten pages. The condensation and analysis of it, as embodied in the briefs of counsel, consists of 284 printed pages.

The admission of testimony to which objection is made arose in this manner: Dr. Hanisch was called as a witness for the defendant and had testified to his examination of the deceased made November 13 following the accident, in the course of which testimony he made frequent reference to the personal history of the insured as given by her in that examination. He was asked on cross-examination whether as a part of that history she told him that on October 19, while seated in a chair behind the cigar counter, the chair slipped out from under her and she fell striking her head, left shoulder and left hip. This was objected to as not being proper cross-examination. The objection was overruled and the witness permitted to answer, which he did, stating that she did give him such a history. Upon a further question as to what she had then said as to the acts of certain other persons present at the time, the objection was sustained and testimony not admitted as to her statements concerning the acts or statements of other persons.

The witness, while testifying, held in his hand and made constant reference to a memorandum which he had made concerning his examination and her history given to him as a part thereof. The witness stated: "I will be very glad to give you the results of my examination I have before me. * * * Yes, sir, that is my memoranda. It is from my notes. * * * Q. What findings did you make there as to her physical condition at that time? * * * A. Let me just refer to my notes and I will give you that information. * * * My diagnosis was cerebral embolism. * * * My report of her heart here indicates that she had a very badly diseased heart. * * * Q. What did she say about that? A. This is as to her past history." The witness then details cer-

tain statements by the insured at the time in reference to matters pertaining to her health, going back to her childhood, and was further asked: "Q. She told you then that she had been told that she had a rheumatic heart? * * * A. Yes, sir." Upon cross-examination the witness was asked concerning her blood pressure, to which he replied that he could not tell about the blood pressure without looking at his memorandum, that it was three years ago. The memorandum was then referred to by counsel cross-examining the witness and, after certain inquiries, was shown to the counsel, and thereupon the question was asked to which objection was made and the ruling complained of followed.

In view of this situation as disclosed by the testimony itself and without further discussion, we express the opinion that the trial court did not abuse its discretion or commit prejudicial error in permitting the question to be answered. Any undue expansion upon further questions concerning other things not directly connected with the subject of inquiry was not permitted by the court, and the witness having made his memorandum and the history and certain parts of it as stated by the deceased rather prominent in his testimony on direct examination, the cross-examiner was entitled to make this inquiry.

Upon the assignment of error as to the matter of instructions, the criticism is directed particularly to the instruction No. 8 which is as follows:

"The defendant pleads as a defense to the plaintiff's right to recover in this action against the defendant that the insured did not come to her death as a result of an accident, independent of all other causes; that her death resulted from a stroke of paralysis caused by a diseased condition of the heart.

"In this connection you are instructed that if the defendant has satisfied you by a preponderance of the evidence that the death of the insured was due to a stroke of paralysis or other cause due to a diseased condition of the heart, then, in such case, the plaintiff would not be entitled to

recover, and your verdict should be for the defendant."

This instruction, of course, must be considered in its connection with all the other instructions given at the trial. It is neither necessary nor possible that the propositions involved should all be stated in one instruction. Particular criticism is applied to the clause that the defendant "pleads as a defense" the things stated. In this we feel there is too much of a tendency to a critical distinction of words. It is often the case that lawyers and courts in discussing the terms of an instruction become too deeply analytical as to refined distinctions involved in the language used. Often these distinctions are apparent to lawyers and judges accustomed to the analysis of such documents, and when their application is confined to the boundaries of legal discussion it is perhaps all right; but in use and application of terms in the trial of a case we fear that often the decision goes off on a matter which would have been entirely incomprehensible to the average juror. It is quite possible that the trial judge might have found a more appropriate word than "pleads," and yet in determining the effect of the instruction in its possible influence upon the jury we are not prepared to say he could have done so. We all know that to the average juror and layman the word "pleads" is practically synonomous with "claims," "urges" or "contends." It does not to the juror have its legal significance as to the lawyer, of its particular application to the pleadings proper in the case, but to the average juror and layman what a litigant pleads in a case is that which he asserts or contends in his own behalf.

It is further urged that the court erred in referring to the death as resulting from a stroke of paralysis, and appellant urges in its brief that it was not defendant's contention that paralysis caused death; that defendant's contention was that the cause of death was not established, but that it was not due to paralysis, and that the defendant introduced no evidence as to the cause of the insured's death. The appellant seeks thereon to make a distinction

between its contention as to the cause of the fall and the cause of the death. As we gather the contentions of the parties, there was no dispute that death followed upon the paralysis—there was the fall, there was the paralysis, there was the death. The real point of controversy between the litigants was whether the fall caused the paralysis and resulting death or whether the paralysis came first and caused the fall and resulting death. That was the proposition to which the evidence was directed, and the defendant did plead in its answer, after reciting questions concerning the insured's previous condition of health to which alleged false answers had been made, that "said heart disease caused and resulted in the death of the said Irene Sweeney on or about December 2, 1931," and that was the issue tendered by defendant's answer.

The defendant's medical witness, Dr. Young, testified: "In my opinion the cerebral infarct due to embolism was the cause of her paralysis." The doctor further testified that he had the opinion that the cerebral embolism occurred prior to the fall and that it was the cause of her fall.

The defendant's counsel, as one of the grounds of his motion for a directed verdict, states that the undisputed evidence shows that the insured had an attack of cerebral embolism which was caused in part by preexisting disease —in part or altogether by such cause. In view of the immediate connection in point of fact and in time between the fall and the paralysis and the death, and that upon the theory of both sides in the trial the single controversial question was whether the fall caused the paralysis or the paralysis caused the fall, and that in either case death resulted, we cannot find any tangible ground for a distinction as to whether reference shall be made to the cause of the fall or cause of the death.

The court informed the jury in instruction No. 4 that, before the plaintiff could recover, she must establish by preponderance of the evidence that the death of the insured, Irene Sweeney, was caused through accidental

means independently of all other causes, and that upon establishment of that fact by a preponderance of the evidence then the verdict should be for the plaintiff, unless the defendant satisfied them by a preponderance of the evidence that the defendant was induced to accept the application of the insured and issue the policy by false answers to interrogatories contained in the application, which the defendant believed and relied upon, and which the insured knew were untrue.

The court further in instruction No. 9 informed the jury that, if the defendant had satisfied them by a preponderance of the evidence that the insured, in answer to the question in her application whether she had ever had chronic or recurrent heart disease, knowingly answered it untruthfully, also stating to the jury the proposition as to other answers, and that said company relied on said answers and would not have issued the policy had it known that said answers or any of them were not true, then under such circumstances the plaintiff would not be entitled to recover and the verdict should be for the defendant.

Upon the whole record we are not able to find any prejudicial error in the instructions, nor in the instruction No. 8 of which particular complaint is made.

Upon the questions whether fraud by false answers in the application was established by the evidence, or whether the evidence was sufficient to prove the accidental fall and consequent death independently of all other causes, we are of the opinion that those questions were properly left to the jury and that their determination upon the conflicting evidence should be final. While the question was a debatable one, we have no doubt that there was sufficient evidence on both sides to go to the jury. The testimony as to the physical condition of the insured was derived from examination after the fall and from an autopsy and has in part already been adverted to. Upon the part of the plaintiff the evidence showed that the insured had sustained this fall from a rickety stool which she occupied, on the top of which was a box on which she sat, and from

which she fell on to a tile floor sustaining bruises to her head, shoulder and hip. The testimony of plaintiff's medical witness was to the effect that these things might cause what followed, but that he could not absolutely fix the cause himself, which could only be done by God Almighty. The testimony of lay witnesses was to the effect that the insured had been active and engaged in labor, much of it hard physical labor, for many years, and that up to and immediately preceding this occurrence she had been lively, active and without any apparent indisposition of any kind. She had done house work, farm work, and was at the time engaged as sales girl at the cigar counter in the Henshaw Hotel. She had been told in early girlhood that there was something the matter with her heart, but that she insisted it never bothered her any, and she went on thereafter doing many kinds of work requiring physical exertion. She was not shown to have been afflicted with vertigo, fits, dizziness, fainting or any similar affliction, or to have ever had a fall until the one which shortly preceded her death.

The case of *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235, presents some features quite analogous to those of the present case. In that case the contract feature over which the controversy arose was whether the death of the insured, who had been shot by a robber, resulted from the intentional act of the insured or from the intentional act of another person. The jury evidently found, and the trial court and this court approved the finding, that the pistol of the robber had been accidentally discharged, thereby resulting in the death of the insured. The court in the opinion by the late Justice Sullivan say: "The inference that the pistol in the hands of the robber was accidentally discharged and that the killing of Drummond was unintentional, is a reasonable deduction from all the circumstances proved on the trial."

In a later case of *Western Travelers Accident Ass'n v. Holbrook,* 65 Neb. 469, and on rehearing 475, it is held that, when it has been sufficiently established by circumstantial evidence that a person has suffered injury by rea-

son of falling from a dangerous height, it will be presumed, in the absence of evidence to the contrary, that the fall was accidental. The proposition is approved and restated in *Thomas Kilpatrick & Co. v. London Guarantee & Accident Co.*, 121 Neb. 354. It is said in the opinion in the *Holbrook* case: "The petition alleged that the fall was accidental, and it is insisted that the burden of proof was upon the plaintiff to establish that cause, and no other. The correctness of this contention is undisputed, but we think the plaintiff has met the requirement. All that was demanded of him was to establish a reasonable probability." We do not perceive that the difference in the distance of the fall, whether it is from a railing surrounding an areaway to a floor below, or whether it is from a stool to a tile floor, is ground for any distinction as to whether the fall was accidental. It is within the knowledge of every one that in either case the fall on to a tile floor might be productive of serious injury.

Therefore, finding no prejudicial error in the record, the judgment of the trial court is

AFFIRMED.

IN RE ESTATE OF JAMES H. HUNTER.
ROBERT H. HUNTER ET AL., APPELLANTS, V. JAMES D. HUNTER, ADMINISTRATOR, ET AL., APPELLEES.

FILED JULY 19, 1935. No. 29236.

1. **Wills: ELECTION: EFFECT.** "Where a widow elects to renounce the provisions made for her in the will of her deceased husband and take under the statute, such election does not render the will inoperative. As between other persons it will be enforced as nearly as may be in accordance with the intention of the testator." *In re Estate of Grobe*, 101 Neb. 786.
2. ———: ———: ———. It is only when the subject-matter upon which the will was intended to operate has been so changed and the manifest plan and purpose of the testator has been effectually destroyed by the election of a surviving spouse to take under the statute that a will will be declared inoperative.
3. **Evidence.** A testator is presumed to know that his widow may

lawfully exercise her right under the statute to take against the will, and that such right is paramount to his will.

4. **Wills: ELECTION: EFFECT.** Where the widow elected to take under the statute and against the will of her deceased husband, *held*, that under the facts in this case the will was not thereby rendered inoperative as between the other legatees to each of whom a certain number of shares of stock had been bequeathed, but that each was entitled to receive the shares bequeathed, as diminished by the widow's election.
5. ———: ———: ———. Where a widow elected to take against the will of her deceased husband, and a devise of certain real property was reduced by reason thereof, *held*, on the facts in this case, not to render the will inoperative, but to reduce the interest of the devisee therein accordingly.
6. ———: ———: ———. Where, in two bequests, a certain number of shares of stock are bequeathed, and in each bequest it is provided that, in the event the testator shall dispose of said shares of stock during his lifetime, in lieu thereof each shall receive certain sums of money, and the testator does not dispose of said shares of stock during his lifetime, the legatees, because the number of shares of stock bequeathed to each has been reduced one-third by reason of the election of the widow to take against the will of her deceased husband, are not entitled to receive the money in lieu thereof.
7. ———: ———: ———. Where a testator devises certain real property, and provides that, in the event that the testator shall dispose of said real property during his lifetime, the devisee in lieu thereof shall receive a certain sum of money, and the testator does not dispose of said property during his lifetime, the devisee, because his interest therein has been reduced by reason of the election of the widow to take against the will of her deceased husband, is not entitled to receive the money in lieu thereof.
8. **Executors and Administrators.** Under the facts in this case, *held*, that the administrator is not chargeable with loss of interest, occasioned by the conversion of certain shares of stock into money, in excess of the amount charged against him by the trial court in the settlement of his account.
9. ———. Error was not committed by the trial court in allowing the administrator his statutory fees for his services as such.

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

Will H. Thompson, for appellants.

Gray & Brumbaugh, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

HASTINGS, District Judge.

James H. Hunter, a resident of Omaha, Nebraska, died testate on the 28th day of March, 1932. Deceased was survived by his widow, Louise A. Hunter, and his four children born to the marriage, Robert H. Hunter, Laura Hunter Howell, James D. Hunter, Frank C. Hunter, and his foster sister, Libbie Magers. The will was executed on the 16th day of November, 1925, and admitted to probate in the county court of Douglas county, Nebraska, and on June 5, 1932, James D. Hunter was appointed administrator with will annexed. Thereafter, and within the time allowed by law, the widow filed her election to take under the statute.

The estate of deceased consisted of 540 shares of stock in the City Service Company, 525 shares of stock in the Hunter Realty Company, 150 shares of common stock in the Chicago & Northwestern Railway Company, and shares of stock in the Conservative Savings and Loan Association amounting to $15,000, convertible into cash on 30 days' notice, a debt of $2,700 owing to the estate by the Hunter Realty Company, also two lots in the city of E. Las Vegas, New Mexico, and between four and five thousand dollars in cash.

On the 6th day of July, 1933, said administrator filed his final account and petition for final settlement, and for a distribution of the estate. Robert H. Hunter and Laura Hunter Howell, appellants herein, filed objections to the final account, in which it was alleged that without any authority or order of court said administrator withdrew from the Conservative Savings and Loan Association, on the 25th day of October, 1932, $15,000, which was then drawing interest, thereby said administrator lost the interest thereon in the sum of about $700, and that said ad-

ministrator should be charged with said interest. It was further alleged in said objections that, by reason of the widow having elected to take under the statute, the bequest to Laura Hunter Howell of 50 shares of stock in the Chicago & Northwestern Railway Company had failed, and that in lieu thereof she was entitled to the sum of $2,500. It was further alleged that by reason of said election of the widow the bequest of Robert H. Hunter of 100 shares of stock in the Chicago & Northwestern Railway Company had failed, and that he was entitled in lieu thereof to the sum of $5,000, and that, by the election of the widow, the devise to Robert H. Hunter of the town property in the city of E. Las Vegas, New Mexico, had failed, and that in lieu thereof he was entitled to the sum of $2,500.

The county court entered an order charging the administrator with $606 interest on the money withdrawn from the Conservative Savings and Loan Association, and decreed that a distribution could not be made under the will owing to the widow's election, except as to the legacy of $1,000 to Libbie Magers, which was ordered paid. The remainder of the estate was ordered distributed under the statute as intestate property. An appeal was taken from the decree of the county court, and on a trial in the district court the order of distribution of the county court was affirmed, except as to the interest item, which had been charged to the administrator, and this item, by the decision of that court, was reduced to $300. Robert H. Hunter and Laura Hunter Howell appealed to this court.

The principal question for consideration is the construction that should be given to the will. Without the formal part, the will is as follows:

"To my wife, Louise A. Hunter, I give and bequeath, to have and to hold forever, all of my wearing apparel, my jewels and ornaments, all our household furniture and furnishings, and the sum of one thousand dollars.

"I am the owner of five hundred twenty-five shares of Hunter Realty Company stock, and to my son Robert H. Hunter I give, bequeath and devise and to have and to hold

forever, six shares of said stock, and lots ten, eleven and twelve (10, 11 and 12) in block twenty-three (23) in San Miguel Townsite Company's Addition to the city of E. Las Vegas, New Mexico. In the event that I shall have disposed of said town property before my death then in lieu thereof I give and bequeath to my said son two thousand five hundred dollars in money.

"To my foster sister, Libbie Magers, of Brighton, Colorado, I give and bequeath the sum of one thousand dollars. If still alive at my death.

"To my aforesaid son, Robert H. Hunter, I give and bequeath one hundred shares of common stock of the Chicago and Northwestern Railway Company, which I now own, and if I shall have disposed of said stock before my death then in lieu thereof I give and bequeath to my said son two thousand five hundred dollars in money.

"The five hundred nineteen shares of said Hunter Realty Company stock I give and bequeath to my said wife for and during the period of her natural life, during which time she shall have the net earnings thereof for her own use, but she shall not encumber or dispose of any of it.

"To my son, Frank C. Hunter, I give and bequeath two hundred ten shares of said Hunter Realty Company stock, but subject to the life estate and interest therein of my wife, who is his mother; and to my son, James D. Hunter, I give and bequeath two hundred nine shares of said Hunter Realty Company stock, but subject to the life estate and interest therein of my wife, who is his mother. The remaining one hundred shares of said Hunter Realty Company stock I give and bequeath to my daughter, Laura Hunter Howell, for life, and at her death the same shall go to the surviving children of my son James D. Hunter, share and share alike, and this bequest is made subject to the life estate and interest therein of my said wife.

"This means that during her lifetime my said wife shall have the net earnings of the aforesaid 519 shares of the aforesaid stock, and that after the death of my said wife 210 shares of said stock shall go to my son Frank C.

Hunter, absolutely; 209 shares of it shall go to my son James D. Hunter, absolutely; 100 shares of said stock shall go to my said daughter, Laura Hunter Howell, for life; and at her death the said 100 shares shall go to the surviving children of my son James D. Hunter, absolutely.

"My daughter, Laura Hunter Howell, shall not in any manner encumber said 100 shares of stock, or any part of the same, and during her life, after the death of my said wife, she shall have for her own use the net earnings of said hundred shares of stock, and so that said 100 shares of said stock shall go intact to my said grandchildren after and upon the death of my said daughter.

"By net earnings is meant the amount of earnings remaining after all expenses pertaining to the operation of the business of said Hunter Realty Company are paid, including taxes and assessments, and all direct expenses and indirect expenses.

"To my said daughter, Laura Hunter Howell, I give and bequeath fifty shares of common stock of the Chicago and Northwestern Railway Company, and if I should dispose of said stock before my death then in lieu thereof I give and bequeath to my said daughter the sum of two thousand five hundred dollars.

"I have herein bequeathed to my son Robert H. Hunter one hundred shares of common stock of the Chicago and Northwestern Railway Company, and have provided that in case of disposal of said stock by me before my death that he shall have in lieu thereof the sum of $2,500 in money; in case I shall dispose of said shares of stock during my lifetime then I give and bequeath to my said son Robert H. Hunter the further and additional sum of two thousand five hundred dollars, and so that if he shall not receive said 100 shares of railway company stock he shall receive five thousand dollars in money in lieu of said stock.

"In paying the money bequests herein and hereby made none of the Hunter Realty Company stock shall be used, or disposed of, and if there shall not be sufficient property

belonging to my estate at my death, aside from Hunter Realty Company stock, to pay the money bequests in full then the same shall be proportionately reduced to accord with the deficit.

"All the rest, remainder, and residue of my property, personal, real, or mixed, and wherever situated, I give and bequeath to my aforesaid three sons, one daughter, and my wife, and share and share alike, and to have and to hold forever.

"The life estates in said Hunter Realty Company stock, and hereby created and willed, shall carry the voting privilege thereof, which means that while my said wife survives me she shall vote all of said 519 shares, and after her death my daughter shall, while she lives, vote the 100 shares.

"It is my very earnest desire and wish that the business of the Hunter Realty Company shall be continued after my death, during the lifetime of my widow, and I hope also that after the death of my widow the said business will still be continued until my aforesaid grandchildren come into absolute ownership of the one hundred shares of the stock willed to them."

It appears from the evidence that the Hunter Realty Company, in which the testator owned the shares of stock disposed of by his will, is a corporation organized by the testator some 27 years prior to his death. At the time of testator's death the corporation owned an apartment house, known as the "Hunter Apartment," a hotel, known as the "Hunter Inn," and adjacent thereto a valuable business corner which at that time was being improved. Of the 1,000 shares of the Hunter Realty Company, 997 were outstanding, with ownership as follows: Testator 525, his widow 161, Robert H. Hunter 244, Laura Hunter Howell 61, Frank C. Hunter 2, and James D. Hunter 4. At the time of the death of James H. Hunter and since that time the business of the Hunter Realty Company has not yielded any net income.

It is the contention of counsel for appellees that the will and the surrounding circumstances disclose an intention

on the part of the testator to perpetuate the Hunter Realty Company as a family corporation, a purpose as to the final ratio of stock ownership among his 4 children, and a desire for an equal division of his entire estate among them, and that by the election of the widow to take under the statute such manifest plan and purpose of the testator had been so changed or destroyed as to render his will inoperative.

By the widow's election each of the legacies provided for in the will, with the exception of the legacy to Libbie Magers, was reduced one-third, and the devise of the New Mexico town lots one-half.

We think that the will indicates a desire on the part of the testator that the Hunter Realty Company be perpetuated as a family corporation during the lifetime of his wife, and until the time his grandchildren, referred to in the will, should come into absolute ownership of the shares bequeathed to them. The ratio of stock ownership in said corporation, as between his said 4 children, was not changed by the election of the widow.

We have held: "Where a widow elects to renounce the provisions made for her in the will of her deceased husband and take under the statute, such election does not render the will inoperative. As between other persons it will be enforced as nearly as may be in accordance with the intention of the testator." *In re Estate of Grobe*, 101 Neb. 786.

It is only when the subject-matter upon which the will was intended to operate has been so changed and the manifest plan and purpose of the testator has been effectually destroyed by the election of a surviving spouse to take under the statute, that a will will be declared inoperative. *Fennell v. Fennell*, 80 Kan. 730.

The testator is presumed to have known the law, and that his widow might lawfully exercise her right to take against the will. 28 R. C. L. 233, sec. 193; *Disston's Estate*, 257 Pa. St. 537, L. R. A. 1918B, 62; *Vance's Estate*, 141 Pa. St. 201, 12 L. R. A. 227, 23 Am. St. Rep. 267;

Crocker v. Crocker, 230 Mass. 478, 5 A. L. R. 1617; *Upham v. Emerson,* 119 Mass. 509; *Sawyer v. Freeman,* 161 Mass. 543. To the same effect see *Hill v. Hill,* 90 Neb. 43.

Nothing appears in the will from which it may be inferred the testator would have made any different disposition if he had known his widow would exercise her right to take under the law. The effect of the election of the widow was to reduce by one-third each bequest of the shares of stock in the Hunter Realty Company and of the shares in the Chicago & Northwestern Railway Company. The legatees to whom he bequeathed the shares of stock in the Hunter Realty Company took in the same ratio, as among themselves, as they would have taken if the widow had taken under the will. The legatees of the Hunter Realty Company stock and the legatees to whom the stock of the Chicago & Northwestern Railway Company was bequeathed took ratably the same as they would have if the widow had not exercised her election.

Under this construction, the legatees to whom he bequeathed the shares of stock in the Hunter Realty Company take as follows: Robert H. Hunter, to whom was bequeathed 6 shares of stock, receives 4; Frank C. Hunter, to whom was bequeathed 210 shares, receives 140; James D. Hunter, to whom was bequeathed 209 shares, receives 139 1/3, and Laura Hunter Howell, to whom the net income from 100 shares was bequeathed, receives a like income from 66 2/3 shares during her life, and on her decease the ownership thereof vests in the surviving children of James D. Hunter. With the shares so distributed under the will, the expressed desire of the testator that the business of the corporation be continued until his grandchildren come into absolute ownership of the shares of stock bequeathed to them in remainder may be observed and carried out. Under the order of distribution of the trial court, Laura Hunter Howell receives 87½ shares of the stock absolutely, and the children of James D. Hunter are disinherited, a result which was not intended by the testator.

It is the contention of counsel for appellant that, since the shares of stock of the Chicago & Northwestern Railway Company bequeathed to Laura Hunter Howell and Robert H. Hunter have been reduced one-third by the widow's election, under the terms of said bequests, they are entitled to receive in lieu of the stock bequeathed to them $2,500 and $5,000 respectively. The condition on which they were to receive said sums of money in lieu of said stock bequeathed to them was the testator's disposition of said stock during his lifetime. Testator owned all of this stock at the time of his death, and the condition on which they were to receive money in lieu of stock does not attach. Under said bequests, as reduced by the widow's election, Laura Hunter Howell receives 33 1/3 shares, and Robert H. Hunter receives 66 2/3 shares.

The same contention is made in relation to the devise of the town lots in New Mexico to Robert H. Hunter. In the devise of the property to him it is provided that, if the testator disposed of the same before his death, then in lieu thereof Robert was given the sum of $2,500. Testator did not dispose of the property during his lifetime, and the election of the widow does not entitle him to receive $2,500 in lieu thereof, but he takes the interest remaining after the widow's election.

Under the will Libbie Magers is entitled to the $1,000 bequeathed to her.

After the payment of the debts and expenses of administration, the four children of testator are entitled to share equally in the remainder of his estate as diminished by the widow's election.

On October 25, 1932, the administrator converted the $15,000 of stock in the Conservative Savings and Loan Association into money without an order of the court therefor. It appears that interest or dividend on said stock was payable semiannually on the 1st day of January and the 1st day of July each year, and that by the withdrawal of the money the interest or dividend thereon from July 1, 1932, to January 1, 1933, was lost to the estate. It is ad-

mitted by the administrator in his answer that, if the money had remained in said company from July 1, 1932, to January 1, 1933, the interest or dividend would have amounted to $606. The trial court found that by waiting two months more the administrator would have realized the sum of $300 more in interest, and that there was no legal cause why said administrator should withdraw said money and lose such interest, and adjudged that his account should be charged with $300.

The court found and adjudged that subsequent to said date a justifiable cause arose for withdrawing said fund, and the administrator should not be charged with interest subsequent to January 1, 1933. The administrator has not filed a cross-appeal from the judgment charging him with $300 interest and the question whether said sum was rightfully charged to him is not here for review.

Counsel for appellants contends that the trial court erred in not charging the administrator with a further sum of $300 interest from January 1, 1933, to July 1, 1933. Counsel seems to base this claim solely upon the ground that the administrator failed to procure an order from the county court permitting the withdrawal of said money. It is insisted that such an order was required by the provisions of section 30-1404, Comp. St. 1929. For his own protection the administrator should have applied to the county court for leave to withdraw this fund, and should have received the sanction of the court before proceeding to do so. The fact that he did not make such application and obtain an order of the county court does not render him liable, if the transaction was in good faith on his part, without profit to himself, and he exercised the care, prudence and judgment a man of fair average capacity and ability would have exercised in the transaction of his own business affairs, and this is true, even though subsequent events should disclose that the action taken was not necessary. *Dundas v. Chrisman,* 25 Neb. 495; *In re Estate of Bush,* 89 Neb. 334; 11 R. C. L. 133, sec. 140. The administrator on withdrawing the money deposited it temporarily

in the United States National Bank, without interest, in the account of the estate. Shortly thereafter, owing to financial conditions and the fear that the money might be lost, he withdrew the money from the bank, rented a safety deposit box in the name of himself as administrator of the estate, and placed the money therein. The administrator did not profit in any way by the withdrawal of the money and the subsequent retention of the same. At the time the administrator withdrew the money, and for months subsequent thereto, the financial conditions existing were critical, and banks and large financial institutions were failing or suspending payment of their obligations almost daily. The administrator in this transaction exercised the utmost good faith, and on the facts disclosed by the record should not have been charged with the loss of any interest, but not having appealed from the judgment of the trial court charging him with the loss of $300 in interest said charge against him, as made by that court, must stand.

Counsel for appellants contend that the administrator was not entitled, on account of alleged mismanagement of the estate, to the allowance of any fee for his services. The county court allowed the administrator his statutory fees, and the district court affirmed such allowance, and on the facts and circumstances disclosed by the record the contention is without merit.

The judgment of the trial court, so far as it sustains the allowance of the account of the administrator and the charging him with the $300 loss as interest, is affirmed, but the judgment holding the will inoperative, except as to the legacy of Libbie Magers, and ordering the remaining property distributed as intestate property, is reversed, with directions to enter an order of distribution under the will in conformity with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

MAX MOSHER, APPELLANT, V. HERMAN BESELIN ET AL., APPELLEES.

FILED JULY 19, 1935. No. 29322.

Attachment: ESTOPPEL. A defendant in an attachment proceeding, who fails to assail the validity of the attachment or the truthfulness of the affidavit upon which it is based, but who, within a few days after the levy of such attachment, voluntarily executes and delivers a bill of sale of the attached goods and chattels for the use and benefit of the plaintiff and other creditors and accepts an exemption of $500 obtained from the sale of such goods and chattels, acting upon his attorney's advice, the attachment action having been dismissed, ratifies and confirms such attachment proceedings and cannot thereafter proceed against the judgment creditor or the surety upon the attachment bond for damages claimed to have been sustained by reason of an alleged malicious, unlawful and fraudulent procurement and levy of such attachment.

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

Foster & Yates, for appellant.

Webb, Sheehan & Kelley, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and MESSMORE and RYAN, District Judges.

MESSMORE, District Judge.

This is an appeal from the district court for Douglas county, wherein that court dismissed the case and discharged the jury at the conclusion of appellant's testimony.

The action is one for malicious attachment. Only the evidence necessary for a determination of the case will be set forth in this opinion. Appellant was a resident of Omaha for a number of years, was engaged in the cigar business there and had transacted business with the appellees Beselin for some years. He had entered into a written agreement on or about December 26, 1931, with one C. W. Detrick, a purchaser furnished by an agent of

appellant, to sell to him the cigar store for the sum of $1,000 down and the balance to be carried back on the stock. The purchaser, Detrick, being unable to raise $1,000, entered into another agreement, verbal in its nature, with appellant for the purchase of said store, agreeing to give appellant three shares of building and loan stock as a first payment, appellant to depreciate the stock and take out a radio. This deal was to be consummated on January 2, 1932. On this same day appellees Beselin, being creditors of appellant, filed an action in attachment in the municipal court of Omaha, with appellee Jamieson as their bondsman, against appellant.

The affidavit in attachment sets out that defendant, appellant herein, is about to remove his property, or a part thereof, out of the county with intent to defraud his creditors; is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; has property or rights in action which he conceals; has assigned, removed or disposed of, or is about to dispose of his property, or a part thereof, with intent to defraud his creditors; fraudulently contracted the debt, or incurred the obligation for which suit is about to be or has been brought.

Appellant declares the affidavit in attachment and the garnishment of the purchaser, Detrick, by appellees Beselin to be false, that the same were made maliciously by said appellees for the purpose of injuring and damaging appellant and to put him out of business.

After being served with process in the attachment action, appellant consulted an attorney whom, appellant claims, he employed only to sell the store. The attorney, after consultation with appellant, told him that under the circumstances he could get $500 from the proceeds of the sale of the store for appellant's exemption and he thought that would be about the best he could get and to take that and let it go. This conversation took place about January 4, 1932. The following questions and answers are set out in the bill of exceptions and are contained in the direct

examination of appellant: "Was that in reference to the sale of your store? A. Yes; he told me I couldn't do nothing. He says, 'You had better take this $500 and get out of it.' I was willing to do that because I was surrounded with so much—(interrupted). * * * Q. On the 6th did you sign a bill of sale? A. Yes; I went up there—he called me and says, 'Come on up here,' but I was so disgusted that I turned the key over to Mr. Detrick before I ever got any money out of the place. I was willing to let it go if I didn't get a nickel out of it, to get out of the mess. * * * Q. After you signed the bill of sale, then what happened? A. I come back and he took out what he wanted out of there first, and what was left he gave me and I paid off some small bills to different parties that I owed, and it took all I had, what I got out of it." This evidence, in substance, sets out the relation of the attorney with his client, the appellant. The bill of sale was signed by appellant, the store sold to Detrick, and out of the proceeds thereof $500 paid to appellant in the nature of an exemption, which he accepted.

The attachment action was dismissed on or about January 7, 1932, in the municipal court by the appellees Beselin. About February 17, 1932, a release was filed in said attachment action, waiving all claim for damages by appellant as against the appellees Beselin, signed by the attorney employed by appellant to sell the store.

In *Parmer v. Keith*, 16 Neb. 91, in paragraph 2 of the syllabus, it was held: "To maintain an action for malicious attachment there must be a want of probable cause, malice of the defendant, and injury to the plaintiff." Further, quoting from the opinion in said case, it was held: "Three things are necessary to be alleged and proved, viz., want of probable cause, malice in the defendant, and damage to the plaintiff."

Appellant signed the bill of sale, a legal transfer of the property to the purchaser, disposing of his rights in the property then under attachment, and the attachment action was dismissed. In directing his attorney to sell the store

and in advising with his attorney, there was only one thing that the attorney could do in behalf of his client, the appellant, and that was, if appellant wanted his exemption, wanted to dispose of his interest in the property and desired to sell the store, claiming the sum of $500 exempt to him, then naturally the attachment action would have to be dismissed in performance of the ordinary duties of an attorney in securing the rights of his client that his client had agreed to accept.

We do not believe that the scope of an attorney's authority can be narrowed to the point suggested in appellant's brief. In that behalf we believe that the general authority and duty of an attorney under the circumstances may be summarized as follows: "But where an attorney is called on to perform specific services, and does not identify himself with the record of the cause, and performs only the particular services which he has been retained to perform, his implied authority to bind his client seems limited to the proper conduct of the specific work entrusted to him." 2 R. C. L. 976, sec. 54. In order that appellant could obtain the exemption, it would be necessary to dispose of the attachment suit and not litigate it; the implied authority existed in his attorney for that purpose.

Assuming that appellant's attorney did not have the authority, as contended by appellant, yet appellant accepted and retained the fruits of the allegedly unauthorized act of his attorney. "An unauthorized compromise by an attorney may be ratified by the client, and such ratification may be either express or implied from circumstances, as by the client's acceptance of the fruits of the compromise, with knowledge thereof." 2 R. C. L. 998, sec. 78.

If the attachment issued out of the municipal court had been issued unlawfully, wilfully, wrongfully and maliciously, and without probable cause, and was based upon a false affidavit, the appellant could have had those matters determined in that action, and if the allegations were true could have fixed the liability of the appellees Beselin and

of the surety on the attachment bond. He did not see fit to pursue that course, but instead voluntarily sold and assigned all his right, title and interest in the goods attached for the benefit of the original purchaser, Detrick, and for the benefit of his creditors, and thus obtained a dismissal of the attachment action. By such a course of procedure, no action can be maintained for damages for a malicious attachment against the attaching creditor or the surety on the attachment bond for the wrongful levy of such attachment. *Eiseley v. Norfolk Nat. Bank*, 89 Neb. 382.

This would leave only for consideration the question of damages for the destruction of appellant's business and loss of credit. We do not believe the record reflects any damages to appellant in this respect for the reasons given in this opinion.

A consideration of the waiver of damages filed by appellant's attorney on February 17, 1932, in the original attachment action is not necessary to a determination of this case.

The action of the lower court in dismissing the action and discharging the jury should be and is

AFFIRMED.

GEORGE W. JOHNSTON, APPELLANT, V. LOUIS R. JACKSON ET AL., APPELLEES.

FILED JULY 19, 1935. No. 29328.

Landlord and Tenant. Tenants under a written lease were adjudged bankrupts prior to the termination of the term. The leased premises were taken over by the trustee in bankruptcy, who sold the equipment and merchandise of the bankrupts; the purchaser thereof going into the possession of the premises for a period of a little over one month. The rentals accruing during the period the premises were in the possession of the trustee in bankruptcy and the purchaser of the stock of the bankrupts, lessees, were credited to the account of such lessees. The premises then remained vacant for the period of eleven months, the remainder of the lease term. Lessor instituted suit against

lessees to collect the eleven months' rent due under the lease. *Held*, the acts of the landlord, under such state of facts, did not amount to such interference with tenants' possession as to clearly indicate an intention on his part that the tenants should no longer continue to hold the premises and did not amount to a reentry of said premises on the part of the landlord.

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

Edward F. Leary, for appellant.

Shotwell, Monsky, Grodinsky & Vance, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY and CARTER, JJ., and MESSMORE and REDICK, District Judges.

MESSMORE, District Judge.

This is an appeal from the district court for Douglas county, wherein the case was tried to the court without the intervention of a jury. That court entered its judgment against plaintiff, appellant herein, and for the defendants, appellees herein, from which judgment this appeal is taken.

The action is one for rent. The affirmative defense is upon the proposition of the reentry of the premises in question by the landlord, appellant. The facts are stipulated and may be summarized as follows: Appellant became the owner of the interest of E. R. Deputy in the lease in question, and from September 8, 1924, to September 11, 1931, appellees, partners under the name of Jackson Mattress Company, carried on the business of the manufacture and sale of mattresses, occupying the entire fifth floor of the building located at the southeast corner of Eleventh and Howard streets, Omaha. On September 11, 1931, appellees were adjudged bankrupts in the district court of the United States, for the district of Nebraska, Omaha division, and thereafter, on December 1, 1931, were regularly discharged as such bankrupts by said court. Appellees did not pay appellant rent for said premises for the month of September, 1931, amounting to $100, and since

said date made no payments of rent to appellant. Appellees never exercised authority over or carried on any business on the premises after September 11, 1931. On September 12, 1931, G. P. Horn was appointed receiver for said bankrupts and the keys to said premises turned over to an agent of the said Horn by appellees and a receipt taken therefor. On October 23, 1931, the said Horn was appointed trustee in bankruptcy of said appellees, and on September 28, 1931, a sale at auction of all the machinery, equipment, furniture, fixtures and stock of said bankrupts was held by said receiver and the property purchased by one Alfred Borchman, which sale was confirmed on October 5, 1931. Appellant had full and complete knowledge of said bankruptcy proceedings and was paid the sum of $125 for rent of said premises during the period they were occupied by the receiver and trustee in bankruptcy and was also paid rent by the said Borchman in the sum of $83.85 on October 27, 1931, through his rental agents, Tukey & Sons, for the period ending November 1, 1931. In the month of October, 1931, the said Borchman gave written notice to appellant that he would on or about December 1, 1931, leave and vacate said premises, and did vacate them on or about November 17, 1931, and tried to settle his rent due appellant for the amount which would have accrued prior to the date he vacated the premises, but appellant, through his agents, insisted that Borchman was obligated to pay rent for the full month of November, 1931, because he was a tenant from month to month and required to give 30 days' notice prior to the first of the month, and thereafter, on December 10, 1931, Borchman paid to appellant through his said agents, Tukey & Sons, the sum of $100 as rental for said month of November, 1931. From and after December 1, 1931, appellant had full and complete control over the premises in question and made diligent effort to relet the same, but said premises remained entirely unoccupied from December 1, 1931, to October 31, 1932, and appellant received no income whatsoever therefrom during said period. At all times

during the months of September, October, November, and December, 1931, Tukey & Sons, agents of appellant, were in full charge of the rental collections from said premises. Appellant credited to appellees' account the rental payments of $125, $83.85 and $100 paid as above set forth.

The question as to the future rents under the lease being a provable claim in bankruptcy is not in issue in this case, as that defense has been abandoned by appellees, since it is conceded that such a claim for rents is not a provable claim in bankruptcy. *Manhattan Properties v. Irving Trust Co.*, 291 U. S. 320.

Appellant contends that the holding of this court in *Merrill v. Willis*, 51 Neb. 162, is decisive of the instant case.

Appellees contend that the sole issue to be decided is whether or not under the statement of facts as above outlined appellant can collect rent from them for the 11 months during which appellant failed in his efforts to rent the premises again, under the theory of the reentry of the landlord terminating the lease.

One provision of the lease is as follows: "Provided always, and these presents are upon the condition, that if such rent or any part thereof shall at any time be in arrears or unpaid, or if the parties of the second part shall at any time fail or neglect to perform or observe any of the covenants, conditions or agreements herein contained on the part of said parties of the second part to be performed and observed, or if the parties of the second part shall become bankrupt or insolvent, or shall compound with creditors, then in any such case it shall be lawful for the party of the first part or any person or persons duly authorized by said party of the first part in that behalf, without any formal notice or demand, to enter into and upon said demised premises, or any part thereof in the name of the whole, and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made, without prejudice to any right of action or remedy of the said party of the

first part in respect to any antecedent breach by the said parties of the second part of any of the covenants hereinbefore contained."

Under the facts in this case, appellees contend that this is exactly what appellant did by accepting the rent from the trustee in bankruptcy and from the purchaser of the bankrupts' stock; that he reentered the premises and released appellees from any obligation to pay the remaining rent due under said lease.

There is nothing in the record to show that appellant intended to or did reenter the premises and thereby relieve appellees of their obligation under the lease to pay the stipulated rental. Appellant did nothing more than to try to keep the lease alive under the circumstances. Under the trustee's possession, which ensued as a matter of law, appellant took the rents accruing, crediting them to appellees' account. The purchaser at the sale in bankruptcy took about 30 days to remove the property purchased from the premises and appellant collected the amount of rent due from him for such term, as outlined. Thereafter, until the end of the term, appellant, having full charge and authority over the premises in question, received no income of any kind or nature therefrom.

In the case of *Merrill v. Willis, supra,* this court held that a landlord, upon abandonment of the demised premises by the tenant, is not required to relet them for the protection of the latter, but may, at his election, suffer the premises to remain vacant and recover the rent for the remainder of the term by means of an action on the lease. The following is from the opinion of Post, C. J., in that case: "The rule * * * is that the landlord may in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term, and recover his rent in accordance with the terms of the lease."

In the case just cited it is true that the lessor refused to accept the proffered surrender of the premises, but, being advised by the lessee of his intention to abandon the premises at once, notified the latter that he would look to him for payment in accordance with the terms of the lease, while no such notice appears in the instant case, which, appellees contend, distinguishes it from the case just cited. We believe it is not necessary under the circumstances of this case, nor is it required under the situation presented, for the landlord to seek out the tenant and serve notice as to what he intends to do. The holding in the case of *Merrill v. Willis, supra,* indicates that it is within the landlord's election. The tenants were in default of rent, which certainly did not increase their right in the premises. The burden of proof, under appellees' affirmative defense, was upon them to establish the same by a preponderance of the evidence. They have failed to show in this case, in our opinion, that the landlord resumed possession of the premises in question in pursuance of a right which the landlord reserved to himself. No other parties were dealt with, as far as the lease was concerned, except the trustee in bankruptcy and the purchaser of the bankrupts' stock, who removed the same from the premises shortly after the purchase. "To terminate a lease by the landlord his acts must amount to such interference with tenant's possession as to clearly indicate an intention on his part that the tenant shall not longer continue to hold the premises." *Hayward v. Ramge,* 33 Neb. 836. In the instant case we can draw no such conclusion from the affirmative proof offered by appellees in support of their contention of a reentry by the landlord.

For the reasons given in this opinion, we believe the action of the district court should be reversed and that court directed to enter judgment in favor of appellant and against appellees in the amount sued for.

REVERSED.

NEW IDEA SPREADER COMPANY, APPELLANT, V. WALTER E. BROWN ET AL., APPELLEES.

FILED JULY 19, 1935. No. 29095.

Appeal: SURETY: RELEASE. An agreement between the parties to an appeal from the county court, pending in the district court, without the knowledge or consent of the surety on the appeal bond, to the effect that the appeal of the defendant be dismissed with costs taxed to defendant and that the plaintiff withhold issuing execution upon the original judgment of the county court for three months and four days after the dismissal of the appeal, operates as a release of the surety on the appeal bond.

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

Halligan, Beatty, Halligan & Maupin and *Gerald J. McGinley,* for appellant.

Bruce K. Lyon, contra.

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

MUNDAY, District Judge.

This action was brought upon an undertaking given on an appeal from the county court of Perkins county.

In the action where the appeal bond was given, the appellant and plaintiff herein, the New Idea Spreader Company, was plaintiff, and the defendant Brown herein was also defendant in that action. The appellee and defendant Whipps herein was the surety on said appeal bond. The appeal in that action was not heard in the district court, but in pursuance of a stipulation between the parties in the original action, the appeal was dismissed by the district court. The stipulation and the order of dismissal are hereinafter set out.

In the case at bar the defendant Whipps filed a general demurrer which was sustained by the court, and the plaintiff elected to stand on its amended petition and the court

entered an order dismissing the suit. The plaintiff has appealed from that order.

The amended petition set forth: That the plaintiff is a corporation; the recovery of a judgment on March 21, 1932, in Perkins county by the plaintiff against the defendant Brown in the sum of $444.42 with interest at 8 per cent. per annum from that date, and costs in the sum of $9.90; the taking of an appeal to the district court for Perkins county by Brown and the execution and approval of the bond sued on, which is the usual statutory bond and is set out in the transcript; the docketing of that appeal in the district court for Perkins county on April 21, 1932; that the defendant Brown did not plead thereafter in the district court; the filing in the district court for Perkins county upon September 28, 1932, of the following stipulation, viz. (omitting title and signatures):

"Comes now the parties to this action, the New Idea Spreader Company, a corporation, plaintiff, and Walter E. Brown, defendant, and hereby stipulate that the appeal of the defendant taken to the district court for Perkins county, Nebraska, from the county court of Perkins county, Nebraska, may be dismissed as of this date with expenses of said appeal taxed to the defendant.

"It is further stipulated by and between the parties hereto that in consideration of the dismissal of said appeal by the defendant Walter E. Brown that the plaintiff herein, the New Idea Spreader Company, a corporation, will withhold issuing execution upon the judgment obtained in the county court of Perkins county, Nebraska, against the defendant until January 1, 1933."

The petition further alleged the order of said district court made on September 28, 1932, in the following words: "September term, September ——, 1932, appeal dismissed by stipulation of parties;" the issuance of an execution on January 1, 1933, upon said judgment against the defendant Brown and its return by the sheriff unsatisfied for want of property; that Brown and Whipps in

executing said bond both became principal obligors for payment of the judgment, and there was prayer for judgment against each defendant.

Whether or not the petition states a cause of action hinges on the effect of said stipulation and order of the court thereon. The appellant contends that the stipulated dismissal of the appeal and the delaying of execution on the original judgment in the county court do not release the surety Whipps upon the appeal bond. The appellee Whipps contends that the stipulation and dismissal exonerate him on the bond.

When the stipulation was filed in the district court, that court made the order as set out above.

The appellant cites several Nebraska cases and sections of the Nebraska statutes holding that the liability of a surety on such an appeal bond is a primary and not a secondary liability. There is no question but that the liability of a surety is as so contended, but that legal proposition is not controlling in this case.

The determination of the appeal appears to depend on whether or not the stipulation filed on September 28, 1932, without the consent and knowledge of the surety, to the effect that the appeal should be dismissed and that execution on the judgment on the original debt in the county court was to be held until January 1, 1933, was made on a good consideration.

The appellant contends that it was not, and urges that in the absence of proof of fraud or collusion, a consideration outside the matter involved in the appeal between the principal debtor and the creditor is necessary, and that there is no such consideration shown by the stipulation and dismissal. The appellee contends that the stipulation and consequent dismissal of the appeal by the district court constitutes a good consideration.

There is no fraud or collusion in the case. Nor is there any allegation in the amended petition that at the time of its execution the appellee consented to or knew of the stipulation or order of the court in pursuance thereof.

To support its contention the appellant relies on the case of *Howell v. Alma Milling Co.*, 36 Neb. 80, and the cases cited therein, and especially the case of *Ammons v. Whitehead,* 31 Miss. 99. In the *Howell* case the suit was on an appeal bond where the appeal had been filed in the district court, and it was there stipulated between the parties, without the surety's consent and knowledge, that another party, who succeeded to the plaintiff's interest in the suit, was to be substituted as plaintiff and the cause continued to a later date, and that in pursuance of the stipulation the court permitted the substitution and the cause was continued. After several continuances by agreement of the parties, judgment was finally entered for the plaintiff. This court held that the Code of Civil Procedure then in force provided for such a substitution and that plaintiff had a right to have such substitution made and a continuance without any stipulation; that such procedure was contemplated when an appeal bond was signed and that the surety knew that the court had such power and that the plaintiff was not in the least prejudiced; that the surety was not placed in a worse position than before the stipulation.

The opinion has this language: "He was not placed in a worse situation, for had there been no substitution Howell could have prosecuted the suit to judgment in the name of the original plaintiff."

As to the continuance of the original suit, the court say: "The fact that the original suit was continued from time to time by agreement, without the consent of the surety, did not operate as a release of the latter, nor did the rendition of the judgment by consent of the principal in the bond have the effect to discharge the surety from liability. The court had the power to grant the continuances irrespective of the agreement of the parties. Had it done so on the application of either party without the consent of the other, the surety would have been bound, since his undertaking contemplated a possible exercise of such power."

It is therefore clear that the *Howell* case is not in point in the case at bar as there is no question as to substitution or continuance in the district court involved. Nor is the case analagous to the case at bar. The substitution of parties and continuances of cases are matters within the power of the district court irrespective of any agreement of the parties. Also in the *Howell* case the substitution of parties and the continuances were made while the case was pending in the district court. In the case at bar the only action in the district court was the dismissal of the appeal in pursuance of the stipulation. The stipulation was to further be carried out elsewhere and independent of the matters involved in the appeal. The stipulation related to the delay of appellant to collect the original debt which was in judgment in the county court. This was an independent consideration outside the matters involved in the appeal. The holding in the *Howell* case is correct under the facts in that case.

This court some time later than the *Howell* case had the question of a release of surety before it in the case of *Wabaska Electric Co. v. City of Blue Springs*, 84 Neb. 577. It appears in this case that the parties stipulated that the judgment of the lower court should be entered in the district court and that the appellee waived full payment of electric light service for a time which was at a date later than that included in the suit. The court held that the stipulation between the parties to the appeal pending in the district court, without the knowledge or consent of the surety, to the effect that a judgment might be entered against the appellant for a specified sum, with costs, based upon a valuable consideration moving to each of the parties outside of the matters involved in the appeal, operated as a release of the surety on the appeal bond. The court in discussing what the consideration to each party was under the above stipulation used the following language:

"It appears that, while the cases were pending in the district court, the plaintiff and the defendant city entered

into the stipulation above mentioned, by which the city consented that judgment be entered in that court the same as in the court below, with interest added, for a valuable consideration, viz., the relinquishment by the plaintiff of a claim for 21 months' electric light service to the city. If plaintiff was willing to yield so large a claim, it seems reasonable that it must have been on account of some inherent weakness in its cases then pending before the district court. For the purpose of getting the judgments affirmed in that court, the plaintiff waived its aforesaid claim and consented to surrender its franchise. So far as the surety was concerned, the effect of that agreement was to credit the city with the value of that claim upon the judgments which it had appealed from the county court."

Thus in the *Wabaska* case the appellant received the release of the plaintiff's claim for electric service. The appellee for the purpose of getting the judgment affirmed in the district court waived its claim, which may have been on account of some inherent weakness in its case pending before the district court. Whatever it was, this court held that it received a consideration in getting its judgment affirmed. This case was in the district court and the judgment was entered in the district court, which is not a fact in the case at bar.

In the case at bar the principal debtor received an extension of time of payment of the judgment of the county court of several months without giving a stay bond. Also in the instant case the original appellee received the same as the appellee did in the *Wabaska* case, *i. e.*, that it recovered a judgment; also it had a judgment in another court reinstated on the original debt, probably because of some inherent weakness in its case pending before the district court. Therefore the consideration received by the appellees in the case at bar was independent and outside the matter involved in the appeal. This holding of this court is in accord with principle and authority. The surety on the appeal signed an appeal

bond conditioned "that the appellant will prosecute his appeal to effect, and without unnecessary delay, and that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs." The surety was entitled to have the contract of the principal debtor preserved and the debtor has no right to stipulate, without the surety's consent, to vary its terms, if the surety is to be held liable.

Kendall v. Grice, 1 Mackey (D. C.) 279, 47 Am. Rep. 243, is a case where an agreement was entered into whereby the plaintiff recovered possession of real estate and the payment of $175 for rent and damages, and a stay of execution on the judgment against the defendant was agreed upon for 30 days from date. The rule is stated as follows:

"The engagement of the surety is not to be enlarged or varied without his consent. Any agreement to do so by the creditor is an attempt on his part to make for the surety a new contract to which he never assented. The time of payment may be quite as important a consideration to the surety as the amount he has promised conditionally to pay. He may have agreed to become responsible, because he then had in his possession property of the principal debtor sufficient to indemnify him against loss. When the time fixed in the contract has passed without notification to him of the default of the principal, he may naturally suppose his liability to be at an end, and thus release the means of reimbursement, to his ultimate loss, if the changed contract is subsequently enforced against him. Again, the surety has the right, on payment of the debt, to be subrogated to all the rights of the creditor, and to proceed at once to collect it from the principal; but if the creditor has tied his own hands from proceeding promptly, by extending the time of collection, the hands of the surety will equally be bound; and before they are loosed, by the expiration of the extended credit, the principal debtor may have become insolvent and the right of subrogation rendered worthless.

It is also well settled that it is unimportant whether the extension given has actually proved prejudicial to the surety or not."

This case cites and approves *Ross v. Ferris,* 18 Hun (N. Y.) 210.

In the *Ross* case there was a stipulation that there would be a judgment of affirmance in the appellate court upon the "condition that execution should not issue upon the judgment to be entered, under six months." The court say:

"It extends the time of payment, which would otherwise be fixed by the judgment. It prevents the sureties, if they should pay the debt, from immediately enforcing the judgment obtained by the creditor, and to which they might be entitled by subrogation."

In *Wingate v. Wilson,* 53 Ind. 78, Wilson recovered judgment and Wingate was surety on the appeal bond filed in the appellate court. In that court, by agreement of parties, judgment was rendered for $80 and costs and no execution was to issue until the expiration of six months. The court puts the rule thus:

"The appellee, by the agreement embodied in the judgment, tied up his hands and deprived himself of the right to issue execution for a month longer than it could have been stayed by replevin bail. * * * It is established by numerous cases in this court and elsewhere, that, if the creditor and the principal make a new contract, based upon a sufficient consideration, for an extension of time for payment, for a definite period beyond that contemplated by the original contract, without the knowledge and consent of the surety, the latter is thereby discharged. The principle, it seems to us, is entirely applicable to this case. If the appellee had not, by the agreement, disabled himself to issue execution for the six months, he might, perhaps, within that time have realized his money, either by a voluntary or coerced payment, and thereby relieved the surety upon the appeal bond from obligation. The agreement for time, it sufficiently appears, was based upon a valid consideration."

See, also, *Quillen v. Quigley*, 14 Nev. 215; *Montrose v. Baggott*, 161 App. Div. (N. Y.) 494.

While the courts are not in agreement on this question, the majority rule seems to be the rule announced by this court in the *Wabaska* case. See 4 C. J. 1286, note 54.

In *Johnson v. Flint*, 34 Ala. 673, there was a stipulation that $400 would be deducted from the verdict of the lower court and the judgment then affirmed with interest, and it was further agreed that the grist mill and other items of personal property would become the property of the defendant in the original suit, and the court said:

"The appellants were the sureties for Kirk on an appeal bond, the condition of which was that Kirk shall 'prosecute to effect his suit in the supreme court, and pay and satisfy such judgment as the supreme court shall render in the premises.' The obligation of the appellants was for the performance of certain acts by a third person. In reference to obligations of this description, it is a well-settled principle that if the non-performance of the stipulated acts was occasioned by the conduct of the creditor, or was the result of an agreement between him and the principal obligor, the sureties are discharged. This plain principle is conclusive in this case. The principal obligor was prevented from proceeding in the attempt to prosecute his suit to effect, by the agreement entered into between him and the obligee, without the knowledge or consent of the sureties. By thus interfering, and becoming a party to an agreement binding Kirk not to prosecute his appeal, Flint must be held to have waived the obligations in his favor imposed on the sureties by the terms of their bond. The sureties guaranteed the performance by their principal of a particular contract, and engaged for nothing more. Without their consent, and by an agreement between the creditor and their principal, in which mutual advantages are secured to each other, the contract into which the sureties entered has been varied."

Johnson v. Flint, supra, is approved by this court in the *Wabaska* case.

So in the instant case appellee Whipps signed an appeal bond providing that Brown would do certain acts. This was an obligation that Brown would do those acts. The case could not be prosecuted to effect on account of the stipulation and conduct of the creditor, before any breach in the bond, and the acts for which the surety was pledged, *i. e.*, the prosecution of the appeal in the district court to effect and without delay, could not be performed.

The appellant also contends that, at the time the stipulation was made between the parties and the appeal dismissed in pursuance thereof by the district court, Brown was in default of pleading in the district court, and that appellant would have been entitled to judgment by default, and that the agreement was thus without consideration. We cannot accept this contention as correct. The district court could have permitted the defendant Brown to file a pleading out of time as well as the stipulation. It is a common practice for district courts to permit parties, in default of pleadings, to file pleadings in the case. The record does not show that a motion to take such default had been filed or been asked in the district court. It is a reasonable presumption that, since the stipulation was filed, the appellant would not have been given a default judgment had it asked for one. If so, why was the stipulation made? At least there is no presumption that a default judgment could have been had in the district court and the record does not show the entering of such judgment. The stipulation had the effect, other than heretofore mentioned, of preventing the defendant Brown from making further effort to defend the action in the district court.

The judgment of the district court is right and is

AFFIRMED.

ETHEL NEECE, APPELLEE, V. HARRY L. LEE ET AL., APPELLANTS.

FILED JULY 19, 1935. No. 29287.

1. **Principal and Agent: NEGLIGENCE OF AGENT: LIABILITY OF PRINCIPAL.** Where a salesman or a solicitor acts for a company on commission and represents the company only as to the results of his work, and where the company does not prescribe the means by which the work is accomplished and does not direct the mode of performing the work nor require the solicitor to devote his entire time to the service of the company, the company is not liable to third persons for personal injuries caused by the negligence of such solicitor.
2. **Venue.** In an action *in personam* a summons cannot be lawfully sent to a county other than the one where the action is pending unless there is a joint demand against the nonresident defendant and the defendant summoned in the county where the action was commenced.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Reversed, with directions to dismiss.*

Shelburn & Russell, Cleary, Suhr & Davis and *Louis H. Cooke,* for appellants.

McNeny & Sprague, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and RYAN, District Judge.

RYAN, District Judge.

This is an action brought to recover damages for personal injuries growing out of an automobile accident. It was brought in the district court for Adams county by the plaintiff against the defendants Harry L. Lee and the New York Life Insurance Company as Lee's alleged employer. It was alleged in plaintiff's petition that Lee was an agent and employee of the insurance company, and while in the course of such employment and while engaged in obedience to the specific orders and instructions of the company, he, on May 15, 1933, drove a Ford sedan into

the automobile in which plaintiff was riding; that plaintiff suffered severe injuries; and that Lee was negligent by reason of excessive speed and lack of control of the automobile he was driving.

The answer of the New York Life Insurance Company admitted the collision, denied all other allegations in the petition, and alleged contributory negligence on the part of the plaintiff. The answer of the defendant Harry L. Lee alleged that Lee was a resident of Furnas county and was absent from Adams county when the action was commenced; that the defendant insurance company was served with summons in Adams county and service had upon Lee in Furnas county; that there is no joint liability between the defendant Lee and the insurance company with reference to the plaintiff's cause of action; and that the insurance company was made a defendant for the purpose of prosecuting the action in Adams county rather than in Furnas county. The answer further contained a general denial of the allegations of plaintiff's petition.

The reply was a general denial.

Previous to the filing of the answer of the defendant Lee, he filed a special appearance on the grounds set forth in the answer. This special appearance was overruled, but was preserved in the answer of the defendant Lee.

At the close of the plaintiff's evidence the defendant insurance company moved for a directed verdict in its favor, for the reason that the plaintiff had failed to introduce evidence sufficient to constitute a cause of action against the defendant insurance company; that she had failed to establish that defendant Lee was a servant or employee of the New York Life Insurance Company at the time of the accident, or that he was in the course of any employment performing any service for the company. The company renewed the motion at the close of all the evidence. The motions were overruled and the cause submitted to the jury. A verdict was returned by eleven jurors for the plaintiff and against both defendants. Mo-

tions for a new trial were overruled and judgment rendered upon the verdict on April 23, 1934. The defendants bring the case to this court on appeal.

There are many errors assigned, but the principal one relied upon is that there was no joint liability between the defendants, and that the suit was improperly commenced in Adams county, and that no judgment could be rendered against either defendant in Adams county.

The evidence showed that the defendant Lee was a soliciting agent for the New York Life Insurance Company and that he held an agency contract, dated May 3, 1920, whereby he was appointed the company's "special agent for the purpose of canvassing for applications for insurance on the lives of individuals, and of performing such other duties in connection therewith as the officers of said first party may in writing expressly require of him." The contract also provided that Lee should have no authority to accept risks, to make contracts, to extend the time of payments of premiums, or to bind the company by any statement. It provided that Lee should devote to the business of his appointment "such portions of his time as he can spare from his other occupations." It provided further that he should receive as compensation only certain percentages of the first premiums collected. The defendant Lee was authorized to solicit life insurance in any part of the state of Nebraska. The contract provided for cancelation for cause, and further that either party might without cause terminate the agreement upon thirty days' notice. At the time of the accident the defendant Lee was an inspector for the regional agricultural credit corporation. His duties were to make inspections for farm yard and feeder loans for this corporation over a large territory and he devoted practically all of his time to that occupation. He testified that he spent a very small part of his time soliciting life insurance for the defendant company; that he had not written any business for four or five months previous to the accident for the defendant insurance company.

On May 15, 1933, Lee made an inspection south of Republican City for the credit corporation. He left his home at Oxford at 8 or 9 o'clock in the morning by automobile. He drove his Buick car to Alma and there he borrowed a new Ford sedan and drove to a farm where he made a barn yard inspection and completed his work there at about 4 p. m. When he left this farm he drove to Republican City and called at the office of Dr. Talcott to inquire about the physical examination of two applicants for insurance, whose applications he had taken some months previously, but which had been held up for final action. He had no supplies of the insurance company with him at this time. There is a dispute in the evidence as to whether or not the defendant Lee actually saw Dr. Talcott on that day. He called at his office and learned that the doctor was absent and said he would see him later. Lee testifies that he did not see the doctor, but got in his car and left for Alma. The accident took place while Lee was driving from Republican City to Alma about 4:30 p. m. on that day. A witness, Ulis Wolf, testified that he saw and overheard the defendant talking with Dr. Talcott in the barber shop at Republican City.

It is a well-settled rule that, where one person has sustained an injury from the negligence of another, he must, in general, proceed against the party by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained. The master selects the servant and the servant is subject to his control, and, in respect to the civil remedy, the act of the servant is in law regarded as that of the master; but it is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person sought to be charged. It must be shown in addition that

the employment created the relation of master and servant between them. *King v. New York C. & H. R. R. Co.*, 66 N. Y. 181. In *Wyllie v. Palmer*, 137 N. Y. 248, it was held that the doctrine of *"respondeat superior"* applies only when the relation of master and servant is shown to exist between the wrong-doer and the person sought to be charged with the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose. See *Neff v. Brandeis*, 91 Neb. 11.

The defendant Lee worked under a contract by which he was authorized to solicit and receive applications for life insurance anywhere within the state of Nebraska and was to be paid a certain percentage of the first premiums upon policies written under applications received by him. There was no provision that the company should pay a salary or his traveling expenses or any other expenses. There was no provision in the contract as to how or where or when Lee should travel or that he should travel at all. The defendant reserved no control over Lee's manner or method of working. He was not required to devote any particular portion of his time to the service of the company.

In *Barton v. Studebaker Corporation*, 46 Cal. App. 707, wherein it was sought to hold the defendant company liable for the negligent driving of a salesman, who worked upon a commission, and whose negligent driving resulted in injury to a customer of the salesman who was riding with him in an automobile belonging to the salesman, the court said: "The real test as to whether a person is an independent contractor or a servant is whether the person alleged to be the master, under his arrangement with the other party, has or has not any authoritative control of the latter with respect to the manner in which the details of the work are to be performed, and, therefore, this test or element 'must, in the last analysis, always determine what was the essential nature of the relationship between the person who performed the given work and the person for whom it was performed.' Labatt on Master and Servant, sec. 18, p. 56. As some evidence of the nature of the

relationship existing between the corporation and Owen, in this case, we may refer to the fact that Owen received no definite compensation; that the automobile used by him for the purpose of facilitating conveniently the work he engaged himself to perform for the corporation was his property, and that he himself paid the expense of its maintenance and care and for the gasoline necessary to run it. But more important than these considerations, which really involve evidence only tending to show the relationship, the probative value of which as disclosing the nature of the relationship must, of course, be measured by other considerations more directly addressed to the fact, is the fact, clearly and unquestionably established, that his business under his engagement with the corporation was merely that of seeking and finding and procuring purchasers of its automobiles (for which service he was paid a commission) and the further fact that, in prosecuting that business or work, he was at liberty under his engagement with the company to go where and when he pleased and to exercise his own judgment and discretion as to the parties whom he should seek as purchasers or to whom he might present propositions for the sale and purchase of the corporation's automobiles. He was, in other words, perfectly free, under his engagement with the corporation, to choose his own time, place, and means of seeking and procuring purchasers. * * * In brief, he was perfectly free to prosecute the work he agreed by his contract to do for the corporation in any manner he saw fit, using such means or methods as to his judgment might seem the most effective for accomplishing the ends of his business. When a sale was made through him he was paid his stipulated commission, but received no compensation unless a sale was effected through him. He was as much engaged in business for himself when prosecuting the work called for by his contract with the corporation as is the contractor who engages to construct a building for a stipulated sum of money, he agreeing to furnish the labor and materials."

In *James v. Tobin-Sutton Co.*, 182 Wis. 36, the court

said: "It is well settled that where one drives his own automobile a third party cannot be held liable for injuries to a stranger resulting from negligent driving unless the relation of master and servant or principal and agent exists between the third party and the driver and the latter is actually at the time of the injury engaged in the furtherance of the master's or principal's business. If the driver is an independent contractor and not an employee or agent there is no liability on the part of the employer. So the question as to whether the driver is an employee or agent or an independent contractor is the turning point as to liability."

The case of *Aldrich v. Tyler Grocery Co.*, 17 A. L. R. 617 (206 Ala. 138) in the syllabus states: "A salesman employed on a commission basis, who owns and operates an automobile to assist him in seeking his trade, and whose movements are in no way controlled by his employer, is, with respect to the operation of the car, an independent contractor, so that his employer is not answerable for injuries caused by his negligent operation of the car."

In *Christensen v. Protector Sales Co.*, 105 Neb. 389, the facts were as follows: One Christensen was employed by the defendant to sell its products on a commission basis. He was assigned a territory and given an advancement for expenses. He was furnished with samples of the goods he was to sell with advertising matter. He went into his territory and on the first day out took two orders for merchandise. On the morning of the second day, while traveling by automobile between two towns within his territory, he was accidentally killed. The question involved was whether Christensen, at the time of his death, was an employee of the defendant within the contemplation of the workmen's compensation act. The court said: "Generally, to determine whether the relationship of employer and employee exists, it is necessary to determine the right of the employer to control the manner and method in which the service shall be rendered. This ordinarily includes the right to determine the hours of service and to have the

exclusive right to the time demanded. In the instant case Christensen was not required to render service any particular day or to travel in any special manner or, in fact, to travel at all. He might devote every day of the week to the sale of defendant's products or he might let days go by without doing any act whatever in relation to his contract. Nor was he required to render the service personally. He was paying his own expenses; and he was not obligated to take orders for any specified quantity of defendant's goods. Defendant had no right to dictate to the salesman in relation to the method of transportation which he would employ. The relationship existing between these parties may be likened to that between insurance solicitors and their companies. When day dawns the agent is free to work or play. If he idles away the day, he does so at his own loss. The company has the right only to revoke the agency agreement. Christensen was free to make his sales by writing letters to the dealers within his territory; he might have called them by telephone, or he might have employed subagents. He was the master of his own acts, and his compensation depended solely upon the results obtained." The court concluded that he was not an employee within the meaning of the compensation act.

Priest v. Business Men's Protective Ass'n, 117 Neb. 198, was a proceeding under the workmen's compensation act. Priest, at the time of his death, was engaged in activities looking toward the establishment of an insurance agency for the defendant in the state of South Dakota, of which he was to be the head, and he would be known as the state agent for South Dakota. The court said: "We think it must be conceded that the management of an insurance agency which employs subagents for soliciting insurance of various kinds and for a number of companies may be considered as an industry in itself, enjoying the privileges and bearing the burdens of the workmen's compensation act; and that such industry may be established though the business is confined to writing insurance for one company. Persons engaged in that industry are in no sense

employees of the insurance companies represented by them. Such agencies are numerous and well known to the business world. It has not been brought to our attention that a claim was ever made that agents in that business were employees of the single or several companies they represent." The court concluded that Priest was engaged in a separate industry and his relation to the defendant would be that of an independent contractor.

The case of *Johnston v. Smith,* 123 Neb. 716, states in the syllabus as follows: "One who undertakes to obtain contracts for advertising for another for no other remuneration than a percentage of the gross amount of the contracts, to pay all of his own traveling expenses, to choose his hours of labor, and to select the prospective customers upon whom he should call in his territory, without any right of such other to control the manner or method of his work, is not an employee, within the meaning of the term 'employee' as used in the workmen's compensation act, even though assigned to a specified territory, and furnished a list of prospective customers and supplies for writing the contracts."

In *State Automobile Ins. Ass'n v. Pickett,* 124 Neb. 481, it was held that a man hired to go into another state and bring back an automobile for a specified sum was an independent contractor.

In *Wesolowski v. John Hancock Mutual Life Ins. Co.,* 308 Pa. St. 117, 87 A. L. R. 783, one Adams was authorized to solicit life insurance for the defendant and to collect premiums. He worked upon a stated salary per week and received commissions upon new business. The company did not require him to use a car, although the superintendent, when informed that Adams had a car, said: "If you have one, you might as well use it." It was held that the insurance company was not liable for the negligence of Adams. In so holding the court said: "While the general rule of law is that a principal is liable for the negligence of his agent while in the performance of the agent's duty, and the reason for the application of this rule is that the

agent, during the performance of his duty, is presumably under the direction and control of the employer, where, as here, the instrumentality used by the agent or employee is not furnished at the direction of the employer, or subject to the employer's direction or control, the employer should not be held responsible."

The court further said: The defendant was in no position to require Adams to use his car, "for the use of his car was no part of his contract of service. It could not direct him when, where or how to drive his car. It had no more control of Adams' car in which he transported himself than it had of the shoes he used in walking from patron to patron. The employer was indifferent as to whether Adams walked, rode a bicycle, or operated a motor car to reach the people with whom he transacted business."

The appellee relies upon the case of *Singer Mfg. Co. v. Rahn,* 132 U. S. 518, 33 L. Ed. 440. It appears to the court that that case is readily distinguishable from the instant case. Paragraphs 2 and 3 of the syllabus in L. Ed. read:

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the results to be accomplished, or, in other words, not only what shall be done, but how it shall be done."

"Where a person, for certain commissions to be paid him, agrees to give his whole time and services to the business of a company in selling its machines, and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it, such person is the company's servant, for whose negligence, in the course of his employment, the company is responsible."

In that case the contract of employment provided that the agent should give his exclusive time and best energies to the business of said company. It furnished him a wagon as a means of transportation, though it required him to furnish a horse and harness to be used in connec-

tion with it. He agreed to employ himself under the direction of the said Singer Manufacturing Company under such rules or directions as it or its manager at Minneapolis should prescribe.

In considering the case the court said: "In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive."

As has been stated, this action was commenced in Adams county and service upon the defendant Lee was had in Furnas county. Upon the trial, if the plaintiff did not establish a right to recover against the defendant insurance company, then, as a matter of law, the court would have no jurisdiction over the defendant Lee. *Peters v. Pothast,* 120 Neb. 208. In order for the plaintiff to recover against either defendant, the defendant company must be held liable. We conclude that the defendant insurance company was not liable for the negligence of the defendant Lee and that the action was improperly brought in Adams county against the defendant Lee.

The decision of the district court is accordingly reversed and the cause remanded, with instructions to dismiss.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1935

CLARA HITCHENS ET AL., APPELLEES, V. MABEL ALDERSON ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1935. No. 29283.

1. **Mortgages: FORECLOSURE: PLEADING.** Failure to insert in a petition to foreclose a mortgage allegations that there has been no action at law to collect the debt and that the debt has not been paid is not a ground of reversal on appeal, where such allegations were read into the record of the trial, with permission of the court, were put in issue by an answer, and the issues tried.
2. ———: **DELIVERY: PROOF.** Where direct evidence is unavailable, delivery of a note and a mortgage securing it may be proved by circumstantial evidence.
3. **Witnesses: COMPETENCY.** In a foreclosure proceeding, mortgagors who signed and delivered the note and the mortgage securing it, *held* not competent witnesses to testify to conversations and transactions with deceased mortgagee, thus showing that those instruments were shams, where plaintiffs were representatives of the deceased person with interests adverse to mortgagors who had a direct legal interest in the result of the suit. Comp. St. 1929, sec. 20-1202.
4. ———: ———. Where two mortgagors in a foreclosure proceeding are both disqualified as witnesses to testify to transactions or conversations with the deceased mortgagee, neither is a competent witness to repeat on the witness-stand overheard conversations between the other mortgagor and the mortgagee, for the purpose of proving that the mortgage was a sham.

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

Jackson & Rice and *Kelsey & Kelsey*, for appellants.

Mapes & Mapes and *Fred H. Free, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

ROSE, J.

This is a suit in equity to foreclose a mortgage on a quarter-section of land in Pierce county. The mortgage purports to secure a note for $17,576. Both instruments were dated May 26, 1927, and were payable May 26, 1932. Mike Hitchens, a bachelor, was payee and mortgagee. He died intestate May 4, 1928, leaving as his sole heirs at law 16 nephews and nieces. Morton Taylor was administrator of decedent's estate and made his final report April 30, 1929, which was approved by the county court May 24, 1929. Among the unadministered assets were the note and mortgage in suit, which the administrator had assigned to the 16 heirs. Thirteen of them are plaintiffs herein and two of them, Mabel Alderson and Nellie Alderson, sisters, unmarried, are defendants, they having inherited the property interests of their deceased brother, Roy Alderson, who died August 7, 1928. The note and the mortgage were signed by the brother and his two sisters in this order: Roy Alderson, Mabel Alderson, Nellie Alderson. The mortgage was recorded in the public records of Pierce county May 27, 1927.

The answer contains a general demurrer, a general denial, and an affirmative defense which may be summarized as follows: Hitchens, the bachelor uncle, made his home with his unmarried nephew, Roy Alderson, and the latter's two sisters, the defendants. They inherited their land which had been heavily mortgaged and they were in danger of losing their farm and the home of the four of them. The uncle paid the previous indebtedness and took the note and mortgage in suit to save the farm and the home of all from the improvidence of Roy and to prevent him and defendants from again encumbering the land. The instruments were signed for that purpose, the uncle stating they would not create a liability for the payment

of any debt nor create a lien on the land, the papers being a sham without any purpose to make them binding obligations. The papers were signed with this understanding and were never acknowledged or delivered. The defenses thus outlined were pleaded in detail by defendants.

The reply to the answer contained a general denial and pleas that the note and mortgage were inventoried in the Hitchens' estate and included in the county court's order of distribution, from which there was no appeal; that defendants participated in the distribution; that defendants were estopped by their own writings and conduct to assail the mortgage or the acknowledgment or the delivery.

Defendants summarize the issues on the merits of the cause as follows:

"1. Were the note and mortgage made, executed and delivered by the defendants to Hitchens?

"2. Were the note and mortgage what they purported to be or merely shams?"

The district court found the indebtedness due to the heirs from defendants on the note and mortgage to be $18,183.80 and ordered foreclosure. Defendants appealed.

Defendants assail the petition as fatally defective, because it does not contain allegations that there had been no proceeding at law to collect the debt, and that the debt had not been paid—statutory requirement. Comp. St. 1929, sec. 20-2144. Though these pleas were never in fact inserted in the petition to foreclose the mortgage, the point is not well taken on the record presented, for the following reasons: During the progress of the trial, plaintiffs presented in open court a motion to insert in their petition the omitted allegations. Permission was granted from the bench. Defendants were permitted to answer and were given time to do so. Plaintiffs stated that, by leave of court, they amended their petition by adding the omitted allegations, reciting what they were. The trial court allowed the amendment and defendant filed an amended answer. Afterward the petition was treated by the trial court as amended. The issues raised by the amendment

and the answer were tried. The cause of action was not changed. Plaintiffs proved by uncontradicted evidence the new matter pleaded—no action at law to recover the debt and nonpayment of the debt. Defendants understood the issues and were not prejudiced by the failure to insert in the petition itself the amendment made in open court and read into the record. According to well-established rules, defendants are not entitled to a reversal on this ground.

Defendants argue further that the delivery essential to the validity of the note and mortgage as binding obligations of defendants was not proved. Where direct evidence is not available, delivery may be shown by circumstances. Defendants and their brother, Roy, signed the note and the mortgage in controversy. Following the mortgage there is the certificate of a notary public in regular form that each of the signers, all single, appeared before him personally and severally acknowledged the execution of it to be their voluntary act and deed. The seal of the notary is impressed on his certificate. The mortgage on its face imports a *bona fide* transaction. It was recorded in the public records of Pierce county the day after it was signed. Considered what it purports to be, a genuine instrument, mortgagee was a person interested in having it delivered and recorded. Mortgagors inherited the land when it was heavily encumbered. Later, mortgagee paid the former mortgage and the new lien followed the old. The present mortgage was inventoried as an asset of the Hitchens' estate and was so treated in the settlement thereof. It was included as part of that estate in estimating inheritance taxes. Defendants did not challenge in the county court the power of the administrator or of the county judge to treat the mortgage as an asset of decedent's estate nor question their rightful possession of it in a representative or judicial capacity. There were two other mortgages, each for $4,500, on different tracts of land, in which defendants were named mortgagors and Hitchens mortgagee. One of them was paid by defendants and the proceeds distributed among the heirs. The other was ordered

foreclosed in the present suit and from the judgment for that particular debt there was no appeal.

Defendants and their brother, Roy, parted with possession of the note and mortgage for $17,576 after signing them. There was no writing by Hitchens that those instruments were intended as shams. He was capable in business affairs and left an estate exceeding in value $150,000, but he did not leave a will or other written instrument releasing defendants from liability on the instruments which they signed. The administrator testified the note and mortgage in controversy came into his possession after he was appointed as such and that he first saw them in Hitchens' safety deposit box in the First National Bank of Plainview.

The facts outlined are shown by direct evidence or by proper inference from the record as a whole. The conclusion is that plaintiffs made a *prima facie* case on the issue of delivery.

An elaborate argument was directed to the proposition that the trial court erred in ruling that defendants were not competent witnesses to testify on the issues of signatures, acknowledgment, delivery and intent. Their competency as witnesses was challenged under the statute providing:

"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 between the deceased person and the witness." Comp. St. 1929, sec. 20-1202.

The mortgagee is a deceased person. Plaintiffs are entitled to a share of his estate and are his legal representatives. Defendants have a direct legal interest in the result of the action. The execution of the mortgage was a "transaction" within the meaning of the statute. That word in the sense used by the lawmakers "embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties." *Wilson v. Wilson,* 83 Neb.

562. Plaintiffs did nothing to waive the statutory disqualifications. It is clear, therefore, that both Mabel Alderson and Nellie Alderson, defendants, who signed the note and mortgage in controversy, were disqualified as witnesses to testify to transactions and conversations between themselves and the deceased person. In a former opinion it was said:

"Having in view the common-law rule as to competency, and the mischief which this statute sought to prevent, it should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify, when the party interested adversely to the witness' interest is the representative of a deceased person." *Wylie v. Charlton*, 43 Neb. 840, 853.

It is also insisted the trial court erred in sustaining objections to offered proof of conversations supporting the affirmative defense of sham paper. Nellie Alderson, defendant, was asked on the witness-stand to testify that, without herself participating, she heard conversations and understandings between Hitchens and her sister, the other defendant, to the effect that the note and mortgage did not represent a debt of defendants, nor create a lien on their land, but were intended as shams to prevent further credit and encumbrances as pleaded in the answer. Questions and offers of proof in different forms called for the conversations and understandings thus implied, but were excluded, counsel for defendants insisting that the witness was a third person and was therefore qualified as a witness to answer such questions. The witness Nellie Alderson was not a third person permitted to so testify. She had signed the papers and was named therein as a debtor. She was one of two defendants whose interests in the litigation were adverse to the interests of plaintiffs, representatives of the deceased person who was the creditor in the transactions. Defendants were both disqualified by statute to testify directly to the conversations with Hitchens. To permit one of them to repeat what would amount to the testimony of the other by means of an over-

heard conversation would circumvent an obvious purpose of the law. The rulings below on this phase of the defense were proper. The findings of fact upon the trial *de novo* are the same as those of the district court. Error prejudicial to defendants has not been pointed out or found.

AFFIRMED.

JOHN LUTHY, APPELLEE, V. FARMERS MUTUAL HAIL INSURANCE ASSOCIATION OF IOWA, APPELLANT.

FILED SEPTEMBER 20, 1935. No. 29304.

1. Insurance: PROOF OF LOSS: WAIVER. In an action on an insurance policy for the loss of an insured automobile destroyed by fire, where the defense is failure to furnish proofs of loss, proofs of due notice of the destruction of the automobile by fire while the policy was in force, of the sending of an adjuster to adjust the loss, of the adjuster's estimate of the loss, of what insured claims, and of a promise of the adjuster to report the facts to insurer's home office, evidence a waiver of proofs of loss.
2. Appeal. In furtherance of justice by affirming a just judgment, the supreme court upon appeal may, in a proper case, consider pleadings amended to conform to facts proved without dispute.

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

Loren H. Laughlin and *Dort & Witte*, for appellant.

Kenneth S. Wherry and *J. A. McGuire, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

ROSE, J.

This is an action on insurance policy No. 43374 to recover from defendant, the insurer, the loss by fire of an automobile valued by plaintiff, the owner, at $500. Defendant received the premium of $17 and issued the policy. The automobile was insured for an amount not exceeding its actual cash value and was destroyed by fire June 5, 1933, when the policy was in force. In the county court

there was a judgment on a verdict in favor of plaintiff for $325. Defendant appealed to the district court where there was a judgment on a verdict in favor of plaintiff for $275. Defendant appealed to the supreme court.

Plaintiff alleged in his petition that he performed the insurance contract on his part, including the furnishing of due and affirmative proof of his loss and damage. The allegation as to such proof was denied by defendant in its answer and it is argued that the judgment of the district court should be reversed because the furnishing of such proof is without support in the evidence. This is the only point presented by defendant on the appeal to the supreme court.

Plaintiff promptly gave notice of the loss by using the form he found with the policy and sending the notice by mail to the home office of defendant at Des Moines. In reply he received a letter as follows:

"This will acknowledge receipt of report of fire loss under your policy No. 43374. We will have our adjuster call on you in the very near future. Kindly be patient with us and wait until he arrives."

This letter was written on a letter head of defendant, was dated June 9, 1933, four days after the fire, and bore what purports to be the signature of H. W. Byers, Chief Adjuster, Automobile Department. There is evidence to the effect that, about 10 days later, an adjuster named Mann, with the local agent of defendant, who had issued the policy, went to plaintiff's place where the ruins of the car could be seen. Plaintiff was asked on the witness-stand to relate a conversation between himself and Mann in reference to the loss of the car by fire and answered as follows:

"Mann told me he was an adjuster and he was down to take care of it, if he could, and he said the car, according to the values, that car was worth anywhere from thirty-five to fifty dollars."

Plaintiff testified further that in conversation with the adjuster the latter said he would take the report to the

office and would be back in 20 or 30 days; that he came back within 10 or 20 days and said there would be another man around in 30 or 40 days; that no other man came. In detailing further conversation with Mann plaintiff testified:

"He made me no price other than that ($35 to $50); and he asked me to make a price and I made him a price and he told me then, he says, 'I will take that in to the home office and report to the home office,' and I told him five hundred dollars. He says, 'Are you in earnest?' I says, 'Yes.' He says, 'Well, I will take this home and there will be another man here.' He says, 'I have got thirty—twenty-nine or thirty—days, something like that, to report in;' but nobody showed up."

There was a motion by defendant to strike out the foregoing answer on the ground, among others, that, if the same is offered for the purpose of tending to prove a waiver, the same has not been pleaded and is not within the issues. This motion was overruled.

It is shown by undisputed evidence that defendant had due notice of the fire and of the loss of the insured car while the policy was in force; that, after such notice, an adjuster for defendant appeared at the place of the fire and estimated the value of the car at $35 to $50; that he had plaintiff's estimate of $500 as such value; that the adjuster said he would report to the home office and that there would be another man there; that no other man came. Defendant, therefore, not only had prompt notice of the fire, but through its adjuster had the facts relating to proof of loss and damage, which the adjuster said he would report to the home office. There is no defense except the technical one that defendant did not furnish in writing the proofs of loss and damage—knowledge acquired by or chargeable to defendant. This defense, if sustained, would amount to a forfeiture of the insurance without an offer to return the premium. There was no fraud on the part of plaintiff in connection with the procuring of the insurance or in regard to the fire. Defend-

ant sent an adjuster who did not offer to pay a loss in any amount, but said another man would appear later. The other man never came.

Proof of the sending of an adjuster to adjust the loss, his appearance at the place of the fire and the other facts shown by uncontradicted evidence tend to prove a waiver of the furnishing of proofs of loss and damage. *Roumage v. Mechanics Fire Ins. Co.*, 1 Green (N. J. Law) 110; *Bon Aqua Improvement Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764; *Welsh v. London Assurance Corporation*, 151 Pa. St. 607. Defendant understood at the trial that plaintiff had adduced evidence of the waiver of proofs of loss and damage and objected to such evidence as not within the issues, but the objections were overruled and the rulings of the trial court in that particular are not presented for review on appeal. Defendant, therefore, is bound by those rulings for the purposes of the appeal. In furtherance of justice by affirmance of a just judgment, and to prevent a forfeiture of the insurance without an offer to return the premium after a loss when the policy was in force, the supreme court, upon appeal, may consider the pleadings amended to conform to uncontradicted evidence of a waiver of proofs of loss and damage. In an opinion by Judge Sedgwick the supreme court ruled:

"A pleading may be amended before or after judgment, in furtherance of justice, 'when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.' Rev. St. 1913, sec. 7712. If the evidence, without objection, clearly proved a 'claim or defense,' the pleading will, upon appeal, be considered amended accordingly." *Allertz v. Hankins*, 102 Neb. 202. See, also, *Berwyn State Bank v. Swanson*, 111 Neb. 141.

While in the present case there were objections to the uncontradicted evidence of waiver, the objections were overruled and insurer is bound by such rulings, because it did not present them for review on appeal.

AFFIRMED.

LUCIE LOGIE, APPELLANT, V. FRANK SNYDER ET AL., APPELLEES.

FILED SEPTEMBER 20, 1935. No. 29305.

1. **Fraudulent Conveyances: INTENT: QUESTION OF FACT.** The intent with which a husband deeds real estate to his wife, while he is indebted to others, is a question of fact.
2. ———. "To make a conveyance a fraudulent transfer, a fraudulent intent participated in by both parties to the transfer must exist." *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130; *State Bank of Beaver Crossing v. Mackley*, 121 Neb. 28.
3. ———: PRESUMPTION: REBUTTAL. The presumption that a deed from a husband to his wife is fraudulent as to creditors of grantor may be overcome by clear and convincing evidence.

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

William M. Ely, Samuel C. Ely and *L. G. Nelson*, for appellant.

Ben H. Burritt, G. A. Farman, Jr., and *H. D. Curtiss, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and RYAN, District Judge.

ROSE, J.

This is a suit in equity in the nature of a creditor's bill to cancel a deed to a quarter-section of land in Rock county, a deed to two town lots in Bassett, a mortgage on the two town lots, and to subject the real estate described to the payment of a judgment. The creditor is Lucie Logie, plaintiff. The defendants are Frank Snyder, Elinor Snyder and Eva Hilborn. The Snyders are husband and wife. Frank Snyder deeded the real estate in suit to Elinor Snyder. Eva Hilborn is the holder of the mortgage on the two town lots.

Plaintiff pleaded that both deeds were without consideration, and were executed for the purpose of hindering, delaying and defrauding plaintiff in the collection of the debt

owing by Frank Snyder to her and that the mortgage was executed and accepted with knowledge that the deed from him to his wife was fraudulent as to creditors and was executed and accepted for the purpose of hindering, delaying and defrauding his creditors.

The judgment which plaintiff is seeking to collect was recovered in her favor in the district court for Rock county against Frank Snyder April 3, 1933, for $1,084 on a promissory note. Execution thereon was issued May 3, 1933, and returned *nulla bona*.

The two deeds from Frank Snyder to his wife were executed February 29, 1932, and recorded March 3, 1932.

The Snyders executed in favor of Eva Hilborn a mortgage on the two town lots for $510 April 25, 1933, which was recorded April 27, 1933.

The facts outlined were pleaded in detail in the petition. In answers by defendants the fraud imputed to them was denied and good faith and full consideration in all the transactions and conveyances affirmatively alleged.

Upon a trial of the cause, the district court found the issues in favor of defendants and entered a judgment of dismissal. Plaintiff appealed.

Plaintiff invokes the doctrine that a deed from a husband to his wife is presumptively fraudulent as to a creditor of grantor and argues that the record herein does not contain such clear and satisfactory evidence as to overturn such presumption. Authorities on these propositions are discussed at considerable length. It is a well-settled rule of equity that the intent with which a husband deeds real estate to his wife, while he is indebted to others, is a question of fact. The trial *de novo*, therefore, required an examination of the evidence from every standpoint.

The quarter-section of land described in the petition is the homestead of the Snyders and, there being no evidence that it exceeded $2,000 in value, the suit as to that feature of the cause was properly dismissed by the trial court—a ruling not questioned on appeal. The controverted issues are limited to the two town lots which the husband deeded

to his wife and the mortgage by which those lots were encumbered by mortgage in favor of Eva Hilborn, defendant.

The deed to the town lots was executed, delivered and recorded more than a year before plaintiff procured her judgment. Elinor Snyder testified in her own behalf to the effect that she did not know of her husband's indebtedness to plaintiff or of the note evidencing it when she accepted her deed; that she received by check in 1915, from the estate of her father, whose home was in Virginia, near Richmond, $4,800, and entrusted the fund to her husband; that $3,200 of the money which her husband owed her was invested in a house on the two town lots which were formerly vacant; that she and her husband lived in the house for about five years and afterward moved to the quarter-section of land; that thereafter she received the rents from the house on the two town lots. The testimony contained details of the transactions enumerated and bore evidence of frankness and candor. It is uncontradicted. In a measure the husband's testimony was the same. It may fairly be inferred that the two town lots were of little value before the house thereon was constructed with money owing to Elinor Snyder by her husband. Whether it was built with money owing by the husband to the wife or whether he held the fund in trust for her, the consideration was amply sufficient for the deed. A fraudulent intent on her part to interfere with plaintiff in the collection of the judgment against grantor is not properly inferable from the evidence. The true import of the evidence is that the transfer was made in good faith without any fraudulent intent of either party. "To make a conveyance a fraudulent transfer, a fraudulent intent participated in by both parties to the transfer must exist." *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130; *State Bank of Beaver Crossing v. Mackley*, 121 Neb. 28.

The good faith of the parties to the mortgage in favor of Eva Hilborn, defendant, is perfectly clear. After the valid transfer of the town lots in Bassett to Elinor Snyder,

she entered into a contract with Eva Hilborn to buy the latter's stock of merchandise in what is called in the record the "Midway Store." The parties to the sale invoiced the stock. The buyer assumed some unpaid debts of the seller and executed in her favor a mortgage on the town lots for $510, the remainder of the purchase price. Both parties acted in good faith. The buyer took immediate possession of the store and thereafter conducted it. There was no fraud in the transactions. The evidence will not admit of any other conclusion. Both deed and mortgage being valid, the dismissal is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. MITCHELL IRRIGATION DISTRICT, APPELLANT: FARMERS IRRIGATION DISTRICT, INTERVENER, APPELLEE.

FILED SEPTEMBER 20, 1935. No. 29522.

1. Trial: FINDINGS. "The request for a separate statement of conclusions of fact and of law in the trial of a cause to a court without a jury, to render a compliance therewith compulsory, must be made not later than at the final submission of the cause." *Ross v. Barker*, 58 Neb. 402.
2. Waters: IRRIGATION: INJUNCTION. The state may maintain an action in equity to compel an irrigation district to refrain from using water for the purpose of irrigation in this state, unless it complies with the statute regulating irrigation districts and their use of water for the purpose of irrigation.
3. ———: ———: ———. The state has the right, by action, to enforce compliance with the laws that will protect the rights of all users of water for irrigation purposes within the state.
4. ———: IRRIGATION DISTRICTS: LAW GOVERNING. An irrigation district, organized under the laws of Nebraska and irrigating lands wholly within this state, is subject to the irrigation laws of this state, regardless of the fact that the district's headgates and diversion works may be in an adjoining state.
5. ———: IRRIGATION. Under its Constitution and laws, it is the duty of the state of Nebraska to see that the waters of its streams, used for irrigation purposes, will not be wasted, and that prior appropriators of water shall be protected as against subsequent appropriators.

6. Courts. Where two or more courts may have jurisdiction of a cause of action, the one which first acquires jurisdiction will retain it to a final conclusion.
7. Waters: IRRIGATION: PRIOR ADJUDICATION. The priority of appropriations of water from the North Platte river for irrigation purposes by the Mitchell Irrigation District and the Farmers Irrigation District has been heretofore judicially determined in *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, and such prior adjudication is adhered to.
8. ———: ———: ———. The extent of the appropriation of water for irrigation purposes by the Farmers Irrigation District has been heretofore determined by this court in *Farmers Canal Co. v. Frank*, 72 Neb. 136, and *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, and is hereby reaffirmed.
9. ———: IRRIGATION: APPROPRIATION: FORFEITURE. The fact that an irrigation district in this state has contracted with the government for an additional supply of water from storage reservoirs, to supplement its supply of water during the irrigation season in dry years, will not work a forfeiture or abandonment of such district's appropriation from the natural flow of the stream, nor a surrender of a portion of its appropriation.

APPEAL from the district court for Scotts Bluff county: LOUIS LIGHTNER, JUDGE. *Affirmed as modified.*

Morrow & Morrow and *James A. Greenwood*, for appellant.

William H. Wright, Attorney General, C. G. Perry and *Neighbors & Coulter, contra.*

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

GOOD, J.

In 1931, on request of the governor, the attorney general instituted this action, to compel defendant to comply with the laws of the state of Nebraska applicable to irrigation districts in this state, and to enjoin defendant from using any water from the North Platte river for irrigation purposes until it complied with such laws, and for other equitable relief. Plaintiff alleged that defendant has

hitherto failed and refused to comply with any of the laws of the state of Nebraska regulating the use of water from Nebraska streams for purposes of irrigation in Nebraska.

The Farmers Irrigation District, by leave of court, intervened and alleged that it had an appropriation of water from the North Platte river to the extent of 1,142 6/7 cubic feet per second for irrigation purposes, which appropriation was prior to any appropriation by defendant; alleged that defendant was appropriating and using water to such an extent that it deprived intervener of the amount of water to which it was lawfully entitled under its prior appropriation; and prayed that the respective priorities of appropriation of defendant and intervener be ascertained and determined, together with the extent of the appropriation by each.

Defendant answered plaintiff's petition, admitting that it had appropriated and was using water from the North Platte river for irrigation purposes on lands wholly in Nebraska; that its headgate and place of diversion of water from the river was in Wyoming, under an appropriation granted by that state; admitted that it had failed and refused to comply with the demands of the Nebraska state officials to comply with the regulations and laws of Nebraska, and asserted that it was not subject to such regulation, because its headgates and appropriation were in the state of Wyoming; and claimed that it was not subject to the jurisdiction of the state of Nebraska. Defendant also answered the petition of intervener, admitting that intervener had an appropriation of water, prior to that of defendant, to the extent of 28 cubic feet per second, and asserted that defendant's appropriation was prior in time to that of intervener, except to the extent of 28 cubic feet per second. There are other allegations which will be considered in the course of this opinion. Replies were filed by the state of Nebraska and by intervener. The cause was tried to the court which entered two decrees, one in the action between the state and defendant, finding generally in favor of the state; the other between defendant and

intervener, finding generally in favor of intervener, and that it had an appropriation of water, prior to that of defendant, to the extent of 905 cubic feet per second.

A general survey of the record discloses that defendant has an appropriation of water from the North Platte river for irrigation purposes, granted by the state of Wyoming, to the extent of 193.15 cubic feet per second, dating from June 20, 1890, and that its right was secured from the state of Wyoming by defendant's predecessor in title. The present defendant is an irrigation district, organized under the laws of Nebraska. Its principal place of business and residence of its officers are in Nebraska, and the lands which it irrigates are wholly within this state. Defendant has failed and refused to install in the state of Nebraska any measuring device, by which the amount of water it uses for irrigation purposes in this state may be measured. It is conceded that defendant has not complied with the laws of Nebraska regulating the waters of Nebraska streams for irrigation purposes, and regulating irrigation districts, and that it has refused to comply with the orders and directions made by Nebraska officials charged with administering the irrigation laws of the state. Intervener is also a Nebraska irrigation district, claiming an appropriation of water from the North Platte river in the state of Nebraska of 1,142 6/7 cubic feet per second, with a priority dating from September 16, 1887, which was acquired by one of its predecessors in title.

The first irrigation laws in this state were enacted by the legislature in 1889. In 1895, a comprehensive irrigation code was enacted by the legislature which, as amended from time to time, appears as chapter 46, Compiled Statutes of Nebraska for 1929. Reference to the various sections of that code will be by number of section only, and, where other sections than those in the irrigation code are referred to, the proper designation of the chapter will be made.

Section 501 declares that water for the purpose of irri-

gation in this state is a natural want. Section 502 provides that the water of every natural stream not previously appropriated within the state of Nebraska is declared to be the property of the public and dedicated to the use of the people of the state, subject to appropriation as provided by statute. Section 503 provides, as between appropriators, the one first in time is first in right. The irrigation code provides for the policing of streams and the enforcement of laws governing appropriation of water and rights of priority, and that appropriations should be limited to a beneficial use, and places restrictions upon the use of water, limiting each appropriation, as against other appropriators, to the amount of water that he may beneficially use. Penalties are provided for taking water from any stream through any ditch or canal to any land for irrigation, or for allowing the same to be used on any land or lands without authority from the department of public works. Section 615 requires an appropriator of water for irrigation purposes to file acreage reports, and to install a recording gauge, of a design approved by the department of public works, to record the amount of water used, and provides that the department of public works shall not furnish any water to be delivered to or used by or through any ditch, reservoir or other contrivance for the use or appropriation of water until the provisions have been complied with, and that the department may prevent, by the construction of bars or dams, such delivery or use. Other sections provide for the creation of water districts within the state and the appointment of superintendents to regulate the use of water for irrigation purposes within the several districts, and in these sections provision is made for the forfeiture of appropriation and for determination and adjudication of priorities, and a comprehensive plan is provided for the proper administration of water for irrigation within the state. Throughout the Code an affirmative duty is imposed upon the executive branch of the state government to regulate the use of water for irrigation purposes.

Defendant complains of the refusal of the trial court to make special findings of fact and separate conclusions of law. It appears that the cause was finally submitted to the court in October, 1934. November 9, 1934, the court filed an opinion, giving its views with reference to the rights of the respective parties to the action, but decrees at that time were not formulated to carry into effect the announcement made by the court. Thereafter defendant made its request for special findings of fact and separate conclusions of law. On December 12, 1934, a hearing was held as to the form of the decrees to be entered, pertinent to the findings that the court had theretofore made and stated in its opinion. The trial court refused to make further findings of fact or separate conclusions of law.

Section 20-1127, Comp. St. 1929, reads: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

In *Ross v. Barker*, 58 Neb. 402, it was held: "The request for a separate statement of conclusions of fact and of law in the trial of a cause to a court without a jury, to render a compliance therewith compulsory, must be made not later than at the final submission of the cause." In the instant case, the cause had been tried; the case submitted to the court, and it had rendered an opinion therein, in which it stated its findings and conclusions as to the rights of the parties prior to any request for special findings of fact and conclusions of law. We think the request for special findings in the instant case came too late to require compliance therewith.

Defendant contends that the state of Nebraska has no pecuniary interest in the outcome of this action, is not the real party in interest, and has no right to maintain the action. It asserts that the action is, in fact, on behalf of

other irrigation districts, claiming appropriations prior to those of defendant, and that these are the real parties in interest and could maintain any action necessary for the protection of their rights. Under the facts disclosed, we think it cannot be seriously questioned that the state, even though it has no pecuniary interest in the institution of this action, has a right and a duty to protect the interests of water users, and that this was sufficient justification to authorize the state to bring and maintain this action.

In *State v. Pacific Express Co.*, 80 Neb. 823, it was held: "The attorney general may, on behalf of the state, maintain an action in equity to enjoin common carriers whose rates are fixed by law from violating the terms of the statutes and exacting unlawful and excessive rates and charges." In that case the action was against the express company to enjoin it from violating the provisions of the statute and exacting unlawful rates. It was therein held: "A wrong of a nature which affects the rights and interests of people living in almost every city, town and village in the state, as well as persons living in the country, when committed by a public service corporation, is a public wrong. An action to restrain such a wrong by the state is within the jurisdiction of this court." In the opinion it was said (p. 828): "But it is contended that the state is not properly a party in this case, and it is argued that no suit can be instituted by the state in the exercise of its constitutional powers or 'sovereign capacity,' except such suit is expressly provided for by statute; that the act in question has by its terms imposed upon the executive department the duty of its enforcement, and that it is therefore beyond the power of the attorney general to shift the burden of executing the law from the executive to the judicial department; that section 6 of the act provides: 'The Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act'—and therefore that the railway commission is the only body vested with authority to enforce the provi-

sions of the act. * * * The railway commission, if it seeks to enforce the law, must travel the same road as any private citizen—appeal to the courts for relief, or for the punishment of the carrier who violates the law."

There are many users of water for irrigation purposes in the state of Nebraska. It seems clear that the state has the right, by action, to enforce compliance with laws that will protect the rights of all users of water for irrigation purposes within the state. Other authorities, holding to a like tenor, are: *Attorney General v. Jamaica Pond Aqueduct Corporation,* 133 Mass. 361; *Stockman v. Leddy,* 55 Colo. 24. Similar rulings have been made by the federal courts. *In re Debs,* 158 U. S. 564; *United States v. San Jacinto Tin Co.,* 125 U. S. 273; *United States v. American Bell Telephone Co.,* 128 U. S. 315.

Defendant argues that the attorney general is without authority to institute and carry on this action. We think the contention is unfounded. Section 84-208, Comp. St. 1929, reads: "It shall be the duty of the attorney general of the state to commence, prosecute and defend any and all actions affecting the rights of Nebraska water-users in interstate streams as against appropriators in any other state and to take such steps as in his judgment are required to protect any and all interests of appropriators of water within this state in such cases." This section of the statute alone, we think, is sufficient to confer authority on the attorney general to institute this action. However, section 84-205, Comp. St. 1929, provides: "The duties of the attorney general shall be: * * * 4. At the request of the governor, the head of any executive department, * * * to prosecute or defend for the state all actions and proceedings, civil or criminal, relating to any matter connected with either of their departments." In the instant case, the action was commenced by the attorney general at the request of the governor and the department of public works. The sections quoted confer ample authority for commencement of the action by the attorney general.

Defendant also contends that, since its appropriation of

water from the North Platte river was acquired by grant from the state of Wyoming and its diversion works, whereby water is taken from the North Platte river, are located in Wyoming, it is not subject to the jurisdiction of the state of Nebraska, and that the state has no power to regulate or control its use of the water as an irrigation district, or to control or administer the water which it thus takes from the North Platte river.

We think the contention is unsound. Defendant is a corporation organized under the laws of Nebraska. Its principal place of business, the residence of its officers, the lands for which it furnishes water for irrigation purposes are all in the state of Nebraska. It uses the laws of the state of Nebraska to perfect its organization, to collect rentals, and to protect its rights in the distribution of waters to the various landowners. There can be, therefore, no question that, by residence, the corporation is subject to the jurisdiction of the state of Nebraska. The fact that it takes water from the North Platte river just outside of the state of Nebraska and conducts it into the state does not justify the assumption that it is not subject to the control of the state as soon as the water is brought within its borders. It is the duty of the state, under the Constitution and laws, to see that the waters of the streams used for irrigation purposes are not wasted; that the prior appropriators shall be protected as against subsequent appropriators, and in this instance it appears that there are a number of prior appropriators whose rights are superior to those of the defendant in the use of the waters of the North Platte river. These appropriators are all in Nebraska. Clearly, the state of Wyoming would have no authority to administer the waters, after they come into this state, and control their use. If the contention of defendant is sound, it would leave the defendant in absolute control of the waters which it takes from the river, without regard to the rights of prior appropriators, and no state and no court would have any authority to interfere to compel it to use the waters for a beneficial purpose.

Gas companies and oil companies, having pipe lines carrying gas and oil from other states into Nebraska, are subject to control in this state, in so far as the gas and oil which they bring into the state are concerned, and they are obliged to comply with reasonable regulation by the state. We think, likewise, that defendant, as soon as it brings the water across the line into this state, is subject to regulation by the state, and it should be compelled to comply with any reasonable regulation imposed by authority of the state.

In *Stockman v. Leddy, supra,* the court said (p. 28): "The state has never relinquished its right of ownership and claim to the waters of our natural streams, although it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. The property right, however, in the natural streams, and the waters flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its waters to those who have, under its authority, acquired, by perfected appropriation, the right to their use."

In *Willey v. Decker,* 11 Wyo. 496, it was held:

"As between parties diverting water from the same stream in this state and using the same for irrigating lands within this state, the district court has jurisdiction, not only to restrain the unlawful diversion of water by one to the injury of the other, but to determine their relative rights to the use of the water. * * *

"Where a stream has its source in another state, and flows from that state into this state, the district court of the proper county, having acquired jurisdiction over the parties, has jurisdiction to enjoin defendants from diverting the waters of such stream at a point in the other state to such an extent as to deprive plaintiffs whose lands are situated in this state of the water for their irrigation, to which plaintiffs are entitled by priority of appropriation."

Since the institution of this action, the state of Nebraska has commenced an action in the United States supreme court against the state of Wyoming, wherein the state of Nebraska asserts that the state of Wyoming is diverting and using waters of the North Platte river for appropriations junior to many appropriations in the state of Nebraska, and seeks a determination of the amount of waters of said river which the state of Wyoming is entitled to divert and the amount of appropriations of waters of said river which should be permitted to run into Nebraska to supply the needs of prior appropriators in this state. Defendant contends that the pendency of that action is sufficient to oust the courts of Nebraska of jurisdiction to determine the issues in the instant case. No authorities are cited to sustain that view.

The principle is well established that, where different courts may have jurisdiction of a cause of action, the one which has first acquired jurisdiction of the cause will retain it to a final conclusion. This action was begun three years prior to the action by the state of Nebraska against the state of Wyoming. Moreover, the parties to that action are not the same as the parties to this action. We are of the opinion that the pendency of that action does not affect the jurisdiction of the courts of this state in the instant case.

We will next consider the contentions arising between the defendant and the cross-petitioner Farmers Irrigation District. At the outset the defendant strenuously objected to the right of cross-petitioner to intervene in the action. At another point in its brief defendant insists that, if the action was begun by the state for the purpose of determining relative priorities of appropriation, then all alleged prior appropriators in Nebraska should have been made parties defendant. If, as it contends, all alleged prior appropriators in Nebraska should have been made parties defendant, we fail to see any reason why defendant should object to the intervention and filing of the cross-petition by intervener. The authorities cited to sustain defendant's

contention do not appear to be in point. Moreover, intervener has a direct interest in the controversy, since the defendant attacked the prior decisions of this court and of the state board of irrigation, which had awarded to intervener its appropriation and fixed its priority at a date previous to the appropriation by defendant. Intervener, therefore, had a direct interest and was entitled to intervene.

The state board of irrigation in Nebraska in 1897 entered an order, determining that cross-petitioner had a valid appropriation for 1,142 6/7 cubic feet per second, with a priority date of September 16, 1887. The validity of that adjudication was before this court in the case of *Farmers Canal Co. v. Frank*, 72 Neb. 136. It was therein held: "The powers of the state board of irrigation exercised under section 16, art. II, ch. 93a of the irrigation act of 1895, are quasi judicial in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked." The Farmers Canal Company was a predecessor in title to the Farmers Irrigation District, the cross-petitioner in the instant case. In the opinion in that case it was said (p. 145): "The first question which it is necessary to determine under these issues, is as to the status of the Farmers Canal Company and Roberts Walker with reference to the adjudication of priority of appropriation made by the state board of irrigation on the 9th day of January, 1897. This will involve a construction of certain sections of the act of 1895, * * * being the general law relating to irrigation, and, in order to have a proper consideration of the meaning and intent of the legislature in the enactment of such provisions, it will be necessary to consider the whole course of legislation in this state upon this subject, and the construction given to similar statutory and constitutional provisions by the courts of other states and territories." Then follows a statement, giving a summary of considerable of the legislation on irrigation and

the recital of a decision and order entered by the state board of irrigation. The opinion then recites that the state board had jurisdiction to hear and determine, and that, no appeal having been taken from its determination, its order allowing the appropriation is final and cannot be collaterally attacked. The next question determined was whether the Farmers Canal Company, predecessor of the Farmers Irrigation Company, had lost its right to the appropriation by abandonment, and the court held that its appropriation had not been lost by abandonment. It is true that the defendant was not a party to that action. However, in a subsequent case, decided by this court (*Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121), the defendant was a party to the action. In that action the priorities and extent of the appropriation of the cross-petitioner and other parties, including the defendant, were directly involved. This court again held that the appropriation of the cross-petitioner had been adjudicated by the state board of irrigation and that it was entitled to an appropriation of 1,142 6/7 cubic feet per second, with a priority date from September 16, 1887, and again held that the cross-petitioner had not lost its right to the appropriation by abandonment or nonuser.

Defendant contends, however, that it was not a party to that decision in the supreme court. The record does not sustain its contention. It was a defendant in the action and made the same claims that it does in the present action, and the adjudication was against it in that action. It filed a cross-appeal in this court and a brief in support thereof, and after decree was entered in this court it filed a motion for a rehearing. When its motion was overruled it carried the case to the United States supreme court, and its contention was there denied. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157. The court there held that no federal question was involved, and that the defense of estoppel was an independent defense, had merit and, of itself, was sufficient to sustain the decision by this court. We must therefore hold that the

relative priority of the appropriations of cross-petitioner and defendant and the extent thereof have been heretofore fully determined.

In the instant case the trial court found and determined that cross-petitioner's appropriation was valid to the extent of 905 cubic feet per second. Since it has not appealed from this finding, we are not required to determine whether or not its appropriation was valid to the extent, which it claimed, of 1,142 6/7 cubic feet per second. We conclude that cross-petitioner is satisfied with the finding and decision of the trial court in that respect.

It appears that the United States government has established and constructed reservoirs on the North Platte river in Wyoming for the storage of waters, to be released during the irrigation season for the purpose of irrigation, to such irrigators as have applied therefor and secured the right to such release. These reservoirs are known as the Pathfinder and Guernsey reservoirs. It appears that cross-petitioner has acquired from the government the right to a certain quantity of water, to be released to it during the irrigation season from these reservoirs. Defendant contends that, since cross-petitioner has acquired and used water from these reservoirs during the irrigation season, it has not used the amount of water, naturally flowing in the stream, to the extent of its claimed right, and that, therefore, it has abandoned and lost, by nonuser, its right to the natural flow of the stream to the extent that it has used storage water.

The record discloses that, at times during the irrigation season in dry years, there is an insufficient amount of water in the natural flow of the North Platte river to supply cross-petitioner with the amount of water for which its appropriation has been heretofore adjudicated, and cross-petitioner, for the purpose of supplementing this supply, has contracted with the government for a stipulated amount of water, to be released from the reservoirs, above mentioned, during the irrigation season. Its contract with the government for water stored in the reservoirs was

simply a means to supplement its needs in dry seasons. That it may have used less of the natural flow of the stream than its appropriation called for would not amount to an abandonment of its right, nor to a surrender of a portion of its appropriation.

Many other assignments of error by defendant and questions argued by it in its numerous and lengthy briefs have been given consideration, but we deem it unnecessary to further discuss them in this opinion.

The decree of the district court, as between defendant and cross-petitioner, is affirmed, and the decree, as between the state and defendant, is modified so as to require defendant to install measuring devices, headgates and sluicegates in its canal prior to the irrigation season of 1936, instead of in 1935, as provided in the decree, and as so modified the decree, as between the state and defendant, is affirmed.

AFFIRMED AS MODIFIED.

EDWARD WILFONG, ADMINISTRATOR, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 20, 1935. No. 29281.

1. **Negligence**: QUESTION FOR JURY. "In a law action, where negligence is an issue and the evidence respecting it is in conflict, the question is for the jury." *Campbell v. Slater*, 127 Neb. 231.
2. ———: LAST CLEAR CHANCE. "Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover." *Omaha Street R. Co. v. Martin*, 48 Neb. 65.
3. **Abatement and Revival**: ACTION FOR DEATH. In view of the self-executing provisions of section 13, art. 1 of our Constitution, courts of this state must be open at all times to afford a remedy by due course of law for any injury done "a party" in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged. Therefore, an action for damages commenced by an administrator, after the death of his intestate,

for pain and suffering inflicted upon such deceased is maintainable.

4. Appeal: INSTRUCTIONS: ERROR IN PROCEDURE. Where the error relied upon is an erroneous instruction of the trial court directing the jury to consider certain claims for damages as part of the first cause of action instead of as part of the second cause of action, wherein they were properly set out, *held*, under the facts in this case, to be an error or defect in the proceedings which did not affect the substantial rights of the complaining party, and therefore to be disregarded.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, for appellant.

S. L. Winters, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and REDICK, District Judge.

EBERLY, J.

This is an action by Edward Wilfong, administrator of the estate of Edward Wilfong, Jr., deceased, against the Omaha & Council Bluffs Street Railway Company for negligently causing the death of his son and intestate. The deceased was nine years old at the time of his death, which took place in Omaha, Nebraska, approximately five hours after the occurrence of the accident.

The petition sets up two causes of action, viz.: The first for $10,000 on account of "physical pain and suffering which said deceased sustained from the time he was injured" by the impact of defendant's street car "until the time of his death;" the second for $15,608 under the provisions of sections 30-809 and 30-810, Comp. St. 1929 (Lord Campbell's Act). However, the second cause of action also sets forth that the next of kin have incurred for the deceased a hospital bill in the sum of $34; a doctor's bill of $200; and a funeral bill of $374, all necessitated by the injuries inflicted upon the deceased by the defendant.

The defendant denied generally the allegations consti-

tuting plaintiff's first cause of action; challenged the right of plaintiff to recover thereon, for the reason that no action was commenced thereon in the lifetime of the deceased; and also alleged "that said deceased was of the age of 9; that he and other children were playing in the park on the east side of the company's tracks and that the said child ran up a steep bank and out onto the company's track in front of the oncoming street car at a time when it was impossible to stop said car," and alleged that the injuries to said minor "were the direct and proximate result of his own negligence," and that his negligence "was more than slight and was the proximate cause of his injury and subsequent death."

The defendant, in answer to the second cause of action, in effect, denied all allegations of negligence charged, and pleaded contributory negligence on part of the deceased.

By appropriate reply plaintiff joined issues.

On such issues there is a sharp conflict in the evidence. There is no question that the injuries causing the death of Edward Wilfong, Jr., were occasioned by a street car of the defendant on August 13, 1932, as it was then being operated north from Martha street along the east side of Thirty-second street, across Creighton boulevard, and along the west side of Hanscom Park, in the city of Omaha. Near a point where the boundary lines of Francis street, if extended eastward, would intersect with Thirty-second street, the deceased was struck by this car, knocked down, and carried by it some 38 feet. The injuries inflicted caused his death some four and a half to five hours thereafter. Immediately east of the street car tracks at the scene of the accident was a row of thick weeds and also a dense growth of trees along the west side of Hanscom Park. The motorman of the car which came in contact with deceased testified on cross-examination as follows: "Q. And your car went north at about a rate of 18 miles an hour? A. I made a mistake about that 18 miles an hour. Q. You did? A. I sure did; it was 10 or 12 miles an hour at the most. Q. What made you change it? A. I

don't know. * * * Q. I mean in an emergency case like this, how soon could you make a stop with your emergency? A. I don't think you could stop it in more than 30 or 35 feet. It was a little down grade." He also testified that a platform situated near the scene of the accident was a "regular stop;" that he was in the habit of keeping a lookout for children there, and that his orders required this. On his direct examination he had previously testified as follows: "A. As we left Creighton avenue, I gave it five points and threw it off and allowed it to drift down to there, and I was going, I should judge, about 18 miles an hour, and when I got about 30 feet from this here, this brick there, this boy ran right out through the weeds, right in front of me, not more than 6 feet ahead of me, and I swung on the brakes and left them there, left the brakes right there. * * * Q. Where was he when you first saw him with reference to the weeds? A. I never saw him until he came out of the weeds. I never saw anybody there until it was just like coming out of the weeds in front of me here."

There is partial corroboration of the foregoing testimony by other witnesses for the defendant.

Plaintiff's witness, Helen Thomas, a girl 14 years of age, then attending Central High School in Omaha, testified that she resided at 2207 South Thirty-second street; that, in the forenoon of the day of the accident, Bobbie Bock, she, and Edward Wilfong, Jr., were playing "follow-the-leader" in Hanscom Park, and were, in the order named, playing immediately east of the street car tracks when Edward "started south down the tracks," and went south on the track a distance of "about 55 feet." She was watching him all the time, and then Edward saw the street car coming and turned around and went about 15 feet north, and in his excitement he put up his hands. This witness stated: "The street car hit him after he got about 15 or 20 feet" north. "I yelled, 'Edward is hit,' " and "ran as fast as I could to Mrs. Wilfong's house."

If this evidence is to be believed, the deceased was in

plain view of the oncoming street car during the time he was passing over a distance of from 70 to 75 feet, and obviously in a place of danger. This version of the affair also finds corroboration in the record before us.

The squarely conflicting evidence presented was resolved by the trial jury in favor of plaintiff.

"In a law action, where negligence is an issue and the evidence respecting it is in conflict, the question is for the jury." *Campbell v. Slater,* 127 Neb. 231.

The trial court submitted the case to the trial jury under the humanitarian rule, or the "last clear chance" doctrine. The last clear chance doctrine in this state, as applied to the situation here presented, is that, when a street car runs against a person causing his injury, liability arises, when the peril is discovered by the motorman, or by the exercise of ordinary or reasonable care and caution could have been discovered, in time to have avoided the injury. See *Omaha Street R. Co. v. Duvall,* 40 Neb. 29; *Krummack v. Missouri P. R. Co.,* 98 Neb. 773; *Lucas v. Omaha & C. B. Street R. Co.,* 104 Neb. 432; *Wilson v. Union P. R. Co.,* 107 Neb. 111; *Hanford v. Omaha & C. B. Street R. Co.,* 113 Neb. 423; *Porto Rico Railway Light & Power Co. v. Miranda,* 62 Fed. (2d) 479; *Allen v. Des Moines R. Co.,* 218 Ia. 286.

It is to be remembered that the deceased was but nine years of age, and that the scene of the accident was located at a place known to be frequented by children, or at least the orders which were admittedly received by the motorman from his employer contemplated such a situation. Under such conditions a greater degree of diligence was required than at places where danger is not so apparent. See *Mitchell v. Tacoma Railway & Motor Co.,* 9 Wash. 120; *Bergen County Traction Co. v. Heitman's Admr.,* 61 N. J. Law, 682; *Sample v. Consolidated Light & Railway Co.,* 50 W. Va. 472; *Sacca v. Omaha & C. B. Street R. Co.,* 98 Neb. 73; *Schrage v. Miller,* 123 Neb. 266; *Allen v. Des Moines R. Co.,* 218 Ia. 286; *Grabenc v. Union P. R. Co.,* 67 Fed. (2d) 567.

Indeed, courts of high standing have announced the rule that, under circumstances similar to those presented in the instant case, the motorman should anticipate that children would be playing on the street and might run in front of a moving car. *Camardo v. New York State Railways*, 247 N. Y. 111; *Denver City Tramway Co. v. Brown*, 57 Colo. 484; *Devine v. Chicago City R. Co.*, 167 Ill. App. 361; *Childress v. Southwest M. R. Co.*, 141 Mo. App. 667; *Lederer v. Connecticut Co.*, 95 Conn. 520.

We are also of the opinion that the trial court committed no error in its refusal to give the instruction requested by defendant on the subject of contributory negligence. The present case was submitted to the jury on the sole question of the last clear chance. This jurisdiction is committed to the rule that, "Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover." *Omaha Street R. Co. v. Martin*, 48 Neb. 65. See, also, *Lucas v. Omaha & C. B. Street R. Co.*, 104 Neb. 432; *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *Zitnik v. Union P. R. Co.*, 91 Neb. 679; *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511.

It is quite obvious that the last clear chance rule is here controlling, and that questions of contributory negligence are excluded. The reason has been expressed by courts of high standing in substantially the following language: "The person who has the last clear chance of avoiding an accident is considered in law solely responsible for the accident notwithstanding the negligence of the person injured." 45 C. J. 989. See *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511.

The defendant further challenges a recovery under the first cause of action, which was based on pain and suffering of the deceased, for the reason that no action was commenced during the lifetime of the injured party. Defendant's contention is that the common-law rule prevails in

Nebraska, and that a correct statement of the common law applicable to the facts of the instant case is: "At the common law a cause of action for injury to the person although property was incidentally affected did not survive regardless of the form in which it was brought, and the English statutes passed in the reigns of Edward III. and William IV., which modified the common-law rule respecting the survival of causes of action for injuries to real and personal property, did not change the common-law rule respecting the survival of causes of action for injuries to the person." In support of this proposition defendant cites 1 R. C. L. 31, sec. 26.

Conceding this to be a correct statement of the common-law rule, as it formerly existed in England, the question still remains as to what extent it has been adopted in this jurisdiction. By express legislation in this state it is restricted to the following: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." Comp. St. 1929, sec. 49-101.

In the interpretation of this statutory provision, in *Bishop v. Liston*, 112 Neb. 559, Good, J., stated the following conclusion: "This does not signify, however, that the common law is in full force and effect in Nebraska. If it is inapplicable to our needs and conditions, or conflicts with constitutional or statutory provisions, it is not in force." See, also, *Moran v. Moran*, 101 Neb. 386; *Murray v. Omaha Transfer Co.*, 95 Neb. 175.

In reference to this common-law rule on which defendant relies, Sir Frederick Pollock, in his work on Torts (12th ed.) pp. 60-62, in discussing the effect produced on this liability by a death of either the person wronged or the wrong-doer, declares it to be one of the "least rational parts" of our law. He states: "The common-law maxim is *actio personalis moritur cum persona*, or the right of action for tort is put an end to by the death of either party, even

if an action has been commenced in his lifetime. The maxim is 'one of some antiquity, but its origin is obscure and post-classical.' * * * A very similar rule existed in Roman law, with the modification that the inheritance of a man who had increased his estate by *dolus* was bound to restore the profit so gained, and that in some cases heirs might sue but could not be sued. Whether derived from a hasty following of the Roman rule or otherwise, the common law knew no such variations; the maxim was absolute. At one time it may have been justified by the vindictive and quasi-criminal character of suits for civil injuries. A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate, an impersonal abstraction represented no doubt by one or more living persons, but by persons who need not be of kin to the deceased. Some such feeling seems to be implied in the dictum, 'If one doth a trespass to me, and dieth, the action is dead also, because it should be inconvenient to recover against one who was not a party to the wrong.' * * * But when once the notion of vengeance has been put aside, and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground."

In this state, damages for torts are limited to compensation for injury actually sustained. Exemplary or punitive damages have never been recoverable in any action in the courts of Nebraska. See *Riewe v. McCormick*, 11 Neb. 261; *Winkler v. Roeder*, 23 Neb. 706; *Rosewater v. Hoffman*, 24 Neb. 222; *Atkins v. Gladwish*, 25 Neb. 390; *Bank of Commerce v. Goos*, 39 Neb. 437; *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713.

The situation thus presented suggests the ancient conception of the common law that "The law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law." 1 Cooley's Blackstone (3d ed.) *70.

In view of present conditions, it is plain that the en-

forcement of the maxim under consideration to the full extent of its original scope would be manifestly absurd and unjust. However, by section 9, art. I of the Constitution of 1867 (our Declaration of Rights), it was expressly enacted: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Reenacted in identical terms in the Constitution of 1875, it is continued in our present Constitution as section 13, art. I. It seems that a true interpretation of this provision provides a complete answer to the question which now confronts us.

"The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied." 12 C. J. 700.

Section 13, art. I of our Constitution is self-executing.

"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. That a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of the constitutional provision necessarily preclude legislation for the better protection of the right secured. A constitutional provision which is merely declaratory of the common law is self-executing. A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will." 12 C. J. 729.

It is to be noted that this conclusion that section 13, art. I of our Constitution, is self-executing, is quite in harmony with the action heretofore taken by this court in

the interpretation of this constitutional provision. See concurring opinion of Maxwell, J., in *State v. Elder*, 31 Neb. 169, 183; *Carlsen v. State, ante*, p. 84; *Douglas County v. Vinsonhaler*, 82 Neb. 810; *Fitch v. Martin*, 80 Neb. 60; *State v. Reneau*, 75 Neb. 1; *McNamara v. McNamara*, 86 Neb. 631.

In view of the obvious evil sought to be prevented or remedied by the constitutional provision quoted, so far as "personal injuries" are concerned, the purport of its language is to wholly invalidate and destroy the legal effect and force of the common-law maxim, viz., *actio personalis moritur cum persona.*

In *Waller v. First Savings & Trust Co.*, 103 Fla. 1025, in construing a provision of the Florida Constitution identical with our own, the language of Davis, J., in the majority opinion, sets forth reason fully sustaining the conclusion herein announced. He says, in part: "The *reason* for the English law rule to the contrary was that a tort action died with the tort-feasor because a tort action was regarded as punitive in character, all of which has been changed in Florida by the intendment of our Declaration of Rights which recognizes not only the punitive nature of a tortious wrong done, but also recognizes and preserves in organic language a legal 'remedy' for that wrong, and provides that the courts shall always be open to afford it."

Indeed, in the case of *In re Estate of Grainger*, 121 Neb. 338, without reference to or consideration of section 13, art. I of our Constitution, the rule was announced: "The right to an action for personal injury does not abate by reason of the death of the wrong-doer before the action was brought." This amounted to a distinct repudiation of the common-law rule.

It follows, in view of the principles embodied in our "Declaration of Rights," that the courts of this state must be open at all times to afford "a remedy by due course of law" for "any injury done him (a party) in his * * * person * * * without denial or delay," and without refer-

ence to the subsequent death of the wronged party or the wrong-doer.

Prior to the decision in *In re Estate of Grainger, supra,* the rule was firmly established in this state that "a pending action for personal injuries does not abate by the death of the plaintiff," even though "the plaintiff dies from personal injuries for which he brought suit." *Murray v. Omaha Transfer Co.*, 95 Neb. 175. However, the appellant cites *Webster v. City of Hastings*, 59 Neb. 563; *Forbes v. City of Omaha*, 79 Neb. 6; *Sheibley v. Nelson*, 83 Neb. 501; *Levin v. Muser*, 107 Neb. 230; *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, in support of the proposition that in Nebraska, where death ensues as the result of personal injury, a suit, unless brought during the lifetime of the injured person, cannot be maintained by his administrator for the reason that such action does not survive under the laws of Nebraska, but abates at the death of the injured party. In every case cited, however, save and except *Forbes v. City of Omaha*, 79 Neb. 6, an action in tort had been commenced prior to the death of the plaintiff, and the sole question presented by the record was whether an action so commenced would survive under our revivor statute, which question this court answered in the affirmative.

In such *Forbes* case the injured plaintiff did not depart this life, but successfully maintained her suit in the district court and secured an affirmance of the judgment there rendered. The question of whether an administrator of a deceased who died from injuries inflicted by a tort-feasor could institute and maintain an action for the pain and suffering of his intestate between the infliction of the injuries and his death occasioned thereby was not presented by the record in any of the Nebraska cases upon which appellant relies. This question, therefore, could not have been judicially determined therein, and any discussion thereof, if such there be, in the opinions filed in said causes would not be binding upon this court, but would amount to dicta merely.

In a broad sense the claim for personal injury recognized and created by this constitutional provision, as applied to torts, is "a chose in action." As this constitutional provision neither expressly nor by necessary implication requires the institution of a suit prior to the injured person's death as a condition precedent to recovery by his administrator, nor in any manner conditions the remedy it provides on that fact, the amount that the injured person would be entitled to recover in his lifetime would amount to damages to his personal estate, which on his death would go to his next of kin to be distributed as personal estate. Therefore, the cause of action does not abate, but survived, and the contention of the appellant on this point must be overruled. See *Murray v. Omaha Transfer Co.*, 95 Neb. 175; *Lehmann v. Farwell*, 95 Wis. 185; *Rogers v. Windoes*, 48 Mich. 628; *Brown v. Chicago & N. W. R. Co.*, 102 Wis. 137; *Cleland v. Anderson*, 75 Neb. 273; *McGarvey v. Independent O. & G. Co.*, 156 Wis. 580; *Bennett v. Bennett*, 116 N. Y. 584; *Fowlie v. First Minneapolis Trust Co.*, 184 Minn. 82.

The appellant predicates error on the action of the trial court by the instruction submitting as part of the first cause of action the reasonable value of the medical, surgical, hospital, and burial expenses that the father was put to incident to the treatment and burial of his said son. As has already appeared, the allegations covering these items constituted a part of the second cause of action, and the first cause of action of the petition contained no reference thereto. We are committed to the view that the administrator in a case such as the instant one may recover on behalf of the parent "funeral expenses incurred for an unmarried minor child whose death was caused by defendant's negligence." *Killion v. Dinklage*, 121 Neb. 322.

In the instant case the items covering this claim were properly alleged; plaintiff's evidence establishing the same was properly received; and no objections to the instruction of the court submitting these items to the consideration of the jury are now presented, save and except that they were

submitted as part of the first cause of action when they constituted in fact part of the second cause of action. The jury returned a separate verdict on each cause of action and the recovery for these items was provided for in the verdict on the first cause of action and was not included in the verdict on the second cause of action. It is self-evident, therefore, that the alleged error in no manner increased the aggregate of plaintiff's recovery.

"According to the weight of authority, if each of several independent counts, or causes of action, not otherwise repugnant, is sufficiently alleged and is sustained by the proof, a general verdict assessing entire damages is sufficient." 25 Standard Ency. of Procedure, 970. And, "It is not ordinarily necessary for a jury to separately assess the different elements of recovery, unless required by statute, or by the court to do so." 25 Standard Ency. of Procedure, 965.

We do not find that the trial in the instant case required the jury to return a separate verdict on each cause of action. The correct amount of their general verdict for plaintiff is ascertainable from the verdict actually returned. It thus affirmatively appears that the error or defect in the proceeding here presented is one which does not affect the substantial rights of the complaining party, and therefore must be disregarded. Comp. St. 1929, sec. 20-853.

The judgment of the district court is correct, and is

AFFIRMED.

HELEN ANDERSON, SPECIAL ADMINISTRATRIX, APPELLANT, V. INTERSTATE TRANSIT LINES, APPELLEE.

FILED SEPTEMBER 20, 1935. No. 29310.

Evidence in the record examined, and *held* to sustain the action of the trial court in discharging the jury and entering judgment dismissing plaintiff's action.

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

Tyler & Peterson and *Crossman, Munger & Barton,* for appellant.

T. W. Bockes, T. F. Hamer, G. C. Holdrege and *Pitzer & Pitzer, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

EBERLY, J.

This action was brought by Helen Anderson, special administratrix of the estate of Ralph A. Anderson, deceased, against the Interstate Transit Lines, a corporation, to recover damages for the death of said Ralph A. Anderson caused by the alleged negligence of defendant. The proceeding is one under "Lord Campbell's Act" of Kansas, and is prosecuted for the benefit of the father and mother of deceased.

Ralph A. Anderson was nearly 21 years of age at the time of his death, a single man, and employed by Watson Brothers Transfer Company as a truck driver. At about 1:35 a. m. on December 22, 1931, a collision occurred between a truck operated by Anderson and a bus owned by defendant, Interstate Transit Lines, at a point one and one-half miles east of Hiawatha, Kansas. In this accident Anderson was killed, and in a fire which followed the collision both truck and bus were largely consumed. The defendant's bus was being operated at the time of the collision in the usual course of defendant's business as a carrier of passengers by one William T. Erwin, its employee. The elements of negligence on part of the defendant, as alleged in plaintiff's petition, are, in substance, as follows: (a) That Erwin operated defendant's bus at a reckless and dangerous rate of speed in excess of 55 miles an hour, in violation of the rules of the road and contrary to the rules and regulations of the public service commis-

sion of the state of Kansas; (b) that the bus was late in reference to schedule, and Erwin was driving at an excessive rate of speed to make up lost time; (c) that Erwin carelessly and recklessly operated the bus on the left of the center line and on the part of the pavement reserved for traffic from the opposite direction; (d) that Erwin operated the bus so as to cause it to lurch over the center line of the pavement; (e) that Erwin operated the bus in a dangerous and uncontrollable manner, so that he could not and did not stop the bus in time to avoid the collision; (f) that Erwin failed to give any warning of his intention to cross to the left side of the pavement.

By its amended answer the defendant admits the ownership of the truck by Watson Brothers Transfer Company and the ownership of the bus by Interstate Transit Lines; that Anderson and Erwin were the respective drivers, and that the collision occurred at the time and place alleged in the petition. The answer denies that the accident was caused by the negligence of defendant or its driver, alleges that the accident was caused by the negligence of Anderson and his employers, and further alleges a Kansas statute limiting the recovery in actions for wrongful death to the sum of $10,000.

The plaintiff's reply is a general denial of all new matter in defendant's amended answer.

At the close of plaintiff's testimony, counsel for defendant made a verbal motion for directed verdict or dismissal in the following language: "The defendant moves the court to direct the jury to return a verdict in its favor or to discharge the jury and render judgment dismissing the plaintiff's cause of action for the reason that the evidence offered on behalf of the plaintiff is not sufficient to sustain a verdict against the defendant."

The defendant's motion for directed verdict was sustained by the trial court, and a motion by plaintiff for a new trial was overruled. Plaintiff appeals.

The sole question now presented is the sufficiency of the evidence to support a verdict for appellant.

It appears that at the time of the collision the bus was carrying more than a score of passengers in addition to the driver. The record discloses that one of the passengers was killed, but no evidence of the survivors, who were present when the accident occurred, was introduced at the trial. The sole evidence as to the accident was given by witnesses who arrived after it occurred, and when the bus and the truck were in flames. There is no direct evidence in the record as to the speed of the bus immediately preceding the accident, or that it was operated on the left side of the center of the road, or that it was operated in a dangerous and uncontrollable manner, or that it lurched over the center line of the pavement, or that the bus ever crossed to the left side of the pavement. There is in fact a total absence of proof on each of the several claims of negligence. We know the position of the bus and the truck, including its trailer, after all had come to rest after the collision was over and the damages were suffered by each. True, plaintiff's witnesses testify that as the bus was standing after the collision, if the damaged parts were restored, its left fender and left front wheel would project a few inches north of the center of the road. But we know the damages were inflicted at the moment of the impact. It was in no manner due to the stopping of the motor vehicles after the impact. Nothing in the evidence tends to reasonably identify the point of collision, with reference to the center boundary of the highway. The actual problem presented by the record in its present form is one of the resolution of forces, and we would be required to determine from the position of the two motor vehicles at the conclusion of the incident, just where they actually collided. With no evidence before us as to the weight, speed, location on the highway, or direction of movement thereon, of either truck or bus at the moment of impact, obviously this can not be done.

Thus, in *Kroell v. Lutz,* 210 S. W. (Mo. App.) 926, the court of appeals of Missouri announced the following conclusion:

"Where there was a collision of automobiles at a street intersection, it cannot be said as a matter of law that the accident did not happen as stated by either party, solely from the respective positions of the automobiles after the accident; there being such a complexity of forces and resultants as to afford no idea where the two automobiles would go or what they would do."

In *Corcoran v. Ward,* 115 Cal. App. 180, the district court of appeal of California announced this view:

"The complexity of forces operating on two rapidly moving vehicles in collision with one another often makes it exceedingly difficult to reconstruct the manner of the happening of the accident from testimony concerning the marks found upon the highway and the positions and condition of the cars after the accident."

Negligence cannot be inferred from the mere fact that an accident happened. See *Omaha & R. V. R. Co. v. Clarke,* 39 Neb. 65; *Vansyoc v. Freewater Cemetery Ass'n,* 63 Neb. 143.

In the instant case the evidence upon which the appellant relies is wholly circumstantial. But, "Circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Asbach v. Chicago, B. & Q. R. Co.,* 74 Ia. 248; *Lopez v. Campbell,* 163 N. Y. 340; *American Freehold Land Mortgage Co. v. Whaley,* 63 Fed. 743." *Blid v. Chicago & N. W. R. Co.,* 89 Neb. 689.

We are inclined to accept the views of the courts heretofore quoted as to the fact that mere position of the "bus" and "truck" after the accident, with the accompanying marks, as shown by the evidence, afford no just basis for a reasonable conclusion. In other words, these facts are insufficient to meet the burden of proof.

Therefore, from a careful reading of the entire bill of exceptions we are convinced that the action of the trial

judge in discharging the jury and entering a dismissal of plaintiff's action was amply justified by the record.

The judgment of the district court is,

AFFIRMED.

PARSONS CONSTRUCTION COMPANY, APPELLEE, V. SANFORD R. GIFFORD, APPELLANT: CONANT HOTEL COMPANY ET AL., APPELLEES.

FILED SEPTEMBER 20, 1935. No. 29128.

1. **Mechanics' Liens.** A subcontractor is required to file a statement of the amount due him within sixty days from the date of furnishing the labor or material to secure a lien upon the premises.
2. ———. Generally, there is no debt existing between the owner of the premises and a subcontractor independent of the statutory lien.
3. ———. A subcontractor is not entitled to a mechanic's lien for labor and materials furnished in the construction of a building where the structure is defective and unsafe due to his poor or improper workmanship and is not accepted by the owner but is removed.
4. ———. A trifling failure to perform the contract is not sufficient to defeat a mechanic's lien where it appears that there has been a substantial compliance.
5. ———. Where a subcontractor builds a reinforced concrete structure, which is so defective and unsafe because of poor workmanship that it is necessary to remove it, there is not a substantial compliance with the contract.
6. **Equity.** A court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject-matter.
7. ———. A court of equity which has jurisdiction at the commencement of a suit will retain it where the issues presented are in the nature of an accounting and are so numerous, so distinct, and the evidence to sustain them so variant, technical and voluminous that a jury is incompetent to deal intelligently with them and reach a just conclusion.
8. ———. "The preventing of a multiplicity of suits in connection with other grounds of equitable cognizance may justify a court of equity in entertaining jurisdiction." *Rogers v. Selleck*, 117 Neb. 569.

9. **Damages.** It is the general rule that one injured by a breach of contract is entitled to recover all his damages, including profits prevented and losses sustained which are certain and naturally follow the breach.

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

Will H. Thompson and *Yale C. Holland,* for appellant.

King & Haggart, Weaver & Giller, Gaines, McGilton, McLaughlin & Gaines, Wear, Boland & Nye, Brome & Thomas and *James J. Fitzgerald, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

DAY, J.

This was a suit for the foreclosure of a mechanic's lien by a subcontractor. The decree denied foreclosure and canceled the lien. Thereafter, the case proceeded as one for damages with the owner of the premises, the general contractor, subcontractors, lessee of premises, and the bonding company litigating the issues between them. In 1929 the Benson & Garrett Company conceived the idea of placing four additional stories on top of the Sanford Hotel building owned by Dr. Harold Gifford. They consulted with the Parsons Construction Company and John Latenser & Sons, architects. They negotiated a lease with the Conant Hotel Company, tenant in the building, for the additional space. The scheme was presented to the owner who accepted the proposal in October, 1929. The substance of the arrangement was that the Conant Hotel Company had leased the additional space at an annual net rental of $8,000 a year and had agreed to advance $26,000 toward the cost, to be repaid out of the rental; that Benson & Garrett was to get a new loan for $210,000 which would completely finance the project and pay off the existing mortgage on the premises; that Benson & Garrett was to pay all the architect fees and incidental expenses and post

a bond guaranteeing complete satisfaction to all concerned; that the time to complete the work was estimated at five months. Thereafter, on November 20, 1929, Benson & Garrett entered into a contract with the plaintiff, Parsons Construction Company, as principal subcontractor, to erect the addition in accordance with the agreement with the owner and the drawing and specifications furnished by John Latenser & Sons, architects. On November 28, 1929, Dr. Gifford died, before the loan was procured and before any work had been done on the contract. It had become impossible to secure the loan, but one was secured for $150,000 which was sufficient to pay the existing mortgage.

As a result of many negotiations between the executors of the estate of Gifford and the Benson & Garrett Company, a new contract was executed, restating the agreement for building the addition which was approved by the county court. It provided in substance that Benson & Garrett should be accountable for the performance of the contract and would build the addition and deliver it fully completed and free of all liens or claims arising in any manner from the construction; that Benson & Garrett warranted the plans and specifications were sufficient for the intended purpose and satisfactory to the executors and the Conant Hotel Company; that the risk of said building until completed and accepted by the executors and Conant should be that of Benson & Garrett; that the building should be completed by January 15, 1931. The Metropolitan Casualty Insurance Company executed its bond in the sum of $75,000, conditioned upon the performance of the contract by Benson & Garrett. Benson & Garrett contracted with Parsons Construction Company, B. Grunwald, Inc., and Harry Binder as subcontractors. Construction was commenced under these contracts and concrete work, columns and floors for two stories were poured and, upon estimate of architects, $5,872.31 was paid to Benson & Garrett and by them paid to the architects and Parsons Construction Company. Later, when the forms were re-

moved from the concrete work, defects appeared which caused the work to be condemned by the architects. Considerable controversy arose between Benson & Garrett, the architects, and Parsons Construction Company about this work, which was finally torn down and removed under an agreement of November 18, 1930, between Benson & Garrett and Parsons Construction Company, that the responsibility for the defective work was to be determined later. The concrete work was torn down in December, 1930, and immediately an argument ensued relative to the sufficiency of the plans and specifications. Tests were made with haydite aggregate concrete of which the building was to be constructed. On January 30, 1931, an extension of time was granted to August 15, 1931, to complete the work. From that time until May 23, 1931, Parsons Construction Company was refusing to proceed with the work on the ground that the plans and specifications were insufficient and impractical. But, on May 23, 1931, Parsons Construction Company agreed to proceed with the construction. On May 27, 1931, the executors ordered Benson & Garrett and Parsons Construction Company to remove their material and equipment from the building. Thus far, it has been intended merely to narrate the history from the beginning of the transaction giving rise to this litigation. An abstract of the pleadings seems necessary to an understanding of the issues presented and tried in the district court.

This suit was tried upon the amended petition of the plaintiff filed December 16, 1931, alleging the contract between Benson & Garrett and Gifford and between Benson & Garrett and plaintiff. It was alleged that the Conant Hotel Company was the lessee of the building to be constructed; that the plaintiff was to do certain construction work according to the specifications of the architect for a profit of $4,000; that the building was to be of reinforced haydite concrete construction; that on its first cause of action it is entitled to recover for labor and materials furnished or purchased for said addition $14,013.70, less

$3,482.64 which has been paid, or $10,531.06; that on its second cause of action it is entitled to recover $783.83 for extra labor and material furnished at the special instance and request of Gifford; that it is entitled to recover on its third cause of action $4,000 as its profit on said contract; that it was ready, willing and able to construct the building according to the plans and specifications furnished by the defendant and the building code of the city of Omaha, but that on the 27th day of May, 1931, without justification, Gifford canceled the contract.

Gifford in his answer and cross-petition admits the contract with Benson & Garrett company; the contract between Benson & Garrett and Parsons Construction Company, the lease of Gifford with Conant Hotel Company, and that B. Grunwald, Inc., claims lien on the premises, and denies other allegations. Gifford then alleges that Benson & Garrett had procured plans and specifications for the additional stories and warranted the plans and specifications were sufficient for the intended purpose and that the building would be completed to the satisfaction of Gifford. This answer alleges and sets out provisions of the contract relative to the construction work; alleges that the plaintiff in September, 1930, commenced work under the contract and constructed the concrete work for two floors, but not according to the plans, specifications, and contracts, and in a good and workmanlike manner, but that it was faulty and defective and was condemned by the architect and ordered torn down and removed; that the concrete work was removed; that it was not satisfactory to Gifford or the Conant Hotel Company or to John Latenser & Sons, the architects; that the work was not finished by January 15, 1931, the contract date. The defendant Gifford admits that on October 12, 1930, he paid plaintiff the sum of $3,442.31 for the defective building which was removed, but that it was paid at a time when the defective concrete was concealed by the forms and before the defects were known, and he is entitled to a return of this money.

Defendant Gifford also alleges that, after the addition

had been torn down and removed, the plaintiff questioned the sufficiency of the plans and specifications and advised him by letter, as well as Benson & Garrett and the architects, they were insufficient, that it was impossible for it to produce a safe, sound, or workmanlike job that would comply with the ordinances or standard building practice and be acceptable to any of the parties; that the plaintiff informed the Conant Hotel Company that if the addition was erected as planned it would be unsafe; that plaintiff informed others in the city of Omaha that the proposed addition would be unsafe and insecure and would entail large liability against the hotel company; that, as a result, Conant canceled its lease which damaged Gifford in the sum of $60,000.

Gifford further alleges that plaintiff, during the prosecution of the work, damaged the roof and cornices and demolished the pent house, which he was obliged to and did repair at a cost of $2,578.30; that plaintiff failed to protect the building from snow and rain, which penetrated into the rooms on the upper floors, the repairs of which cost $659.54; that the Conant Hotel Company claims from Gifford damages on account of loss suffered to its business in the sum of $5,849.01.

Gifford alleges that the plaintiff complained to the building inspector and caused him to revoke the building permit until May, 1931; that Gifford paid Benson & Garrett for the architect, John Latenser & Sons, the sum of $2,430 before the defective work was discovered, and was damaged that amount; that the total damages sustained were $74,959.16. Gifford alleges the execution of the performance bond for Benson & Garrett company by the Metropolitan Casualty Insurance Company and prays for judgment against it as well as Benson & Garrett for his damages.

Benson & Garrett filed an answer and cross-petition in which it alleges in substance: The execution of the contract to build the addition; the condemnation of the work and the failure of Parsons Construction Company to carry

out its contract until May 23, 1931; that Benson & Garrett was at all times ready and willing to perform its contract; the wrongful cancelation of the contract by the executors on the 27th day of May; that Benson & Garrett had been damaged and asked the court to determine the amount. The damages alleged are $12,106.06 profit lost, $3,850.26 loss on contract for plumbing with B. Grunwald, Inc.; loss on contract with Harry Binder for the electric wiring $526.77; loss resulting from balance claimed by John Latenser & Sons of $388.79; loss of cost of performance bond, $1,095.50.

B. Grunwald, Inc., on December 12, 1931, filed its answer and cross-petition, alleging that it had a valid lien for material and labor for plumbing in the sum of $2,185.96.

Parsons Construction Company filed replies and answers to cross-petitions of Benson & Garrett and Gifford, the substance of which is that the plaintiff was prevented from its performance of the contract by Gifford, and that the work was done in compliance with the plans and specifications and was condemned wrongfully and without authority; that it was not a party to the contract between Benson & Garrett and the executors of the estate and had no knowledge of its provisions; that the damage of other persons furnishing labor and materials on said building was not due to any fault of plaintiff.

The Conant Hotel Company filed an answer and cross-petition against Gifford and Benson & Garrett Company alleging damages for loss of use of parts of the hotel building, loss of business and property damage caused by the delay of building operations and by water and snow leaking through the roof.

Gifford filed an amendment to the amended answer alleging an extension in time at the request of Benson & Garrett and Parsons Construction Company on condition that Parsons Construction Company would retract statements that it could not do a good, workmanlike job under the plans and specifications, and plaintiff must release Gifford from any and all claim for work done and reim-

burse him for the money paid or credit it upon the contract and all liens must be waived or released, which condition it insisted was not met.

The Metropolitan Casualty Insurance Company filed an amended answer challenging the jurisdiction of the court to enter a judgment against it for that there was a misjoinder of parties; that it was brought into the case by defendant Gifford who seeks to recover damages from it for failure of Benson & Garrett to perform its contract; that under the bond it was not liable for any insufficiency of the plans, which are alleged to be insufficient; that an extension of time was granted without its consent and timely notice of failure was not given it; and that Gifford canceled the contract without notice to it.

By proper pleading, the allegations of each cross-petition were traversed. This is a brief resumé of the pleadings. This case came on for hearing September 27, 1932, whereupon much evidence was taken, the trial consuming about a month. It was then argued and taken under advisement. Subsequently on September 11, 1933, more evidence was adduced and on November 3, 1933, a decree was entered, the finding and judgment of which follows:

"That the plaintiff entered into an agreement, as alleged, with Benson & Garrett Co. to do certain work in erecting a four-story addition upon the existing structure of the Sanford Hotel in the city of Omaha, Nebraska, on the premises described in the petition; that said Benson & Garrett Company had previously contracted, as alleged, with Harold Gifford, the then owner of said premises for such erection; that said Harold Gifford died on November 28, 1929, and defendant, Sanford R. Gifford, and one Herbert M. Rogers, who is now deceased, were appointed executors and named as trustees under the will of the said Harold Gifford and the said Sanford R. Gifford is the sole acting executor under the will of the said Harold Gifford; that subsequently the said executors with the authorization of the county court of Douglas county, Nebraska, entered into an agreement with Benson & Garrett

to erect the said addition to the hotel; that plaintiff entered upon the premises and built a hoisting tower and protection to the previously existing structure of said hotel and prepared bases for extending upwards the reinforced concrete pillars of said structure and a canopy over the sidewalk in front of the same and proceeded to supply forms and temporary supports for three of the four floors of said structure and raise the pillars for the same and placed the concrete for such pillars and two floors of the same. Certain of said concrete work was found to be defective and the architects of said building properly required the plaintiff to remove same and same was all removed leaving no part of said structure except the preparatory portions thereof and the temporary supports.

"Afterwards it was mutually agreed by plaintiff and said Benson & Garrett Co. and said executors and their tenant that the time for completing said structure should be extended to August 15, 1931, and on or about May 27th said executor, Sanford R. Gifford, at that time sole surviving one, notwithstanding the extension of time aforesaid and the remonstrances and objections of plaintiff and of said Benson & Garrett Co. and the costly preparations and materials made and procured for such work, ordered said Benson & Garrett Co. to stop any further work upon said structure and remove all property of said plaintiff from the premises and put same in repair, and the court finds that such action by said executor was wholly without justification and constituted a breach of said contract and said executor became liable for all loss and injury thereby caused, and the court finds that such loss and injury to plaintiff in labor and materials for which it is entitled to compensation from said Benson & Garrett is in the sum of $4,179.33, of which it had received before the condemnation of the concrete work the sum of $3,871.31, and there remains unpaid for said labor and materials the sum of $308.02, and by reason of the loss to said plaintiff of the profit reasonably to be derived and agreed for in the contract with said Benson & Garrett Co. of $4,000, making

an aggregate of $4,308.02 recoverable by plaintiff from said Benson & Garrett Co. on account of said contract.

"The court further finds that said Benson & Garrett Co. on account of liability incurred on contract for said construction of said addition to the hotel to B. Grunwald, Inc., on the heating and plumbing contract for the same are liable in the sum of $2,348.46, and also liable to Harry Binder in the sum of $526.77, of which $350.80 was for work torn out with the concrete and which should be charged to plaintiff and reduced plaintiff's demand by that much, viz., to the sum of $3,957.22, and said Benson & Garrett Co. also incurred expense of premium on a surety bond at request of said executor in the sum of $1,095, and in addition to all of above a liability for an architect's fee of $373.87 balance after allowing for $2,000 paid to said architects from moneys received from said executor.

"The total of liability incurred by said Benson & Garrett still unpaid is, therefore, the sum of $7,950.32 and, in addition, thereto, Benson & Garrett is entitled to recover the profit derivable from said contract in the sum of $8,056.22, making a total of $16,006.74.

"The court further finds that neither the plaintiff, Parsons Construction Co., nor B. Grunwald, Inc., is entitled to a lien on the said premises and that the liens which are of record should be canceled and held for naught.

"The court further finds that the petition of the Conant Hotel Company, a corporation, should be dismissed and the claim of Sanford R. Gifford, sole surviving executor and named as trustee under the will of Harold Gifford, deceased, against Benson & Garrett Co., against the plaintiff and against the Metropolitan Casualty Co. should be dismissed.

"It is therefore ordered, adjudged and decreed that Benson & Garrett Co. have and recover from Sanford R. Gifford, sole surviving executor and named as trustee under the will of Harold Gifford, deceased, the sum of $16,006.74 to be paid only after payment of the following

claims to subcontractors, to wit: $3,957.22 to Parsons Construction Co., $2,348.46 to B. Grunwald, Inc., a corporation, and $526.77 to Harry Binder and $373.87 to Latenser & Sons and such balance as may be due on said bond premium; that the claim of the defendant, B. Grunwald, Inc., for a lien against the Sanford Hotel property be and the same is hereby denied; that the claim of the Parsons Construction Co. for a lien against the Sanford Hotel property be and the same is hereby denied; that the claim of the Conant Hotel Co., a corporation, for damages is dismissed and the claims of Sanford R. Gifford, sole surviving executor and named trustee of the estate of Harold Gifford, deceased, against Benson & Garrett, against Parsons Construction Co. and against the Metropolitan Casualty Co. be and the same are hereby dismissed; that the Conant Hotel Co. and B. Grunwald, Inc., shall pay their own costs and Sanford R. Gifford, executor of the estate of Harold Gifford, deceased, and named trustee under the will shall pay the balance of the costs in the action."

B. Grunwald, Inc., the subcontractor, was not entitled to a foreclosure of a mechanic's lien. It was the subcontractor for the plumbing and heating. It had installed considerable work, which was destroyed with the concrete work torn down. But one reason why the foreclosure of the lien was properly refused was that the lien was not filed within the time a subcontractor is required to file a lien. A subcontractor is required to file a statement of the amount due him within sixty days from the date of furnishing the labor or material to secure a lien upon the premises. Comp. St. 1929, sec. 52-102; *Watkins & Co. v. Kobiela,* 84 Neb. 422; *Wells v. David City Improvement Co.,* 43 Neb. 366.

B. Grunwald, Inc., moves that it be permitted to amend its cross-petition by increasing the amount of the prayer from $2,185.96 to $3,503.16 to conform to the proof advanced at the trial. It relies upon section 20-852, Comp. St. 1929, as construed in several decisions of this court.

This cross-petition sought the foreclosure of a mechanic's lien. It did not allege a right to recover either damages or upon a contract with the owner. Generally, there is no debt existing between the owner of the premises and a subcontractor, independent of the statutory lien. 40 C. J. 140. The claim of B. Grunwald, Inc., was considered a liability of the general contractor, Benson & Garrett Company, and allowed as a part of its damage recoverable against the owner by the trial court. As such it will be considered later.

The Metropolitan Casualty Insurance Company's liability could only attach when and if its principal, Benson & Garrett Company, became liable under its contract with the owner for failure to perform. Since we arrive at the same conclusion as the trial court on the question of liability for the cancelation of the contract and no judgment is entered against either the insurance company or its principal, it is unnecessary to consider or decide the propositions advanced by it.

The Conant Hotel Company has not prosecuted an appeal from the judgment against it and therefore need not be considered here. Likewise, the judgment of the trial court that Parsons Construction Company was not entitled to the foreclosure of a lien was correct under the evidence. The Parsons Construction Company failed in the construction of the first two floors of the addition in that the work was defective, unsafe, and not done in a workmanlike manner. A large portion of the evidence relates to this issue. The building was to be of reinforced steel and haydite concrete construction. Haydite is a burnt clay aggregation, used instead of crushed rock or gravel, with cement and water to make a lighter weight concrete. When the mixture is poured into the forms, it requires tamping to get the concrete around the steel. This is called puddling. Competent witnesses, architects, and building engineers testified that the structure built by Parsons Construction Company was defective and unsafe. Even Parsons Construction Company witnesses admitted

it was bad, but could have been repaired by the use of a gunnite machine. The other experts testified that it could not be so repaired giving a solid substantial structure sufficient for the purpose. The witnesses who testified gave persuasive reasons to support their opinion. It is concluded that the concrete work was so defective that it was properly torn down; that the defects were caused by Parsons Construction Company and were due to no other cause.

There is a conflict of authority as to right of a subcontractor to a mechanic's lien where the improvement is worthless due to the contractor's default. In *Pipkorn Co. v. Tratnik,* 161 Wis. 91, 16 A. L. R. 975, it was held that a material-man furnishing materials to a building contractor for the construction of a building was entitled to a lien, even though the work of the contractor was such that it was condemned by the city building inspector and never accepted by the owner. A careful annotator (16 A. L. R. 981) has discussed the cases relating to this question and states that "the court seems to predicate the liability of the owner on the theory that the principal contractor is acting as the agent of the owner in his purchase of material." In Indiana the statute gives the subcontractor a lien unaffected by the failure of the principal contractor to perform his contract. *Coonse & Caylor Ice Co. v. Home Stove Co.,* 70 Ind. App. 226. In *Terrell v. McHenry,* 121 Ky. 452, where a subcontractor claimed a lien for his services in putting a roof on a building, the contract provided that it was to be paid for only if it did not leak. The roof leaked and the owner refused to accept it as a performance of the contract. This is closely analogous to our case, in which the workmanship of the subcontractor Parsons Construction Company was defective and was condemned by the architect and removed. The Kentucky court held that the subcontractor in such a case was in no better position than the general contractor. Later, in *Monyahan v. City of Lancaster,* 168 Ky. 677, that court held that a mechanic's lien would not be allowed where the work was so de-

fective as to be useless, although he was not responsible for the defects, on the theory that the owner had received nothing of value. But no case has come to our attention where a subcontractor has claimed or been decreed a mechanic's lien in a case such as this, where the faulty construction rendering the structure worthless was his fault. It seems so inequitable and unjust to require an owner to pay under such circumstances that it could not be justified under any circumstances.

But Parsons Construction Company contends that the work was performed according to the contract and specifications for which it was not responsible. Let us examine the evidence, for it adequately refutes this contention. John Latenser, Jr., an architect, a member of the firm of John Latenser & Sons, being of the opinion that the work was defective, called L. R. Viterbo, an experienced engineer from St. Louis, and Professor Clark Mickey of the engineering department of the University of Nebraska, who testified after a careful inspection that the concrete work was about 60 per cent. bad to 40 per cent. good; that there were pockets and cavities in the members; that there was much spongy or porous concrete with rough surfaces; that much of the reinforcing steel was exposed and the concrete was not homogeneous; that it was unsafe and could not be repaired; that the failure was due to improper "puddling" or working of the concrete at the time of pouring. We are not unmindful that another expert testified somewhat to the contrary, but we are impressed by the testimony related and find it corroborated by other evidence of the physical facts by photographs and other exhibits as well as testimony of nonexpert witnesses. The concrete work done by Parsons Construction Company was defective and worthless because the workmanship was bad. No other conclusion could possibly be reached from a careful examination of the evidence.

A subcontractor is not entitled to a mechanic's lien for labor and materials furnished in the construction of a building where the structure is defective and unsafe due

to his poor or improper workmanship and is not accepted by the owner but is removed.

This court has held in a suit to foreclose a mechanic's lien for labor and materials furnished for a building that a trifling failure to perform the contract is not sufficient to defeat the lien where it appears that there has been a substantial compliance. *Grove-Wharton Construction Co. v. Clarke,* 86 Neb. 831; *McGowan v. Gate City Malt Co.,* 89 Neb. 10; *Hahn v. Bonacum,* 76 Neb. 837. But where a subcontractor builds a reinforced concrete structure which is so defective and unsafe because of poor workmanship that it is necessary to remove it, there is not a substantial compliance with the contract. The decree of the trial court properly denied the plaintiff a foreclosure of a mechanic's lien.

The trial court also determined that the owner, Gifford, wrongfully canceled the contract on May 27, 1931. This issue was raised by the pleadings of Benson & Garrett. Gifford in his cross-petition had sought to recover damages because Benson & Garrett had not performed its contract. Gifford now asserts that, when the court determined that Parsons Construction Company was not entitled to a mechanic's lien, its jurisdiction was limited to a dismissal of the case. A reference to the pleadings of the six parties involved in the case indicated that the many issues were much complicated. In addition to the matters here, there were other matters, such as the electrical wiring, the premium on the bond, the architects' fee, and the payments made by Gifford on an estimate of the work before the defects were discovered, which required consideration. If, on the one hand, Benson & Garrett had entirely failed and refused to perform their contract or, on the other, Gifford had failed and refused to perform, these matters had to be taken into account and determined for the purpose of adjudicating the rights of the parties. This suit in that respect is almost in the nature of an accounting.

The trial court found that neither the plaintiff nor B. Grunwald, Inc., was entitled to the foreclosure of a me-

chanic's lien. The trial court then considered the case between Gifford and Benson & Garrett as one for damages for failure or refusal to perform the contract for the construction of the addition to the building. For a determination of the issues between these two parties it was necessary to determine the rights of all the other parties in relation thereto. It was also necessary to determine any rights or liabilities that might accrue to one because of the contracts for the electrical wiring with Harry Binder; for the architects with John Latenser & Sons; for the premium on the performance bond with Harry Tukey, and all other matters that might affect the amount of the damages, if any, under the contract. The pleadings presented these issues to the court. Gifford complained that he was deprived of a jury trial on the question of his failure to perform the contract and his liability for damages. But Gifford in his cross-petition asked for damages against Benson & Garrett and the surety on its performance bond. The trial of this case occupied the time of the trial court for almost a month in the first instance. It was taken under advisement, argued, and briefed. Further evidence was then taken upon the question of the amount of damages almost a year later. Then for the first time by either pleading or objection to testimony did the defendant Gifford insist upon his right to a jury trial.

In *Pickens v. Polk,* 42 Neb. 267, this court affirmed a judgment against a former owner entered in a suit in equity, on an account where the property had been sold but no service obtained on purchaser within statutory time. It was held that the court had jurisdiction of the subject-matter, the defendant had been served, and joined issues. In this case, the suit in equity was properly brought to foreclose a mechanic's lien. These other issues were pleaded by the defendants. It is a well-settled rule that a court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject-matter. 21 C. J. 134; *Buchanan v. Griggs,* 20 Neb. 165;

Olson v. Lamb, 61 Neb. 484. The subject-matter of this suit was the foreclosure of a mechanic's lien under a contract for the construction of the addition to the Sanford **Hotel.**

Another reason is that a court of equity which has jurisdiction at the commencement of a suit will retain it where the issues presented are in the nature of an accounting and are so numerous, so distinct, and the evidence to sustain them so variant, technical and voluminous that a jury is incompetent to deal intelligently with them and reach a just conclusion. *Merritt v. Johnston,* 109 Neb. 859. In this case, the rights and liabilities of the parties are so interrelated and dependent upon the rights and liabilities existing between each party and others. For example, Benson & Garrett's right to recover is affected as to amount by the extent of its liability to subcontractors. In order to determine the amount of its recovery, it is necessary to determine its liability to several others. To settle this entire controversy would require numerous actions at law to determine the extent of the liability of the owner, if any, which would again depend upon whose failure caused the damage. "Equity * * * seeks to avoid multiplicity of suits." *School District D v. School District No. 80,* 112 Neb. 867. "The preventing of a multiplicity of suits in connection with other grounds of equitable cognizance may justify a court of equity in entertaining jurisdiction." *Rogers v. Selleck,* 117 Neb. 569. See *Paxton Irrigation District v. Conway,* 94 Neb. 205; *Crawford Co. v. Hathaway,* 67 Neb. 325.

The distinction between actions at law and suits in equity has been abolished by the Code (Comp. St. 1929, sec. 20-101) and legal or equitable principles may either or both be enforced according to the facts. *Hopkins v. Washington County,* 56 Neb. 596. "Of course," states Pomeroy, Equity Jurisprudence (4th ed.) 408, "there must be some common relation, some common interest, or some common question, or else the decree of a court of equity, and the relief given by it in the one judicial proceeding, could not

by any possibility avail to prevent the multiplicity of suits which is the very object of its interference." For the reasons that there was a waiver, that a court of equity having taken jurisdiction could retain it to do complete justice with respect to the subject, that the issues were in the nature of an accounting and so involved, technical and voluminous that a jury was incompetent to deal with them and to prevent a multiplicity of suits, the trial court did not err in determining all the issues presented by the pleadings.

We now reach the controversy between Benson & Garrett and Gifford. Parsons Construction Company is only indirectly involved therein in that its actions are pleaded as a justification of the cancelation of the contract between Benson & Garrett and Gifford, and as an element of damage, in case the cancelation by Gifford was not justified. We have already determined that the defective concrete in the partially erected addition was not due to insufficient plans and specifications but due to the poor workmanship of Parsons Construction Company. Therefore, there could be no recovery for the work or materials which built that part of the structure except such as could be used in proper reconstruction. The right of Benson & Garrett to recover depends upon the justification of the action of the executors of the Gifford estate in stopping work upon the addition, May 27, 1931. If it were not justified, then it constituted a breach of the contract and Gifford became liable for the resultant damages.

While Parsons Construction Company was undoubtedly the cause of trouble in this case by its failure in the construction work, it is also true that Gifford insisted that it proceed with the work of rebuilding. In view of this, Gifford's effort to justify the cancelation because of the delay is unavailing. There had also been an extension for the convenience of all parties, agreed upon by all and objected to by none. Benson & Garrett were the general contractors and they were at all times ready to proceed with the building. It offered to get a new subcontractor

in place of Parsons Construction Company, but the executor demurred to this, although he had no right to make such an objection under the contract. When Parsons Construction Company finally arranged to commence work, it was ordered off the premises by Gifford on May 27, 1931.

Gifford also seeks to justify this action by the fact that, when the controversy arose as to the quality of the construction work, Parsons Construction Company stated that the plans and specifications were such that a workmanlike job could not be done. From December 5, 1930, until sometime in May, 1931, Parsons Construction Company, Benson & Garrett, and the architects were engaged in a controversy over this statement. Gifford was insisting that Parsons Construction Company do the construction work and when it complied with the demand it was stopped. The action of Gifford was inconsistent with the demand that it proceed with the work.

Gifford also seeks to justify his act of cancelation on May 27, 1931, on the ground that Parsons Construction Company had filed a mechanic's lien for the work and materials for the defective construction when the contract with Benson & Garrett provided that it was to be completed and delivered free and clear of such liens. This was no justification because Benson & Garrett had a performance bond which amply protected Gifford on this matter. Without further recital of the evidence, it should be sufficient to state that our finding is the same as the trial court that the action of Gifford "was wholly without justification and constituted a breach of said contract and said executor became liable for all loss and injury thereby caused."

It remains only to determine the amount of the damages occasioned by the breach of the contract with Benson & Garrett by Gifford. It is the well-established general rule in this state that the party injured by the breach of contract is entitled to recover all his damages, including profits prevented and losses sustained which are certain and naturally follow the breach. *Western Union Telegraph Co. v. Wilhelm,* 48 Neb. 910. In this case, Benson & Gar-

rett are entitled to recover the certain profits as well as the losses for which they are certainly liable by reason of their contracts with subcontractors. This was the basis of the decree of the trial court, which is adopted as the decree of this court except in a few minor details. Obviously, the trial court made an error in finding that Parsons Construction Company had been paid the sum of $3,871.31 before the defective construction was discovered. By the pleadings and the evidence, the sum is disclosed to be $3,442.31. With reference to the liability of Benson & Garrett to Grunwald, Grunwald has secured a judgment in a separate action for the sum of $3,503.16. The evidence in this case supports a finding for that amount; the cost of the labor and materials put into the construction of the building, $2,166.80, and in addition $1,336.36, the profit certain to result from the completion of the contract. Grunwald filed a mechanic's lien for $2,166.80, foreclosure of which was denied in this suit. But Benson & Garrett alleged the contract, the judgment recovered against them, and facts sufficient to justify its recovery of the entire damage. Of course, Gifford was not a party to the action brought by Grunwald against Benson & Garrett, but the evidence requires a finding here that Benson & Garrett are liable to Grunwald for the cost of labor and materials in the sum of $2,166.80 and in addition thereto the sum of $1,336.36, representing profit, or a total of $3,503.16. The complaint of Parsons Construction Company has not been overlooked, that certain items, including several carloads of haydite, some metal windows, exterior wood frames and miscellaneous items, were erroneously disallowed by the trial court. The burden of proof was upon the plaintiff to establish loss by reason of these items. The preponderance of the evidence does not establish that there was loss sustained upon these items.

As modified, the decree will read that Benson & Garrett Company ordered through its subcontractor Parsons Construction Company costly preparations and materials made for such work for which Parsons Construction Company

is entitled to compensation from Benson & Garrett Company in the sum of $4,179.33, of which it received before the work was condemned the sum of $3,442.31, and there remains unpaid the sum of $737.02, and by reason of the loss of profit to Parsons Construction Company the sum of $4,000, according to the provisions of the contract, making a total of $4,737.02 due Parsons Construction Company from Benson & Garrett Company. Parsons Construction Company claim must be reduced by the $350.80 for work torn out which Harry Binder had done. This makes the total liability of Benson & Garrett Company to Parsons Construction Company the sum of $4,386.22. Benson & Garrett Company's liability to B. Grunwald, Inc., $3,503.16; to Harry Binder $526.77; to John Latenser & Sons, architects, $373.87, in addition to the $2,000 paid by Gifford heretofore; to Harry Tukey premium on bond $1,095. The total liability of Benson & Garrett Company is $9,885.02. In addition, Benson & Garrett Company were entitled to their profit on the contract, amounting to $7,976.28, making a total due Benson & Garrett Company as a result of total liabilities and profits of $17,861.30.

The decree of the trial court with these slight modifications is affirmed.

AFFIRMED AS MODIFIED.

ANNE S. KENNEDY, APPELLANT, V. CENTRAL POWER COMPANY, APPELLEE.

FILED SEPTEMBER 20, 1935. No. 29292.

1. **Corporations.** The relation between a stockholder and a corporation is always a contractual relation arising out of the stock subscription, the receipt for money paid, the stock certificate itself, together with the articles of incorporation and by-laws, and the statutes relating thereto.
2. **Contracts: "OFFER."** "An offer must be so definite in its terms, or require such definite terms in its acceptance, that the promises and performances to be rendered by each party are reasonably certain." Restatement, Law of Contracts, sec. 32.

APPEAL from the district court for Otoe county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed.*

Tyler & Peterson and *Raymond Frerichs,* for appellant.

William H. Pitzer, Marshall Pitzer and *William Suhr, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and RYAN, District Judge.

PAINE, J.

This was an action based on an oral contract seeking to recover the face amount paid for nine shares of 6 per cent. cumulative stock in the defendant company, repayment thereof being refused. At the close of all the evidence, the defendant's motion to discharge the jury and dismiss the case was sustained. Plaintiff appeals.

The plaintiff charges that the court erred in sustaining the motion to discharge the jury and dismiss plaintiff's action, because there was sufficient evidence to sustain a verdict in said cause, and the order of court discharging the jury was contrary to law.

The plaintiff purchased nine shares of preferred stock in the Central Power Company, defendant, from Miss Mary Carmody, its cashier in the office of the company at Nebraska City, Nebraska. In this office Miss Carmody worked under C. L. Paullin, who was its local manager, and was also a vice-president. The headquarters of this company was located in Grand Island, Nebraska, where the president and some of the other officers resided, and the company furnished electricity to many towns in the state of Nebraska. The defendant company sold its 6 per cent. cumulative preferred stock at its Grand Island office, the stock certificates in evidence being signed by C. W. Amidon, its president, and V. M. Johnson, its secretary, both residing in Grand Island. The sale of such stock was promoted through newspaper advertising, and the first witness was Arthur Sweet, managing editor of the Nebraska Daily News Press, and five advertisements were

received in evidence, which were published in said paper. Two of these advertisements carried a line near the bottom of the advertisement reading, "Ask any employee for full information."

The plaintiff testified that she had known C. L. Paullin, the Nebraska City manager, since he had resided there, and had known Mary Carmody for 15 or 20 years; in fact, had known her when she was an employee of the predecessor company. Plaintiff was asked to state the substance of the conversation with Miss Carmody, and her answer, as set out in interrogatory No. 76, is as follows: "Well, I went in to pay my bill and after I paid it and all she asked me if I was interested in buying some Central Power stock and I told her I didn't have very much money for anything like that and I wasn't interested I didn't think and we talked it over and she said, it was a good investment and paid six per cent. interest and I asked her if I would buy it if I could get the money back when I wanted it and she said, 'Yes.' "

At the beginning of the trial, the plaintiff tendered the two certificates for eight shares and one share, respectively, into court, the same being indorsed in blank in lead-pencil by the plaintiff on the back, in the presence of a witness, and demanded that defendant pay to the clerk of the court for the benefit of the plaintiff the amount of $900, together with interest at 6 per cent. from the 21st day of July, 1933, being the day upon which demand for repayment was made. Such tender was refused for reasons set out in the defendant's answer.

The defendant did not move for a directed verdict at the close of plaintiff's evidence, but called several witnesses, and also introduced in evidence a certified copy of the articles of incorporation of the Central Power Company, together with amendment thereto, in which articles of incorporation, in section 25 of paragraph 3, it is provided that said company may sell stock, bonds, or other obligations of the company, at such time and upon such terms and conditions as the board of directors shall determine,

and in the tenth paragraph it is provided that the board of directors may in its discretion use and apply any surplus or accumulated profits in acquiring bonds or other obligations or shares of the capital stock of the corporation to such an extent and in such manner and upon such terms as the board of directors shall deem expedient, "provided that no such funds or property shall be used for the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation; but shares of capital stock when acquired may, from time to time, successively be resold and repurchased."

"Articles of incorporation and the statutes relating thereto are by construction material parts of the contract executed when a person becomes a stockholder by purchasing stock of the corporation." *Allen v. White,* 103 Neb. 256. See *Luikart v. Paine,* 126 Neb. 251.

"One who subscribes to stock is not a stockholder until the subscription is presented to and accepted by the corporation." *Badger Paper Co. v. Rose,* 70 N. W. 302 (95 Wis. 145).

"A certificate of preferred stock, issued by a corporation, is evidence of the holder's title to shares of stock. The terms and provisions of such certificate and of the articles of incorporation, together with the general law and the by-laws of the corporation, in force at the time, all enter into and together evidence the contract between the corporation and the stockholder." *Miller v. M. E. Smith Building Co.,* 118 Neb. 5.

The defendant's witness, Mary Carmody, testified that early in January, 1931, the plaintiff came to the office and inquired if there was any more Central Power Company's stock for sale. She said she was interested in the stock. Miss Carmody asked her if she would like to have it explained, and plaintiff said she did not have time just then, but that she had some money outstanding that was not bringing in much interest, which she wanted to reinvest in something that would bring in more dividends, and she said she would come in later. Miss Carmody testified that

she did not open the conversation about the sale of stock, but that the plaintiff brought up the matter. Miss Carmody testified that the plaintiff came back on January 16, 1931, and bought eight shares of stock, and paid $800 and signed the regular printed agreement to purchase eight shares of 6 per cent. cumulative preferred stock, for which she paid $800 in cash, said agreement being exhibit No. 7; that, after plaintiff had signed the regular agreement to purchase stock, she took the same to the manager, C. L. Paullin, who approved the same. Miss Carmody denied that she told the plaintiff she could have her money back at any time she wanted it, and testified that all that was said by her on that subject was as set out in interrogatory No. 697: "She asked if she should want her money how long it would take to get it and I told her that the company didn't care to issue stock unless it would be a permanent investment, and she said, she wouldn't care to take her money or to get her money unless she needed it, and I told her—I answered her by saying, that at the present time, we were able to get returns in about four to five weeks, and I asked her if she understood stock transactions and she assured me that she did—that she had stock in another company. Q. 698. When you say 'returns,' what do you mean by that? A. I meant returns; we had to send her request in to Grand Island, as the stock transactions were all handled there."

Plaintiff insists that Miss Carmody promised the plaintiff that she could get her money back at any time she wanted it if she would purchase this stock. Plaintiff contends that, if Miss Carmody had no actual authority, she certainly had ostensible authority to make such an offer. Plaintiff admits that there is nothing in the agreement to purchase stock, signed by the plaintiff, about a contemporaneous oral agreement, and plaintiff admits that there is no fraud pleaded or proved in the case.

The defendant on its part claims that the president, secretary, and all of the records of this corporation are in Grand Island, Nebraska; that Miss Carmody is not a stock

salesman at all, and that the legal relations between the parties to this suit were initiated by a printed and written application to purchase stock, signed by the plaintiff, and that the relation between a stockholder and his company is always a contractual relation, and that a stock subscription agreement signed to purchase stock is not the sole evidence of the relation between the stockholder and the corporation, but the legal relation embraces also the articles of incorporation of the company, and on the back of the certificates issued to the plaintiff appears in fine print some of such provisions, showing the power of the corporation, on the authority of its board of directors, to redeem or retire preferred stock. In the case at bar the evidence clearly shows that this is the only sale of stock that Miss Carmody ever made.

In *Wand v. Blum,* 309 Pa. St. 551, an agreement made at the time of purchase of stock set out the terms of payment and provided that, should the employee leave the employ of the corporation, he agreed to resell his shares of stock to the seller at the price paid for same. It is held that this paragraph of this agreement creates no obligation whatever upon the corporation's part to buy it. It is simply an option to repurchase if the corporation desires.

Again, a corporation has no authority to accept subscriptions to its capital stock on special terms, where the terms are such as to constitute a fraud on other subscribers, and such stipulations are void, though the subscription may be enforced by the corporation. *Cahall v. Lofland,* 12 Del. Ch. 299; *Hewitt v. Linnhaven Orchard Co.,* 90 Or. 1.

Plaintiff held this stock for several years, making no effort to force a repurchase of it so long as the dividends were being paid regularly; when they could not pay them, then she brought action on her alleged oral contract with Miss Carmody. It must have been evident to the plaintiff that accepting the stock subscription blank, properly signed, was the limit of this young lady's authority; for it was within the knowledge of the plaintiff that she was a mere clerk in the Nebraska City office. The unlimited

promise to repurchase this stock, which the plaintiff claims was offered to her by Miss Carmody, would simply make the Central Power Company a depository for money, which money must be returned to the stockholder at any time upon demand, with 6 per cent. interest. Such a contract would make the defendant company obligated to repay money to a stockholder in exactly the same way that a bank is required to pay its demand deposits. It is not contended by the defendant that such a contract could not have been made by the corporation through authority of its board of directors; there is no proof in the record showing that any such promise was authorized. The attempt to bind the defendant by an indefinite, oral promise to repurchase the stock was clearly outside the limits of the subscription contract signed by the plaintiff.

In *Schuster v. North American Hotel Co.*, 106 Neb. 672, the second opinion filed after reargument, which opinion was released December 21, 1921, provides that, where a written contract for subscription to stock is on its face a complete contract, such company is not bound by an oral agreement of an agent who had no authority to make such agreement, and while such agreement might fix a liability for fraud upon the agent, it would not fix responsibility upon the company.

The rule appears to be that mere opinions, estimates, or promissory statements as to the future, though unfounded, will not invalidate a transaction entered into in reliance thereon. 7 R. C. L. 239, sec. 212.

In the recent Restatement, Law of Contracts, sec. 32, we find: "An offer must be so definite in its terms, or require such definite terms in its acceptance, that the promises and performances to be rendered by each party are reasonably certain." The evidence in this case simply shows that the plaintiff was planning to invest her money permanently, but that in case of some emergency arising she wanted to know what method she could follow to cash in her stock, but there were no definite terms made, and nothing certain promised in the future in relation thereto, even on the part

of Miss Carmody, to say nothing of the fact that it was never brought to the attention of the corporation which it is sought to hold.

The plaintiff relies upon the statement in the advertisement, "Ask any employee for full information." This corporation needed capital for its expanding business, and any employee could tell where a stock subscription blank could be found on which a stock subscription could be sent in, but there is nothing in this statement in the advertising which would give any employee of the company the right to vary the terms set out on the subscription form which the plaintiff signed for the stock. The making of special terms outside of the regular subscription provisions was beyond the power of the ordinary employee to do, for the articles of incorporation, filed December 26, 1914, provided that stock could only be sold at such times and upon such terms as the board of directors might determine. There was also the provision that no shares of its capital stock could be repurchased by the company under any circumstances when such use of its funds would cause any impairment of the capital of the corporation, and all of these provisions of the articles of incorporation are considered material parts of the contract that a subscriber enters into in buying stock in the company.

If the plaintiff desired to be granted special terms by the corporation in her purchase of this stock, there was plenty of room above her signature for her to write in that she demanded that the corporation should agree to repurchase her stock at any time that she desired, but she failed to make this desire known.

The law is that an offer to take back the stock is conditional, and the purchaser must show compliance with all of the conditions precedent on her part. She must return, or offer to return, the stock and the dividends received by her, unless under the terms of the contract she is entitled to retain them. 4 Fletcher, Cyclopedia of Corporations (Perm. ed.) 233, sec. 1546. In the same volume, at page 167, sec. 1500, it says: "Agents appointed to receive sub-

scriptions have such authority only as is conferred on them. As a rule, they have no authority to receive conditional subscriptions or subscriptions upon special terms, and, if they do so, the corporation is not bound unless it ratifies their act."

In the opinion of this court, considering the evidence in its most favorable light to the plaintiff, there was not sufficient evidence to establish the oral contract alleged by the plaintiff, and the clerk who received the application would not have been acting within the scope of her ostensible authority if she had made any such agreement to repurchase the stock, as alleged. The following cases are of interest in this connection: *Rhoades v. Banking, Trust & Mortgage Co.*, 125 Va. 320; *Cargill Commission Co. v. Swartwood*, 159 Minn. 1; *Farm Lands Development Co. v. Taft*, 194 Ia. 481; *Omaha Alfalfa Milling Co. v. Pinkham*, 105 Neb. 20; *Grone v. Economic Life Ins. Co.*, 80 Atl. (Del. Ch.) 809; *Brown v. Stroud & Co.*, 112 Neb. 210.

Therefore, the trial court was right in sustaining the motion to discharge the jury and dismiss the action, and the same is hereby

AFFIRMED.

ALBERT F. H. SCHROEDER ET AL., APPELLANTS, V. BUNKUM BARTLETT ET AL., APPELLEES.

FILED SEPTEMBER 20, 1935. No. 29297.

1. **Mortgages.** One of the tests to determine whether a warranty deed, absolute on its face, should be held to be a mortgage, is whether the parties continue to treat each other as debtor and creditor. If they do not, the deed is presumably good as an absolute conveyance.
2. **Appeal: MOTION TO DISMISS.** When defendant moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant thereupon admits the plaintiff's testimony to be true, together with every conclusion which may fairly and reasonably be drawn therefrom.
3. **Trial: MOTION TO DISMISS.** The court must thereupon deter-

mine, as a question of law, whether plaintiff's evidence is sufficient to support a judgment for the plaintiff.

4. ———. The court having determined that the plaintiff failed to make out even a *prima facie* case, it is not necessary for the court to allow the case to proceed further.

5. ———. While a district judge has power to modify any ruling made, during the same term of court, yet it is improper for such court, without notice to plaintiff or his attorney, and in their absence, to reopen a case which was dismissed when the plaintiff rested and grant the relief asked for in the answer, when no evidence had been taken in support thereof.

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

R. E. Bannister and *Harry R. Ankeny*, for appellants.

Frank M. Johnson, contra.

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

This is a suit in equity to have a warranty deed and an option to repurchase the land conveyed and a lease for the rental of the same land all construed together as a mortgage.

The petition alleged the ownership of the real estate in the plaintiff, who upon February 15, 1930, gave the defendant a mortgage bond thereon in the sum of $7,500; that on October 10, 1932, the plaintiff was in financial distress, and owed a balance of coupon No. 4 in the sum of $55, and all of coupon No. 5 in the sum of $225. Defendant insisted upon payment of the entire mortgage indebtedness because of said defaulted interest, and threatened immediate foreclosure thereof. Defendant insisted that if plaintiff would give him a warranty deed for the property he would give him back a one-year lease of the property together with an option for one year to repurchase the said property for the exact amount of the indebtedness. Plaintiff alleges that defendant represented to him that said papers would thereby extend the time of

payment of the amount then due for one year and be considered as further security for the original debt, that said three instruments were all executed at the same time and place, and were parts of the same transaction. The prayer of the petition was that an account be taken of the amount due the defendant from the plaintiff, and that the three instruments be decreed to be a single transaction and constitute a mortgage, and that plaintiff be given the right to redeem said premises, and that the court cancel said deed and quiet the title of the property in the plaintiff.

To this the defendant answered, admitting the execution of the mortgage, and that the interest was in default, and to obviate the necessity of a foreclosure an agreement was reached whereby the warranty deed, the option to repurchase, and the lease were given, and that it was orally agreed that the defendant was to pay the 1933 water maintenance, and the plaintiff would give as rent two-fifths of the corn raised on the land and $64 cash rent for the alfalfa ground. That in pursuance to the terms of the lease the plaintiff delivered to the defendant the two-fifths share of corn produced, and at the termination of the lease refused to give possession of the premises to the defendant, and defendant prayed that plaintiff's action be dismissed and title to the land quieted in the defendant, and the defendant be decreed to be entitled to immediate possession of the land; to which answer the plaintiff filed a reply in the nature of a general denial.

When the plaintiff had rested his case, the following motion was made by defendant's counsel: "Mr. Johnson: Comes now the defendant and moves the court to dismiss the action of plaintiffs because the evidence introduced by the plaintiffs fails to constitute a cause of action against the defendants, or either of them, and for the further reason it is shown by the plaintiffs' own testimony that the note and mortgage were returned to them after the deed was executed; that the relation of landlord and tenant has existed since that time; that the share-rent of the corn has been turned over to the defendant and the plaintiff asking

the defendant if he desired to sell the corn; and the plaintiff further endeavoring to rent the premises from the defendant for the crop year beginning March 1, 1934, and ending March 1, 1935; and for the further reason that it is shown that exhibit 3, the option to repurchase contract, was founded upon a new and independent consideration, which was paid by plaintiffs to defendants, and that the plaintiffs have failed to exercise their rights under said option to repurchase."

It appears from the evidence that the plaintiffs well knew that they were signing a warranty deed and taking a lease of the premises with the option to buy. Thereafter they recognized the defendant as the owner of the property. The defendant paid the taxes assessed against the property, and directed the building of a crib in which to put his two-fifths rent share of the corn crop. On February 1, 1934, the plaintiff asked the defendant for an extension of the lease of the farm for another year from the expiration of his lease, which was to occur on March 1, 1934, and the defendant refused to lease the land to the plaintiff for another year, and shortly thereafter the plaintiff started this action.

It is quite evident from the testimony that the plaintiff did not make any claim of ownership after the execution of the deed until the filing of this suit, and all of his acts in keeping up the farm in good, husbandlike manner were such as would be required of a tenant under a lease. The plaintiff did not pay taxes on the property, or pay insurance, or pay the annual water maintenance fee, but left all of these for the owner to pay.

In this case the evidence is clear that the relation of mortgagor and mortgagee did not continue, but that plaintiff at once assumed the relation of a tenant, and therefore cannot dispute his landlord's title. *Samuelson v. Mickey*, 73 Neb. 852; *Riley v. Starr*, 48 Neb. 243; *Gies v. Storz Brewing Co.*, 75 Neb. 698.

When the defendant made the motion to dismiss the plaintiff's action, he admitted the plaintiff's testimony to

be true, together with every conclusion which may fairly and reasonably be drawn therefrom. It then became a question of law for the court to determine, *i. e.*, whether the evidence which had been offered by the plaintiff was sufficient to support a judgment for the plaintiff.

The court, having reviewed the plaintiff's evidence, and having been aided by the arguments of counsel, reached the conclusion that the plaintiff had failed to make out even a *prima facie* case, as defined in *In re Estate of Hoagland,* 126 Neb. 377. Therefore, it was not necessary to proceed further with the trial, the plaintiff having entirely failed to support the allegations of his petition by his evidence. The defendant's motion to dismiss the plaintiff's action was properly granted, thereby terminating the litigation, and the notes made by the trial judge in his docket in announcing his decision read as follows: "May 10, 1934. Comes now the respective parties and after a statement of the case is made, we proceed to receive the evidence. Plaintiffs rest. Defendants move for a dismissal of evidence. Same is argued to the court, find the motion should be sustained on the grounds that there is insufficient evidence to support the plaintiffs' claim."

However, the journal entry signed by the court did not correspond with the above trial notes made by the court at the conclusion of the case, for it appears that, upon demand of defendant's attorney, the trial court, after the conclusion of the case, in the absence of and without notice to the plaintiff and the attorney, added to his journal entry findings, granting to the defendant the relief asked for in the prayer of his answer, although the defendant had introduced no evidence and had succeeded in getting the case dismissed at the close of the plaintiff's evidence.

It is insisted by the plaintiff that a motion to dismiss the plaintiff's petition at the close of the plaintiff's evidence is in effect a demurrer to the evidence, and that sustaining such a motion carries the entire matter out of court and is a final ending of the lawsuit. *Sammons v. Pike,* 105 Minn. 106. In *Campbell v. Crone,* 10 Neb. 571, it is held that a

party who moves a dismissal of an action has no right to complain of the consequences necessarily resulting therefrom. In *Gordon v. Clark,* 122 Neb. 364, it is held: "A party who invites, urges and consents to an order cannot later be heard to complain that there was error in such order." It has been said: "Where a suit is dismissed or a nonsuit ordered, it carries the parties and the entire cause of action out of court, and all further proceedings in the action are unauthorized, until the judgment of dismissal or nonsuit is vacated and the cause reinstated, except to render a judgment or decree for costs or to make such order or decree in the cause as may be necessary to effectuate the judgment terminating the cause, and except on appeal." 18 C. J. 1207.

In our opinion such affirmative relief, granted under the circumstances stated, exceeded the power of the court in that it went far beyond the ruling of the court as announced in open court, and upon which the plaintiff had a right to reply. We have held that, when the court has announced that he will sustain such motion, it is a final submission, and the case is terminated. *Stungis v. Wavecrest Realty Co.,* 124 Neb. 769; *Bee Building Co. v. Dalton,* 68 Neb. 38; Comp. St. 1929, sec. 20-601. A very exhaustive note is found, discussing many Nebraska cases, in *Texas Electric Railway v. Cox,* 49 S. W. (2d) 725, as published in 89 A. L. R. 11. In *Grimes v. Chamberlain,* 27 Neb. 605, it was held: "An entry of dismissal terminates the jurisdiction of the court over the cause of action presented by such plaintiff, except for the purpose of entering the order of dismissal and rendering judgment for costs." While this order was made upon motion of plaintiff, the holding seems to cover the case at bar.

In *Wachsmuth v. Orient Ins. Co.,* 49 Neb. 590, this court held: "A special finding made at the request of one party after judgment, and without notice to the adverse party, is absolutely void."

The decree of the lower court is modified to the extent of striking out the additional relief granted to the defend-

ant, the only announcement made by the court at the close of the argument on the motion being, "The motion is sustained; I will give you exceptions," as shown by the bill of exceptions.

It is ordered that the decree of the court be modified by striking out all of the decree after the entry "that plaintiff's action be and the same is hereby dismissed," and that the costs in the district court, wherein the plaintiff did not prevail, should be taxed to the plaintiff, and in the supreme court each party shall pay his own costs.

AFFIRMED AS MODIFIED.

LOUIS SMITHBERGER ET AL., PLAINTIFFS, V. WILLIAM B. BANNING ET AL., DEFENDANTS: NEBRASKA PETROLEUM MARKETERS, INC., ET AL., INTERVENERS.

FILED SEPTEMBER 20, 1935. No. 29603.

1. **Constitutional Law**: LEGISLATIVE POWER. The legislative power of the state is vested in the legislature subject only to the initiative and referendum provisions specifically reserved to the people. Const. art. III, sec. 1.
2. ———: ———: DELEGATION. The power of the legislature to make laws is a sovereign power, requiring the exercise of judgment and discretion, which cannot be delegated to an administrative board.
3. ———: ———: ———. The state legislature has no power to delegate any of its legislative powers to any outside agency such as the congress of the United States.
4. ———: ———: ———: EXPENDITURE OF RELIEF FUNDS. A statute which appropriates $4,000,000 for "work relief, direct relief, old age assistance, assistance to dependent mothers and children, unemployment insurance, health of mothers and children, public health or related matters of security and welfare, and public works, especially roads, by the use of work relief labor," to be expended by an administrative board, without providing rules and standards of guidance and leaving the distribution of the fund among the various purposes set out in the act to the arbitrary discretion of the administrative board, is an unconstitutional attempt to delegate legislative authority.
5. ———: ———: ———: ———. A statute appropriating $4,000,000, or so much thereof as may be required, to be ex-

pended under the terms and conditions provided by an act of the congress of the United States to be passed in the future, is an unconstitutional attempt on the part of the legislature to delegate legislative authority to the congress of the United States.

6. **Statutes:** CONSTITUTIONALITY. Where the purpose of a statute is to accomplish a single object only, and some of its provisions are unconstitutional and void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portions.
7. ———: ———. The elimination of the invalid provisions of House Roll No. 675, as amended by Senate File No. 367, and of Senate File No. 363, as amended by House Roll No. 432, and the elimination of the invalid appropriation contained therein, leave entirely different statutes from those which were passed by the legislature so that it cannot be said they would have been passed without said void provisions, and each of the acts must therefore be held void in its entirety.
8. ———: ———. Senate File No. 363, as amended by House Roll No. 432, *held* to violate section 1, art. II, and section 1, art. III of the Nebraska Constitution, for the reason that it attempts to delegate legislative authority to an administrative board.
9. ———: ———. House Roll No. 675, as amended by Senate File No. 367, *held* to violate section 1, art. II, and section 1, art. III of the Nebraska Constitution, for the reason that it attempts to delegate legislative authority to the congress of the United States.

Original action to determine the validity of emergency relief measures. Defendants demurred to plaintiffs' and interveners' petitions. *Demurrers overruled.*

Fay H. Pollock, Wilber S. Aten, John P. McKnight, H. G. Burke, Elmer Rakow, G. J. McGinley, E. Gudmundsen, W. E. Mumby, Erwin A. Jones, Emil J. Eret, Ralph J. Nickerson, Paul R. Morris, Ray E. Sabata, Ted R. Frogge, W. G. Kieck, Elbert H. Smith, Lloyd L. Pospishil, Charles H. Hood and *Burr R. Davis,* for plaintiffs.

William H. Wright, Attorney General, Milton C. Murphy, Sterling F. Mutz and *Lester A. Danielson,* for defendants.

Lee Basye, for interveners.

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

CARTER, J.

This is an original action by which certain taxpayers seek an adjudication of the constitutionality of the emergency relief measures enacted by the fiftieth session of the Nebraska legislature, which measures are known as Senate File No. 363, House Roll No. 432, House Roll No. 675, and Senate File No. 367, the same being companion acts creating a state assistance committee and providing for the raising of funds to be used for the relief of the unemployed, old age pensions, and for other purposes therein described. The Nebraska Petroleum Marketers, Inc., intervened in behalf of the members of such association and all other persons similarly situated. Calvin J. Stover, a gasoline dealer and a taxpayer who is required to pay the one-cent additional gasoline tax, as provided by Senate File No. 363, also intervened in behalf of himself and all others similarly situated. The case is presented and submitted on the general demurrers of the defendants to the petition of plaintiffs and the petitions of intervention of the interveners.

Senate File No. 363, as amended by House Roll No. 432, imposes a one-cent motor vehicle fuel tax, in addition to the previous four-cent gasoline tax, for emergency relief purposes, said tax to be collected from March 1, 1935, to June 30, 1936. The act provides in part as follows: "For assistance to its citizens who are eligible under federal legislation to work relief, direct relief, old age assistance, assistance to dependent mothers and children, unemployment insurance, health of mothers and children, public health or related matters of security and welfare, and public works, especially roads, by the use of work relief."

House Roll No. 675, as amended by Senate File No. 367, appropriated $300,000 of the state general fund, $700,000 of liquor license fees and $3,000,000 from the emergency motor vehicle fuels tax, and provides governmental ma-

chinery for the distribution of the funds, consisting of the state assistance committee, an administrative board, coordinating with the board of educational lands and funds of the state of Nebraska, a trustee of the state assistance fund. Section 13 of House Roll No. 675 provides in part: "Such grants by the state assistance committee shall be made in proportion to the need of such counties and other governmental subdivisions for assistance, when, after reasonable effort, they are unable to furnish necessary and adequate assistance for dependent persons."

The acts of the legislature under consideration designate many classes of emergency and permanent relief and provide that preference should be given for matching federal funds for old age assistance, without any directions or limitations for allocating funds for any of those purposes and without any basis for the determination of the need.

In order to make a county eligible for federal relief, under the rules promulgated by the federal relief administration, the county must provide for its road and bridge funds an amount equal to 25 per cent. of its gasoline tax income for such purpose, and, in addition thereto, levy 1.93 mills of the 1934 assessed valuation for relief purposes, and certain other relief levies not material to this action. It is contended by plaintiffs, and admitted by defendants' demurrer, that certain counties of Nebraska are already making the maximum levies permitted by the Constitution and they are therefore precluded from making the required levy for the matching of federal funds for relief purposes. In certain other counties the relief load has been borne by the counties themselves by levying less than the 1.93 mills required by the federal relief administration and hence they also are ineligible for federal relief.

At the date of the filing of the petition, the congress of the United States had not passed any law providing for old age assistance, public security, health and welfare. It is also admitted by the pleadings that there are distressed and needy persons in all counties of the state of Nebraska within each and all the classifications contained in the acts

in question, and particularly within the 23 counties above mentioned which are not eligible for federal relief.

The plaintiffs contend that the laws in question are unconstitutional for the following reasons: (1) That the acts delegate legislative powers to the congress of the United States and to the executive branch of the state government and therefore violate section 1, art. II, and section 1, art. III of the Constitution; (2) that the acts are not for a general or public purpose, for the reason that the benefits are not state-wide in their scope and do not affect all needy persons of the state in the same class, and therefore violate section 3, art. I of the Nebraska Constitution, and the Fourteenth Amendment of the federal Constitution; and (3) that the acts are broader than their respective titles and therefore violate section 14, art. III of the Nebraska Constitution.

The first question to be determined is whether the legislature has delegated legislative authority to the congress of the United States or to the state assistance committee. If so, the act contravenes section 1, art. II, and section 1, art. III of the Constitution of Nebraska.

Senate File No. 363, as amended by House Roll No. 432, provides in part as follows: "An additional tax of one cent per gallon upon all motor fuels received, imported and unloaded and emptied, * * * and produced, refined, manufactured or compounded by such dealer in the state of Nebraska shall be remitted to the department of agriculture and inspection * * * commencing March 1, 1935, and ending June 30, 1936, shall be credited and shall inure to the state assistance fund, and during said period shall be expended under the general direction of the board of educational lands and funds, advising and counseling with the state assistance committee, solely for assistance to worthy indigent poor persons throughout the several counties in such sum as the board of educational lands and funds shall allocate from time to time during said period and the sums so allocated to be administered by the county boards of the several counties cooperating with such welfare agencies as

provided by law. * * * In passing subsection (b) of this act it is the intention of the legislature that all motor vehicle fuels tax money accruing and in the hands of the state treasurer subsequent to twelve o'clock midnight, June 30, 1936, arising out of the provisions of subsection (a) of this section shall be used and employed as provided in subsection (a) of this section. It is hereby declared that the provisions of subsection (b) of this section are made necessary by emergencies arising out of the present economic crisis, pursuant to requirements of the United States of America that the state of Nebraska and its several counties contribute not less than four million dollars per annum for assistance to its citizens who are eligible under federal legislation to work relief, direct relief, old age assistance, assistance to dependent mothers and children, unemployment insurance, health of mothers and children, public health or related matters of security and welfare, and public works, especially roads, by the use of work relief labor; and in order to relieve conditions which make it impossible for counties properly and necessarily to assist worthy persons by the issuance of anticipatory warrants against the general funds of the several counties until on or before August 1, 1935."

Section 73 of House Roll No. 381, the general appropriation bill, appropriates $4,000,000 to the state assistance committee. There is no provision in any of the bills mentioned that fixes any standards for the guidance of the state assistance committee or the board of educational lands and funds. The committee and board above mentioned have an arbitrary and unrestricted discretion to allocate the $4,000,000 to any of the purposes set forth in the acts under consideration, with the single exception that old age pensions are to be given a preference. Under these acts, the board and committee have the power, if they see fit to do so, to allocate the whole fund to the payment of old age pensions and unemployment insurance without the requirement of the making of any findings of fact under standards and tests provided for in the act. Such provi-

sions amount to a delegation of legislative power. Under section 1, art. II, and section 1, art. III of the Nebraska Constitution, the legislative power of the state is vested in the legislature and cannot lawfully be delegated to any board or committee. Such provisions deny the equal protection of the law and violate the due process provisions of the Fourteenth Amendment to the federal Constitution.

In the case of *Investors Syndicate v. Bryan,* 113 Neb. 816, this court said:

"Plaintiff earnestly contends that the above sections of the statute are void because they vest in an administrative board absolute, unregulated, and undefined discretion to grant or withhold its certificate of approval under general statutory language, which fixes no standards or tests to which an applicant may knowingly conform, and from which it can be determined whether corporations, transacting precisely the same kind and character of business, have been or may be dealt with equally; that the statute attempts to vest in an administrative board absolute and arbitrary power to say which, if any, of two or more companies, proposing to transact the same kind of business in the same manner and under like conditions, may be permitted so to do in the state of Nebraska.

"If the statutes, when properly construed, grant or attempt to grant to an administrative board such unrestricted and arbitrary discretion as plaintiff contends they do, then we will be compelled to hold that they are void because violative of both state and federal constitutional provisions. They would deny the equal protection of the law and violate the due process provisions of the Fourteenth Amendment to the federal Constitution. They would then fall within the class of statutes and ordinances that are condemned in *Yick Wo v. Hopkins,* 118 U. S. 356; *Tai Kee v. Minister of Interior,* 12 Hawaiian Rep. 164; *State v. Superior Court,* 113 Wash. 296; *City of Richmond v. Dudley,* 129 Ind. 112; *City of Seattle v. Gibson,* 96 Wash. 425; *Bear v. City of Cedar Rapids,* 147 Ia. 341; *Hewitt v. State Board of Medical Examiners,* 148 Cal. 590, 3 L. R. A. n. s. 896."

Clearly, in the case at bar, the purposes, for which the fund of $4,000,000 was to be expended, were to be determined by the state assistance committee and the board of educational lands and funds. This is a duty of the legislature that cannot be delegated. In the case of *People v. Brady,* 277 Ill. 124, the court said: "The General Assembly must determine to what objects and purposes money of the state shall be appropriated, and cannot bestow that power upon any person or board for the exercise of discretion of the donee as to the objects for which the money shall be expended." Also, in *People v. Belcastro,* 356 Ill. 144, the court said: "If the legislature leaves to administrative officers the determination of what the law shall be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. 1 Sutherland on Stat. Const. (2d ed.) p. 148."

In *Panama Refining Co. v. Ryan,* 293 U. S. 388, Chief Justice Hughes, in discussing the question of the delegation of legislative power by congress to the president of the United States, said: "It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of state legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the president's authority by reference to the basis or extent of the state's limitation of production. Section 9 (c) does not state whether or in what circumstances or under what conditions the president is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the president's course. It does not require any finding by the president as a condition of his action. The congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the president an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see

fit. * * * The congress did not declare in what circumstances that transportation should be forbidden, or require the president to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the president was not required to choose. The president was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The congress left the matter to the president without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the president the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy. * * * The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the president has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute. While the present controversy relates to a delegation to the president, the basic question has a much wider application."

In *A. L. A. Schechter Poultry Corporation v. United States,* 55 Sup. Ct. Rep. 837, Chief Justice Hughes said: "We pointed out in the *Panama Refining Company* case that the Constitution has never been regarded as denying to congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitu-

tional system is to be maintained. *Id.*, 293 U. S. 388, page 421. * * * To summarize and conclude upon this point: Section 3 of the Recovery Act (15 U. S. C. A. sec. 703) is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of Codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the president in approving or prescribing Codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the Code-making authority thus conferred is an unconstitutional delegation of legislative power."

The above cases have particular application in principle to the case at bar. In the Nebraska acts, there are no limitations, standards, rules of guidance or criterion for the guidance of the state assistance committee and the board of educational lands and funds in allocating funds for old age assistance, unemployment relief, mothers' health, unemployment insurance, and other forms of relief therein enumerated. There is no requirement that the administrators of the acts find certain facts in determining for which of the various purposes allocations should be made and no basis for determining the amount to be allocated to each or any of the purposes therein set forth. This is all left to the discretion of the state assistance committee. Under the authorities hereinbefore cited, this constitutes a delegation of legislative functions to an administrative board.

It will also be noted that section 12 of House Roll No. 675, as amended by section 2 of Senate File No. 367, provides: "Assent is hereby given to the provisions of an act

of congress (H. R. 7260), now pending and as finally adopted entitled 'An act to provide for the general welfare by establishing a system of federal old-age benefits, and by enabling the several states to make more adequate provisions for aged persons, and for other purposes;' and the good faith of the state of Nebraska is hereby pledged to provide funds sufficient to carry out the provisions of said act of congress as hereinafter provided." The petition of plaintiffs alleges, and the demurrer admits, that the above act of congress had not been passed by the congress when the Nebraska acts under consideration became laws, nor had it been passed when plaintiffs' petition was filed. The contention is made that this is an unconstitutional delegation of legislative power to the congress of the United States.

In *Opinion of the Justices,* 239 Mass. 606, that court said:

"It is attempted by these sections and possibly by other sections to make the substantive law of the commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by congress and new regulations issued pursuant to their authority by subsidiary executive or administrative officers of the United States. It purports to create offenses and impose punishments therefor, not by definition and declaration, but by reference to what may hereafter be done in these particulars by the congress of the United States and those by it authorized to establish regulations.

"We are of opinion that legislation of that nature would be contrary to the Constitution of this commonwealth. Legislative power is vested exclusively in the general court except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive

privilege and obligation to enact laws. *Boston v. Chelsea*, 212 Mass. 127; *Opinion of the Justices*, 160 Mass. 586; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149."

In *Cline v. Consumers Cooperative Gas & Oil Co.*, 274 N. Y. Supp. 362, 383, the court said, in considering a like question: "By analogy, there is no power in the legislature of the state of New York to delegate any of its legislative powers to any outside agency, as to the federal government or to the president of the United States. To do so is to impair the sovereignty of the state itself."

In *Darweger v. Staats*, 275 N. Y. Supp. 394, 401, the court said:

"The Schackno act does more than merely declare a policy and provide means to carry it into effect. The NIRA is not adopted, but it is declared to be the policy of the state of New York to conform in intrastate commerce and transactions with its purpose and administration. Codes adopted under the NIRA are made, though not in existence, by reference those of the state of New York. The act adopts not a law of the congress, but a body of rules and regulations prepared by individuals, approved by an administrative authority and finally approved by the president, and then provides that, upon filing a certified copy in the office of the secretary of state, a violation of any provision of such Code so adopted and filed is a crime under the laws of the state of New York. To term such a method of legislation, such a manner of attempting to create criminal offenses, vicious is to indulge in mild criticism. To hold such a legislative act constitutional seems contrary to the plain language and import of our fundamental laws, both national and state. * * * The legislature cannot delegate the sovereign powers of the state to an administrative or executive authority of a foreign jurisdiction. It cannot surrender the sovereignty of the state to declare the acts constituting a crime to federal executive or administrative authority.

" 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved

to the states respectively, or to the people.' U. S. Const. 10th Amendment.

"It seems to us, without attempting to enter into an extended analysis or discussion, that such a statute is violative of the provisions of the Constitution of the state of New York above referred to, as well as contrary to every principle upon which our republican institutions are based."

In affirming the above case, the court of appeals of New York said: "The state legislature cannot leave to congress to determine that an emergency exists in intrastate business in the state of New York, and we may say in passing, that congress has not attempted to do so. The legislature cannot leave to a body of industrials throughout the United States to declare that an emergency exists here in intrastate business, and to provide methods and means for meeting that emergency. * * * Even then the legislature in this case has made no attempt to fix the price of coal or to appoint anybody to investigate as to its necessity. It adopts without ascertaining the facts for itself what may or may not be done by others having interests outside of New York state. * * * We conclude that this state law which we are reviewing is unconstitutional, as an unauthorized delegation of legislative functions, contrary to our state Constitution." *Darweger v. Staats,* 267 N. Y. 290.

Senate File No. 363, as amended by House Roll No. 432, levies a one-cent a gallon tax on all motor vehicle fuels in addition to the tax of four cents a gallon already levied. The taxes thus collected, in the words of the statute, "shall be credited and shall inure to the state assistance fund." The statute further states: "The temporary regulations contained in subsection (b) are designed to promote public convenience as well as the general welfare and prosperity to meet an emergency which the legislature deems of immediate importance since the United States of America requires that legislation on the part of the state of Nebraska to raise said four million dollars annually be enacted prior to March 1, 1935: Provided, that the authority

is hereby given the governor of the state of Nebraska to terminate this tax by executive order when the full amount appropriated has been raised or when he is satisfied the full amount appropriated, or so much thereof as may be necessary, will be raised from funds appropriated for relief purposes as now or hereafter provided." As we have heretofore mentioned, the federal legislation referred to has not been passed. The amount of taxes to be derived from the tax was therefore left as an uncertain amount. Apparently the legislature realized that the federal legislation might carry an appropriation of funds for Nebraska in a sum less than the $4,000,000 provided for in the statute. In order to prevent the collection of an amount in excess of the sum made available by the federal government to match state appropriations for relief, public works, etc., the governor was given power to terminate the tax by executive order "when the full amount appropriated has been raised or when he is satisfied the full amount appropriated, or so much thereof as may be necessary, will be raised from funds appropriated for relief purposes as now or hereafter provided." As we have herein determined, this set of facts constitutes a delegation of legislative power to the congress of the United States. The power to determine the amount to be raised by the tax is dependent upon federal legislation not yet passed.

It is true that the governor is directed under a certain state of facts to terminate the tax. When the full amount appropriated or so much thereof as is required has been collected, the governor is authorized so to act. But, in order to make such a determination, he must await the action of the federal congress which was authorized to fix the amount to be appropriated for relief, etc., in Nebraska. There is a great difference in authorizing the governor to terminate a tax when the amount appropriated has been collected and in having the governor determine the amount to be appropriated from facts not in existence when the act was passed, and terminating the tax when that amount has been collected.

The elimination of the invalid provisions of the legislative acts under consideration and the elimination of the invalid appropriation contained in the statutes leave entirely different statutes from those which were passed by the legislature, so that it cannot be said it would have passed the acts without said void provisions, and the acts must therefore be held void in their entirety. The rule was well stated by a prominent text-writer as follows: "And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all of the provisions which are then dependent, conditional, or connected must fall with them." 1 Cooley, Constitutional Limitations (8th ed.) 362. This court has held: "Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to have an enforceable statute expressing the legislative will, no part of the enactment can be enforced." *State v. Junkin,* 85 Neb. 1. Also, in *Searle v. Yensen,* 118 Neb. 835, this court said: "Sections 3 and 4, ch. 108, Laws 1927, are unconstitutional, as an attempt to impose upon the courts the performance of nonjudicial duties, and an unlawful delegation of legislative power; and such sections being a part of the inducement for the enactment, the entire act must fall." In *Moeller, McPherrin & Judd v. Smith,* 127 Neb. 424, this court announced the rule as follows: "When sections of a legislative act are unconstitutional, and such sections were an inducement to the passage of an act in its entirety, then the entire act is void, notwithstanding a saving clause therein." After resolving all doubts in favor of the validity of the acts in question, yet with the eliminations stated, the remaining parts are not the acts the legislature passed or intended to pass, and hence the acts under review, wholly and entirely, are void.

We conclude, therefore, that Senate File No. 363, as

amended by House Roll No. 432, violates section 1, art. II, and section 1, art. III of the Nebraska Constitution, for the reason that the state assistance committee and the board of educational lands and funds have been delegated legislative powers therein which violate the provisions of the Constitution mentioned. We hold further that House Roll No. 675, as amended by Senate File No. 367, violates section 1, art. II, and section 1, art. III of the Nebraska Constitution, for the reason that the congress of the United States has been delegated legislative powers by the terms of these acts which violate the provisions mentioned of the Constitution of Nebraska.

In view of the fact that the acts under consideration are nullities, it is not necessary that the other contentions of plaintiffs and interveners be considered.

We therefore hold that the demurrers of the defendants to plaintiffs' petition and to the petitions in intervention should be and hereby are overruled.

JUDGMENT ACCORDINGLY.

PAINE, J., concurring.

I concur in the opinion adopted by the court. In addition to the discussion of the attempt to delegate legislative powers to an administrative board and to the congress of the United States, as set out in the main opinion, I desire to emphasize another phase of the attempted legislation.

While certain smaller amounts could be used, under Senate File No. 367, for assistance in the payment of pensions, unemployment insurance, health of mothers and children, or related matters, in any county of the state, yet the bulk of the funds was to be used in direct relief and work relief, and in this concurring opinion I will only discuss that phase of the legislation.

It is provided that such relief funds shall be allocated to the county boards of the several counties which cooperate with certain welfare agencies of the state and nation. The funds shall be distributed on the basis of need in such counties when, after reasonable effort, they are unable to furnish necessary and adequate assistance for

dependent persons residing in such counties. The act does not provide for relief to any county unless and until the governing body shall adopt a resolution accepting its provisions. Therefore, the acts are not for the distribution of these funds for relief of needy persons in all the counties of the state uniformly, but are specifically restricted for distribution in those counties which certify to the authorities that they are unable to meet the needs of the relief burden in their counties.

In the briefs before this court, 23 counties appear, joined together as plaintiffs, insisting that these acts are void, and nearly all of their county attorneys were present at the time of the arguments to resist this legislation, for the reason that such counties have so far handled all of the poor relief in each of their counties by their own tax funds, and have not, and insist that they will not, ask the state for any assistance; therefore, they will be excluded from any benefit of this state assistance fund. The counties resisting the enforcement of these laws are Antelope, Arthur, Banner, Butte, Cass, Cuming, Dawson, Grant, Keith, Kimball, Merrick, Nemaha, Saline, Sarpy, Phelps, Seward, Sioux, Hooker, Colfax, Gosper, Saunders, Stanton, and Wayne.

This law clearly authorizes a one-cent tax on gasoline to be collected in each of these 23 counties of our state and expended for relief in the other 70 counties of the state which have already applied to the state for assistance. This legislation taxes, in this way, the people of these 23 counties who are carrying the entire load of supporting their own poor and unfortunate by their own funds, raised by the taxpayers of their county, and expends this one-cent gas tax so raised entirely in other counties who have failed to carry their own relief burden.

It may be argued that money raised by the state for highway purposes, and to erect bridges and build and maintain state highways, might be so disposed of that money raised in one county might be expended for a bridge in another county, although such funds could not be so traced,

but all of such funds can only be spent on a highway which has been designated by the legislature as a state highway which under our law is accepted as a public purpose for the benefit of the entire state.

On the other hand, it is generally held that the relief of the poor is primarily a burden on the county of which such persons are legal residents. The proceeds of this tax, when appropriated to each of the 70 counties sharing therein, will be expended only by the officials of each county, showing it is not for a state-wide public purpose, but for relief in some 70 counties only, and must be expended by such counties according to rules adopted by an outside agency. This taxing of all the people of the entire state, and expending the proceeds for relief only in certain counties, is not considered a public purpose of state-wide extent.

Of the guaranteed rights, that of equality holds high place in the list. "Discrimination of one citizen in favor of another is beyond legislative authority to make, whether legislation expresses it in terms or produces it in result. Classification must be reasonably adapted to secure a legitimate public interest." *Woolf v. Fuller,* 87 N. H. 4.

I cannot agree that the distribution of funds from this one-cent gasoline tax is a general or public purpose when it cannot be used under the very terms of the legislation except in certain counties. Such a law violates the letter and the spirit of our Constitution, which declares that no person shall be deprived of his property without due process of law. Const. art. I, sec. 3.

It is not even sufficient that a tax be levied for a public purpose, but it must be levied for the use of the public of the district taxed. 26 R. C. L. 72, sec. 51.

It is convincing to me that, while a state-wide tax for the benefit of all needy persons throughout the state would be for a public purpose, yet when the benefits of a state-wide tax are limited, and can only be expended in a definite portion of the state, to the exclusion of the balance of the state, it is not a public purpose, and is clearly illegal for that reason.

STATE, EX REL. CHARLES W. TAYLOR, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NEBRASKA, RELATOR, V. GEORGE E. HALL, TREASURER OF THE STATE OF NEBRASKA, RESPONDENT.

FILED SEPTEMBER 26, 1935. No. 29549.

1. **Constitutional Law**: OFFICIAL SALARIES: LEGISLATIVE RESTRICTIONS. By section 19, art. III of the Constitution of this state, the legislature is prohibited from increasing or diminishing the salary of any public officer during his term of office, whether such salary is fixed by the Constitution or by the legislature subsequent to the adoption thereof.
2. ———: LEGISLATIVE ACTS: UNIFORMITY. By section 18, art. III of the Constitution, the legislature is prohibited from passing any act granting to an individual any special or exclusive privileges or immunity, and it is provided that, in all cases where a general law can be made applicable, no special law shall be enacted. *Held*, to prohibit class legislation which does not operate equally and uniformly upon all members of the class brought within its operation.
3. ———: ———: ———. The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
4. ———: ———: ———. Subject to the rules of proper classification, public offices and their incumbents may be divided into classes for purposes of legislation concerning them.
5. ———: ———: ———. By section 2, art. V of the Constitution, the judges of the supreme court, and judges of the district court, and by section 19, art. IV, members of the board of control, and by section 20, art. IV, members of the state railway commission, are constituted separate classes respectively; and all except members of the board of control are classified specifically as to salaries by section 3, art. XVII.
6. **Statutes**: CONSTITUTIONALITY. If portions of an act are unconstitutional, and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, or putting into effect a law which the legislature would not have passed had its attention been called to the invalid parts, the entire act must fall.

7. ———: ———. Where invalid portions of an act constitute a material part of the inducement for the enactment, the entire act must fall.
8. ———: ———: PARTIES. Ordinarily, a party may not be heard to assert the unconstitutionality of an act upon grounds which do not injure him in his personal or property rights; but where an act deals with a single subject and the party complaining is treated the same as all the others with relation to that subject, the provisions may be so interdependent that each must be considered as the inducement for the other.
9. ———: ———: EMERGENCY CLAUSE. Where by virtue of an emergency clause an act is to take effect immediately upon its approval, and no part can operate at that date because of constitutional inhibitions, the emergency clause is invalid; and in the absence of any declaration that any portion of the act shall take effect at a different date, the act will not be given a prospective operation, contrary to its express provision, and the invalid clause will drag down the entire act.
10. ———: CONSTRUCTION: LEGISLATIVE INTENT. In construing a statute, the court will consider the history of its passage, the amendments offered and the action taken thereon by the senate and house, as well as all matters of common knowledge respecting the subject of legislation, for the purpose of arriving at the legislative intent.
11. ———: ———. Chapter 63, Laws 1933 (Comp. St. Supp. 1933, sec. 84-726), also known as Senate File No. 52, is unconstitutional in its entirety for the following reasons:

    (1) As to all officers mentioned including relator, except the heads of departments, as violative of section 19, art. III of the Constitution, prohibiting the reduction or increase of salaries of public officers during their term of office.

    (2) As to judges of the supreme court, judges of the district court, members of the board of control and state railway commission, as class legislation prohibited by section 18, art. III of the Constitution.

    (3) As to the heads of departments, for failure to comply with section 14, art. III of the Constitution, respecting amendments.

    (4) Section 2 of the act (emergency clause) is invalid as in violation of section 19, art. III of the Constitution, and constituted the inducement for the passage of the act.

Original proceeding in mandamus by the state, on relation of Charles W. Taylor, superintendent of public instruction, against George E. Hall, state treasurer, to

compel respondent to countersign and pay a salary warrant. *Writ allowed.*

Peterson & Devoe, for relator.

William H. Wright, Attorney General, and *Harvey M. Johnsen,* for respondent.

Heard before GOSS, C. J., ROSE and EBERLY, JJ., and FITZGERALD, MESSMORE, REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

This is an original action instituted in this court by the state, on the relation of Charles W. Taylor, as superintendent of public instruction of Nebraska, against George E. Hall, as treasurer of the state of Nebraska, respondent, praying that a peremptory writ of mandamus issue to said respondent requiring him to countersign and pay a warrant dated April 1, 1935, regularly issued by the auditor of public accounts of the state of Nebraska on the state treasury in the sum of $1,250 for payment of the salary of the relator as superintendent of public instruction for services rendered by him in his official capacity for the quarter ending March 31, 1935. By the amended petition relator alleges that, at a general election in November, 1934, he was elected superintendent of public instruction for a term of four years commencing January 3, 1935, and duly qualified and entered upon his official duties; that respondent is state treasurer and, upon presentation of a warrant duly issued by the auditor of public accounts in the sum of $1,250 for payment of relator's salary for the quarter ending March 31, 1935, refused to countersign and pay the same solely because of and on account of the provisions of section 84-726, Comp. St. Supp. 1933, known as Senate File No. 52, and found at page 297, Laws 1933, a copy of which will be hereinafter set forth. The petition further alleges:

"That on May 1, 1933, the stated and purported effective date of said section 84-726, Comp. St. Supp. 1933, your relator as superintendent of public instruction and the

governor, attorney general, secretary of state, auditor of public accounts, commissioner of public lands and buildings and the treasurer of the state of Nebraska were holding their offices, respectively, for and during a tenure or term which commenced prior to the stated and purported effective date of said act, to wit, May 1, 1933, and ending at midnight of January 2, 1935; that the chief justice, the judges of the supreme court, the judges of the district court, the members of the board of control and the members of the state railway commission were holding their offices, respectively, for and during a tenure or term which commenced prior to the stated and purported effective date of said act; the term or tenure of the chief justice ending in January, 1939, and the tenure or term of the judges of the supreme court ending, respectively, three in January of 1937, and three in January of 1935; the term or tenure of the judges of the district court ending in January, 1937; the term or tenure of the members of the state railway commission ending, respectively, one in 1939, one in 1937, and one in 1935; the term or tenure of the members of the board of control ending, respectively, one in July of 1939, one in July of 1937, and one in July of 1935."

The petition further alleges that under section 3, art. XVII of the Constitution, relator's salary is, and has been at all times since the adoption of the Constitution in 1920, the sum of $5,000 per annum; and sets forth a number of grounds upon which it is claimed that said section 84-726, Comp. St. Supp. 1933, which will be hereinafter set out, is unconstitutional, and prays for a peremptory writ of mandamus.

Respondent answered and admitted the material allegations of the petition, and admits that he refused to countersign and pay said warrant for the sole reason that by section 84-726, for a term of four years commencing January 3, 1935, relator's salary was fixed at $3,400 per annum, whereby he was only entitled to the sum of $850, which respondent has always been ready to pay.

Relator filed a motion for judgment on the pleadings and it was stipulated that the cause be submitted to the court on said motion, the only question involved being the constitutionality of said section 84-726.

We set out in full the act under attack:

"An act relating to fees and salaries; to provide a schedule of salaries for certain state officers mentioned in the Constitution; and the heads of various departments mentioned in the laws of Nebraska, and to declare an emergency.

"Be it Enacted by the People of the State of Nebraska:

"Section 1. It is hereby provided by law that salaries as follows shall be paid to certain state officers mentioned in the Constitution: Governor, $6,000 per annum; Chief Justice and Judges of the Supreme Court, each $5,200 per annum; Tax Commissioner, $4,000 per annum; Judges of the District Court, and Attorney General, $4,000 per annum; Secretary of State, Auditor of Public Accounts, Commissioner of Public Lands and Buildings, Treasurer, Superintendent of Public Instruction, each $3,400 per annum; Members of the Board of Control, each $3,200 per annum; Members of the State Railway Commission, each $3,400 per annum; Director of the Department of Agriculture and Inspection, $3,800 per annum; Commissioner of Labor, $3,000 per annum; Director of Health, $3,600 per annum; State Engineer, $4,800 per annum; Director of Banking, $4,500 per annum; Director of Insurance, $3,600 per annum.

"Section 2. Whereas, an emergency exists, this act shall be in full force and take effect from and after its passage and approval."

The unconstitutionality of the act is asserted upon the following grounds:

(1) That the act is amendatory of sections 77-301, 83-107 and 75-101, Comp. St. 1929, and section 81-103, Comp. St. Supp. 1933, and said sections were not contained in the act and were not thereby repealed, in violation of section 14, art. III of the Constitution of Nebraska, which

reads as follows: "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."

(2) That said section is amendatory of the same sections above set out with special reference to salaries of tax commissioner, members of the board of control, members of the state railway commission, director of the department of agriculture and inspection, commissioner of labor, director of health, state engineer, director of banking and director of insurance, and is unconstitutional for the same reason.

(3) That by the provisions of sections 2, 4, 5, 7 and 13 of article V, and section 3 of article XVII, of the Constitution of Nebraska, the judges of the supreme court are created as a distinct class for all purposes of legislation affecting them; that by section 19, art. IV of the Constitution, the members of the board of control are created as a distinct class for all purposes of legislation affecting them; that by section 3, art. XVII, and section 20, art. IV, of the Constitution, the members of the state railway commission were created as a distinct class for all purposes of legislation affecting them; and that as to each of said classes, respectively, section 84-726, Comp. St. Supp. 1933, is class legislation in violation of section 18, art. III of the Constitution, upon the ground that said act does not operate uniformly upon and does not affect alike all persons within the respective classes, and also for the reason that the act is in violation of section 19, art. III of the Constitution, providing that the compensation of any public officer shall not be increased or diminished during his term of office; and that said unconstitutional provisions formed the inducement to the passage of the remainder of the act and rendered said act in its entirety unconstitutional and void.

(4) That neither said act as a whole, nor any part thereof, became effective or operative on the date expressed in the preamble or body of the act, to wit, May 1, 1933.

(5) That it was the intention of the legislature, due to

a general financial depression, amounting to a national emergency, that said act should operate immediately and uniformly in respect of all salary provisions therein from May 1, 1933, the date of its passage, as provided by the emergency clause, which said emergency clause is unconstitutional and void as violating section 19, art. III of the Constitution, forbidding increasing or diminishing the salary of any official during his term of office, and that said clause formed the inducement to the passage of the remainder of the act and renders said act void in its entirety.

Upon the face of the petition, it appears that relator's prior term commenced January 2, 1931, and ended January, 1935; his present term began January 3, 1935, he having been reelected in November, 1934. Under section 19, art. III of the Constitution, his salary could not be changed during his prior term, whether the effective date of the act was May 1, 1933, under the emergency clause, or, without such clause, three months after the adjournment of the legislature. It appears that relator had served as superintendent of public instruction for the four-year term beginning January, 1931, and received a salary of $5,000 a year for the entire term, notwithstanding the passage of section 84-726, Comp. St. Supp. 1933. It is therefore apparent that relator is not directly affected by the asserted invalidity of the statute under numbers 1 and 2 as above set forth, for the reason that the salary of relator as superintendent of public instruction is not covered or affected by any one of the statutes sought to be amended; the relator is a constitutional officer whose salary was fixed by the Constitution at $5,000 a year until otherwise provided by law (Const. art. XVII, sec. 3) and the act in question fixing the salary of relator was not amendatory of any other act, but was an original act in pursuance of the authority granted by the Constitution. As to number 3, relator is not a member of any one of the classes as to which the act is asserted to be invalid as class legislation. As to number 4, under our decision in *State v.*

Hall, 125 Neb. 236, later referred to, and as above suggested, the act was ineffective to reduce relator's salary during his then term expiring January 2, 1935. Whether it was effective as to his term beginning January, 1935, is open for decision. As to number 5, the query is whether relator may urge the invalidity of the act upon the ground that invalid portions of the act, other than that referring to his own salary, were the inducement for the passage of the act and the entire act was thereby rendered void.

With reference to this situation, it is the contention of respondent that relator has no standing to assert the unconstitutionality of the statute upon grounds which do not affect him personally or are not applicable to the particular case of relator, and this seems to be the general rule, based upon the general proposition that courts will not ordinarily decide questions of law not presented by the necessities of the particular case before them, or by the decision of which the plaintiff will receive no personal benefit, or a refusal to decide them will result in no injury to him. *In re Gibson,* 35 N. M. 550; *Young Co. v. McNeal-Edwards Co.,* 283 U. S. 398; *State Tax Commission v. Board of Supervisors,* 29 Pac. (2d) (Ariz.) 733; *State v. Howard,* 67 Okla. 289; *Urbach v. City of Omaha,* 101 Neb. 314.

These cases, however, do not deal with situations involving the question of the effect upon the entire act where certain sections or provisions thereof are found to be in conflict with the Constitution, and such invalid portions are the inducement, or a material part of the inducement, for the enactment of the valid portions. If, in the particular case, the act is found to be unconstitutional, and it is apparent that the invalid portion is so connected with other portions of the act, considering the general purpose or object of the legislation, that the rejection of the invalid part will disturb or interfere with the taking effect of the act as a whole, or bring about a result not in accord with the legislative intent, there seems no good reason why the court may not consider the entire act in connection with the invalid part for the purpose of discovering and de-

claring the legislative intent and determining whether the invalid portions were a part of the inducement for the enactment of the remainder; and relator claims that the reduction of his salary was a part of such inducement which opens the inquiry as to what was the entire inducement of which relator claims the section relating to his individual case is a part. Furthermore, if the entire act is void by reason of invalid portions constituting an inducement for enactment of remainder, relator would suffer injury by a refusal of the court to decide that question. In truth, it would seem the duty of the court, in the interest of prompt and orderly administration of justice, and definite settlement of disputes as to the validity of an act, and to prevent unnecessary litigation, to make its pronouncement upon the law as a whole, especially where the question is one of great public interest, and the rights of numerous persons are involved.

The act under consideration deals with the salaries of numerous officials—7 supreme justices, 35 district judges, 6 state heads of departments, 1 tax commissioner, 1 governor, 1 attorney general, 1 auditor of public accounts, 1 commissioner of lands and buildings, 1 superintendent of public instruction, 3 members of the board of control, and 3 members of the state railway commission; it purports to reduce the salaries of all except the 6 heads of departments, as to each of which an increase is provided; it has but one subject—salaries, which is treated of only in section 1. Section 2 is the emergency clause. We are, therefore, of the opinion that, although the salary of only one official, superintendent of public instruction, is directly involved in the present application for a writ of mandamus, for the purpose of determining the question whether the particular provision is so connected with the other provisions of the act as to make them interdependent, we should take a comprehensive view of the entire act, taking into consideration its valid and invalid provisions, as may be determined, and decide whether and what portions constituted the inducement for other portions; con-

cretely, whether the reduction of salaries of other officials (if invalid) was an inducement for the reduction of the salary of relator and *vice versa.*

We will discuss the objections to the act in the order in which they are presented in the brief of relator.

Numbers 1 and 2 may be considered together: That the act is amendatory of section 77-301, Comp. St. 1929, fixing the salary of the tax commissioner at $5,000 per annum, reducing it to $4,000. Also, section 83-107, fixing the salaries of members of the board of control at $4,000, reduced to $3,200. Also, section 75-101, fixing the salaries of railway commissioners at $3,000, increasing it to $3,400. Also, section 81-103, Comp. St. Supp. 1933 (Laws 1933, ch. 149), fixing salaries of departmental heads of agriculture, labor, health, engineer, banking and insurance at varying amounts, which were increased by the act in question, which may be referred to as House Roll 63, or section 84-726, Comp. St. Supp. 1933.

The constitutional provision claimed to have been violated is that portion of section 14, art. III, which reads as follows: "And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

The act in question does not purport to be amendatory of any other act; it refers to no other acts, and there was no attempt to comply with the constitutional requirement above quoted. It is, however, strictly amendatory; it seeks to change the salaries, already fixed by law, of certain officers. That such an act is invalid needs no citation of authority; in fact, we think its invalidity is conceded subject to the one exception, that an act complete in itself is not invalid because it may incidentally modify, change or destroy the effect of existing statutes. *State v. Moorhead,* 100 Neb. 298; *Drew v. Mumford,* 114 Neb. 100.

But is the act complete in itself? The subject is salaries; but by its terms it affects only "certain state officers mentioned in the Constitution, and the heads of various departments mentioned in the laws of Nebraska." It does

not purport to cover the entire subject of salaries of state officers and heads of departments. There are numerous state officers not mentioned in the act, whose salaries are fixed by law, so that the present act is not complete on the subject, it being necessary to refer to other acts as to salaries of other state officers. And the sole purpose and effect of the act is to change existing statutes; it presents no new subject of legislation; it is purely and simply amendatory. The language of Eberly, J., in *State v. Bauman,* 126 Neb. 566, is strictly applicable:

"In truth, the new enactment accomplished nothing of independent nature and its effect is wholly confined to 'changes' of what theretofore existed, with the evident intent of its authors that by the mingling of the new changes with the old provisions a connected piece of legislation covering the same and original subject would result. But this is strictly a process of amendment."

That an act purely amendatory which fails to comply with the constitutional requirement above quoted is void is held in the following, among numerous, cases in this state: *State v. Bauman,* 126 Neb. 566; *Endres v. McDonald,* 115 Neb. 827; *State v. Majors,* 85 Neb. 375; *Dinuzzo v. State,* 85 Neb. 351; *Tukey v. Douglas County, ante,* p. 353. There seems to be no question but that the act is invalid in so far as it attempts to change the salaries of the officials designated in the prior statutes, for failure to comply with the constitutional requirement as to amendments.

3. That the judges of the supreme court constitute a class under the provisions of the Constitution, and that all legislation concerning them must operate uniformly upon them all.

That judges of the supreme court constitute a class is founded upon a number of sections of the Constitution having special application to those officers as a group, such as: "The supreme court shall consist of seven judges, one of whom shall be the chief justice" (Const. art. V, sec. 2); provisions for the election of supreme judges from six

compact districts of approximately equal population; prescribing the qualifications of members; and the salaries they shall receive. These and many other provisions not necessary to enumerate have specific reference to those persons occupying the position of supreme judge, and set them apart as a distinct group or class. Counsel for respondent upon the argument remarked that the conception of a group of *officials* as a class was one of extreme difficulty, but the number of classes into which the citizens may be divided is practically infinite; a large number of them are mentioned in 12 C. J. 1131, such as insane persons, infants, old age, school children, blind persons, absent voters, convicts, tramps, attorneys, physicians, bakers, *et cetera.* It would seem to be an unwarranted discrimination to exclude the supreme judges from classification along with these groups of worthy people merely upon the ground that they were so unfortunate as to hold public office.

The power by constitutional or legislative provisions to designate classes of individuals, corporations, municipalities, associations and other groups is unquestioned; the only limitation being that, if fixed by legislation, the classification shall be reasonable—based upon peculiar circumstances surrounding the various persons, corporations, *et cetera,* composing each separate group. To constitute a group of individuals a class, it is not necessary that they be so denominated in the act; it is sufficient if the provisions of the act are made specially applicable to such group by reason of "such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity, or propriety, of different legislation with respect to them." *Hubbell v. Higgins,* 148 Ia. 36. See *Nichols v. Walter,* 37 Minn. 264. As was said in *Johnson v. Gunn,* 148 Cal. 745: "The classification is a proper one if the subjects included in it have some natural or intrinsic or constitutional distinction which differentiates them from other subjects of like general character, a distinction which bears some relation to, furnishes reasonable

cause for, or makes appropriate, the particular legislation." We have no hesitancy in holding that judges of the supreme court, judges of the district court, members of the railway commission and members of the board of control, respectively, constitute separate and distinct classes for purposes of legislation regarding them; each class satisfies the conditions set out in *Johnson v. Gunn, supra,* which states a rule sustained by all the authorities upon the subject.

There is no prohibition against "class legislation" by that name in the Constitution of this or any other state, or that of the United States, but the terms are used in decisions from all jurisdictions as a characterization of legislation in contravention of the Fourteenth Amendment to the Constitution of the United States providing: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws;" also state Constitutions and statutes prohibiting the enactment of special laws granting any special or exclusive privileges, immunities or franchises, or the passage of any laws for the benefit of individuals inconsistent with the general laws of the land. 12 C. J. 1128, and cases cited.

The applicable provisions of our Constitution are found in section 18, art. III, providing:

"The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

A law to be general must operate uniformly upon all persons and localities of a class brought within the relations or circumstances provided for. *State v. Berka,* 20 Neb. 375. It follows from this statement of the

rule that a law is not general but special which does not operate uniformly upon the class within the relations or circumstances provided for. In *Bessette v. People,* 62 N. E. 215 (193 Ill. 334) it was held that a statute "regulating horseshoeing * * * shall apply to cities of over 50,000 inhabitants, but that cities of over 10,000 inhabitants may adopt its provisions, thus excluding towns of under 10,000 inhabitants, is an arbitrary and unreasonable discrimination between persons engaged in the same occupation" (a class composed of horseshoers); and also void if construed as a classification of towns or cities. In *Badenoch v. City of Chicago,* 222 Ill. 71, an act making salaries and wages of officers and employees of certain municipalities subject to garnishment, and exempting others, was declared void and discriminatory as between persons of the same class. In *Galloway v. Wolfe,* 117 Neb. 824, we held that an act making it a misdemeanor for any person of the age of 14 years and upward to be found on the first day of the week, commonly called Sunday, engaged in public dancing, and excepting from the act cities of the metropolitan class having a welfare board with authority to regulate public dancing, was void as class legislation, in that it discriminated between persons of the same class doing the same act in metropolitan cities and other sections of the state. In *State v. Herrmann,* 75 Mo. 340, it was held that an act applicable only to notaries public in the city of St. Louis, and to notaries whose commissions bore date prior to the act and had not expired when the act took effect, was special legislation, as it did not include all persons belonging to the class—notaries public.

In *State v. Julow,* 129 Mo. 163, it was held that an act which does not relate to all working men, but only to those who belong to some lawful organization or society, was void as class legislation. The Missouri court quotes from Cooley, Constitutional Limitations (6th ed.) pp. 481-483, as follows:

"A statute would not be constitutional * * * which should select particular individuals from a class or locality,

and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute, which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." It is then stated: "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each." *State v. Julow, supra.*

See, also, *State v. Walsh,* 136 Mo. 400. Also, *State v. Garbroski,* 111 Ia. 496, involving discriminatory legislation affecting peddlers as a class.

Does the act in question operate uniformly upon the persons occupying the office of supreme judge considered as a class? It is to be noted that by the emergency clause the act was to take effect May 1, 1933. At that time there were in office a chief justice whose term expired in January, 1939, three justices whose terms expired January, 1935, and three justices with terms expiring January, 1937. The salary of these judges is fixed by the Constitution at $7,500 per annum and may not be increased or decreased during their respective terms. Const. art. III, sec. 19. Therefore the emergency clause could not take effect and the law is unconstitutional as changing their salaries during their terms. We so held with reference to the salary of a member of the railway commission in *State v. Hall,* 125 Neb. 236. But the act is also invalid as class legislation because, if given effect according to its terms on May 1, 1933, it would not operate uniformly upon all members of the class of judges of the supreme court, for the reason that, if the reduction of salaries is made effective, after January, 1935, as to those judges whose terms expired at

that time, or their successors, and as to those whose terms expire January, 1937, the chief justice would draw a salary of $7,500 until January, 1939, three justices $7,500 until January, 1937, and the other three $5,200 during the same period. The only distinction between the two groups of three judges is the fact that one group was elected from even numbered and the other from odd numbered districts. It requires no argument to show that such distinction furnishes no reasonable basis for classification justifying a departure from the rule of uniformity of operation of laws affecting individuals of the same class. The same situation is presented as to the members of the board of control and state railway commission whose terms expire respectively in 1935, 1937, and 1939. We are also of opinion that the act offends the prohibition against any special or exclusive privileges or immunity to any individual, as its effect, so far as legally enforceable if at all, would be to secure to four supreme judges a salary of $7,500 and allow three of them only $5,200 for the performance of the same duties during the same period of time. The same vice is present in the cases of members of board of control and railway commission, each drawing a different salary from others of the same class for part of their respective terms. We are therefore driven to the conclusion that the act is invalid as class legislation with respect to the salaries of judges of the supreme court; and *a fortiori* those of members of the board of control and the state railway commission.

4. That neither said act as a whole nor any part thereof became effective on the date expressed in the preamble or body of the act, to wit, May 1, 1933. This point may be discussed with No. 5.

5. That the act is void as violating section 19, art. III of the Constitution, forbidding increasing or diminishing the salary of any official during his term of office. That section reads as follows:

"The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the serv-

ices have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof, be increased or diminished during his term of office."

By the emergency clause (section 2), the act was made effective the date of its passage and approval, which was May 1, 1933. On said date relator and all other state officials mentioned in the act (with the possible exception of the heads of departments) were holding their offices for terms ending in January 1935, 1937, and 1939, as above stated; relator's term ending in 1935. It is therefore apparent that the act purports to reduce the salaries of such officers during their terms in direct violation of section 19, art. III, above quoted. That the act is void to the extent that it reduced the salary of the railway commissioners was distinctly held in *State v. Hall,* 125 Neb. 236; and the legal position of the other state officers (with the above exception), including relator, being the same as the railway commissioners as to this point, *State v. Hall, supra,* is determinative of this.

(1) We therefore hold that Senate File 52, being chapter 63, Laws 1933, and being, also, section 84-726, Comp. St. Supp. 1933, is unconstitutional and void as to governor, judges of the supreme court, judges of the district court, attorney general, secretary of state, auditor of public accounts, commissioner of public lands and buildings, treasurer, superintendent of public instruction, members of the board of control, and members of the state railway commission, for the reason that it violates section 19, art. III of the Constitution, prohibiting the increase or decrease of salaries of public officers during their terms of office.

(2) As to supreme court judges, members of the board of control and members of the state railway commission, said act is in conflict with section 18, art. III of the Constitution, and void as class legislation.

(3) That as to the heads of departments of agricul-

ture, labor, health, state engineer, banking and insurance, said act is amendatory and void for failure to comply with section 14, art. III of the Constitution, regarding amendments.

It remains to determine whether any part of the act may be sustained. As we understand the contention of respondent, it is that, though section 2 of the act is invalid, the act may be given a prospective operation and given effect after the expiration of the terms of the various officers designated. Such construction however would not meet the objection that the act is class legislation, for as to three members of the supreme court and the members of the board of control and railway commission, their salaries would not be uniform with those of other members of their respective classes. As to the remaining offices, the validity of such construction would depend upon whether the intent of the legislature would be thereby accomplished, and whether the immediate taking effect of the act as an entirety as provided by section 2 was an inducement for the enactment of section 1.

To the point that the mere fact that the provisions of an act become applicable to certain officers at different times because of a constitutional prohibition against increasing or diminishing salaries during a term of office does not invalidate the act, the state cites three cases, viz., *State v. Stuht*, 52 Neb. 209, *Hopkins v. Scott*, 38 Neb. 661, and *State v. Newbold*, 56 Kan. 71. But an examination of the doctrine of the cases cited, in the light of the statutes construed, discloses that it has no application to the present case. Thus, in *Hopkins v. Scott, supra*, the act construed was chapter 50, Laws 1891. This act was not passed with an emergency. The point of attack was a proviso, in the following words: "Provided, that this act shall not apply and be in force until the expiration of the present term of the state treasurer, and the expiration of the present term of the several county treasurers of the state." This was an express provision in the statute which this court rightfully held did not render the statute void. But no such pro-

vision appears in chapter 63, Laws 1933, under consideration.

The same situation is disclosed when we examine chapter 10, Laws 1897, involved in the case of *State v. Stuht, supra.* This was an Omaha charter. As in the case of *Hopkins v. Scott, supra,* certain provisions by their express terms first came into effect at a future time, and after the passage and approval of the act. Obviously when this occurs by virtue of express terms adopted by the legislature, the action is within the general principle that the legislature may determine a future time as the commencement of an enactment. This fully appears from paragraph 9 of the syllabus in such *Stuht* case, which is as follows:

"A law is not open to the criticism that separate provisions of it take effect at different dates if as an entirety it becomes of effect and operative on a fixed date, notwithstanding, as to some persons or matters affected by it, the law is of full operation immediately upon its passing into effect, and as to others its operation is not so full and complete until in the future on the happening of some stated contingency."

The same is true in the case of *State v. Newbold, supra.* In that case the tenth and twelfth sections of the act under consideration read as follows:

"Section 10. This act shall not affect the fees or salaries of the present county treasurer, county clerk, county attorney, register of deeds, clerk of the district court, sheriff, or probate judge, but shall be in full force and effect as to county surveyor."

"Section 12. This act shall take effect and be in force from and after its publication in the official state paper." Laws of Kan. 1893, ch. 81.

So, it will be seen that, by the express terms of this act, it was provided that it was not to "affect the fees or salaries of the present county treasurer," etc.

Thus, in none of the three cases cited is the controlling question involved which is presented in the present case, where we have an unconditional emergency clause without

any special provisions in the nature of exceptions appearing in the act.

Indeed, the Kansas case does not involve an "emergency" condition. It arises under a constitutional provision which prescribes: "The legislature shall prescribe the time when its acts shall be in force." Kan. Const. art. II, sec. 19.

True, it may be said that when the Kansas legislature has prescribed the date when its acts shall be in force, it has accomplished the same result that the Nebraska legislature achieves when it enacts the usual emergency clause as a part of an enactment. However this may be, the Kansas doctrine on this subject does not support the state's contention, for the reason underlying the Kansas decision wholly fails to sustain the state in the instant case. Thus, in *Commissioners of Cherokee County v. Chew,* 44 Kan. 162, the enactment before the court was, "An act regulating the fees and salaries of the county treasurers, county clerks, county attorneys, probate judge, county auditors and register of deeds of Cherokee and Labette counties, Kansas," which act was approved March 5, 1887. Laws of Kan. 1887, ch. 159. It appears from the record that the terms of the several classes of officers covered by this act expired at various dates. The act itself provided: "This act shall take effect and be in force from and after its publication in the statute book, and after the present term of the officers hereinbefore named shall have expired." The legislative intent evidenced thereby was stated by the Kansas court (44 Kan. 165), as follows: "We conclude, therefore, that the legislature intended to have chapter 159, Laws of 1887, take effect and be in force after its publication in the statute book, *and after the expiration of the terms of all the officers therein named.*" (Italics ours.) See, also, *Finnegan v. Sale,* 54 Kan. 420, and *State v. Deets,* 54 Kan. 504.

It will be noted that the act under review contains no saving clause as to the salaries of officers during their existing terms; neither does it contain any provision that

any part of the act shall take effect at some date other than that of its passage. The evident intent of the legislature, derived exclusively from the language of section 2, was that the act should take effect in its entirety upon its passage and approval. Upon a merely cursory reading of the title and two sections of the act, the mind is irresistibly driven to the conclusion that in the judgment of the legislators a real emergency existed which called for drastic reduction of expenses by a slash of salaries of a large number of state officers to take effect immediately; and the need appears to have been so urgent that the lawmakers overlooked or ignored the mandatory provisions of the Constitution. There is no ambiguity in the act; its language is simple and plain, and leaves no room for construction. In our opinion to indulge the presumption that the legislature would have passed the act had it realized that it could have only a prospective operation, its separate provisions taking effect from 2 to 7 years after its passage, by which time the emergency may have passed away, would do violence to the clear expressions of the act and the legislative intent. A construction which would give the act an effect contrary to the intent of the legislature will not be adopted, and if such construction is the only one possible, the entire act must fall. "If a clause in a statute which violates the Constitution cannot be rejected without causing the act to enact what the legislature never intended, the whole statute must fall." *Spraigue v. Thompson,* 118 U. S. 90.

The situation here presented is that the act cannot be given effect as to a single one of the more than fifty officers designated, at the date when by its terms the act is to take effect. In the face of this fact, is there room for any presumption that the act would have been passed but for the declared emergency? or a presumption that the legislature intended that, contrary to its express words, if it could not take effect at once, it should do so at some distant date? The query seems to furnish its own answer. Quite the contrary, the presumption, if one may be indulged contrary

to the express language of the act, is that the act was intended to operate as a whole in the absence of a saving clause or express exception. *Smith v. Thompson,* 258 N. W. (Ia.) 190. We are of the opinion that the dominant purpose of the legislature was to effect a drastic reduction of salaries to take effect at once, and that, if such purpose is defeated in, at least, its substantial entirety, the act must fall. And, further, that the invalid emergency clause (section 2) was the inducement for the enactment of section 1 and drags the latter down with it. Furthermore, we consider the attempted reduction of relator's salary is so connected with and interdependent upon the reduction of salaries of other officers as to be a part of the inducement for the enactment as a whole.

The case of *Smith v. Thompson, supra,* is directly in point both upon fact and law. The statute there under review was a salary reduction act whereby the salary of relator as county treasurer of Woodbury county was reduced, and the action was in mandamus to compel the issuance of a warrant at the rate existing prior to the attempted reduction. The act provided for a reduction of salaries of a large number of state officers, and was held invalid as to members of the general assembly and the lieutenant governor as not within the title, and as to the judges of the supreme and district courts as violative of a constitutional provision that their compensation "shall not be increased or diminished during the term for which they shall be elected." The holding of the court is clearly expressed in the following syllabi:

"9. Judges. Sections of act reducing salaries of supreme and district court judges without stating when they should become operative *held* invalid as contravening constitutional provision against diminution of such judges' compensation during terms for which they were elected, in view of section declaring act effective on first day of month after its enactment. * * *

"10. Constitutional law. In absence of saving clause in salary reduction act, containing unconstitutional provisions

reducing supreme and district court judges', legislators', and lieutenant governor's salaries, presumption is that act was intended to operate as whole, especially in view of recital that all statutory provisions 'relating to salaries be amended, revised and codified in accordance herewith.' * * *

"11. Statutes. Legislature's intent is controlling element in interpretation of statute.

"12. Statutes. In ascertaining legislature's intent, object sought thereby, surrounding circumstances, and context of act under consideration may be considered.

"13. Statutes. Whole act, declared purpose and intent of which is to accomplish single object, must fail if some provisions are void, unless sufficient remains to effect such object without aid of invalid parts.

"14. Statutes. Whole act having single objective or purpose must fall, if constitutional and unconstitutional parts are so connected and interdependent that rejection of unconstitutional part would destroy legislative intent.

"15. Statutes. Provisions of salary reduction act as to various officers *held* so connected and interdependent in object, subject-matter, meaning, and purpose that elimination of unconstitutional sections, reducing compensation of members of legislature, lieutenant governor and supreme and district court judges would defeat legislature's intention, so as to render whole act unconstitutional."

After citing 6 R. C. L. 127, sec. 125, to the effect that, where the invalid portion of an act has a material relation to its other portions so as to modify, restrict or extend its application, it will cause the fall of the other portion also; and "Frequently a single part of an act may be of so great importance that, although in itself it may not be an inducing cause for the enactment of the legislation, its invalidity may render the whole act void;" and, from 6 R. C. L. 125, sec. 123:

"One of the tests used to determine whether a statute is or is not severable so that a portion may be rejected is that it ought not to be held wholly void unless the invalid por-

tion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional; but where the valid and the invalid parts are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid. This test is merely a means of ascertaining and carrying out of the presumed intention of the legislature. If it appears that the invalid portion was designed as an inducement to pass the valid, the inference is that the legislature would not have passed the valid portion alone."

Anderson, J., then continues:

"It will be noticed that one of the pronounced lines of distinction in the various cases relative to a statute invalid in part, and being sustained as to that part which is valid and rejected as to that part which is invalid, is whether or not the statute under consideration relates to two or more subjects or objects; if it relates to two objects, one being void, the other may still be complete within itself and valid, but if the declared purpose and intent of the statute is to accomplish a single object only, and some of its provisions are void, the whole act must fail unless sufficient remains to effect the declared object without the aid of the invalid part. See *Cap. F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, 22 S. W. (2d) 993, 68 A. L. R. 1018. It follows that the point to be determined here is whether the unconstitutional provisions are so connected with the general scope of the act as to make it impossible, if they are stricken out, to give full effect to what appears to have been the intent of the legislature. * * *

"Where the act is single as to its objective, or seeks to obtain a single object or purpose, then if part of the act is unconstitutional, such part cannot be separated from the constitutional part if they are connected and dependent upon each other so that if you reject the unconstitutional part you destroy the legislative intent, then the whole act must fall.

"In the instant case, the legislature has declared the object, the intent, and the purpose of the act, and mandatorily said that it shall and must be in force in accordance with such declared intent, purpose, and object. We are constrained to hold that the provisions of the act applying to the various officers are so connected and interdependent in object and subject-matter, meaning, and purpose that the elimination of the objectionable or unconstitutional sections would result in a condition not contemplated or desired by the legislature. And it follows that the whole act must be declared unconstitutional and invalid."

We approve the reasoning and holding in that case, and, while not absolutely controlling, we are content to follow it as an authoritative precedent.

In *Williams v. Standard Oil Co.*, 278 U. S. 235, it was held: "A declaration in a statute that if any of its provisions be held invalid the validity of others shall not be thereby affected creates a presumption of separability in place of the general rule to the contrary—a presumption overcome, however, when inseparability is evident or where there is a clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remains." In the instant statute there is no such declaration and the presumption is that the legislature intended the act to take effect in its entirety or not at all. We quote further from the opinion in the *Williams* case, pp. 241-242:

"In *Hill v. Wallace*, 259 U. S. 44, 71, it is said that such a legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid act may be properly sustained 'without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part.' But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.' The question is one of

interpretation and of legislative intent, and the legislative declaration 'provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.' *Dorchy v. Kansas,* 264 U. S. 286, 290.

"In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in *Riccio v. Hoboken,* 69 N. J. Law, 649, 662, where the New Jersey court of errors and appeals, in an opinion delivered by Judge Pitney (afterward a justice of this court), after setting forth the rule as above, said: 'In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.'" See, also, *People v. Knapp,* 230 N. Y. 48; *Chicago, M. & St. P. R. Co. v. City of Minneapolis,* 238 Fed. 384.

In *Redell v. Moores,* 63 Neb. 219, the rule was stated: "Where portions of a statute are held unconstitutional, if the remainder is not so connected with such portion as to be incapable of separation, and the remainder is a complete act, and not dependent upon the part held invalid, the latter alone will be disregarded and the remainder upheld, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." Another feature of the case should be noted in connection with the introduction and passage of the act in question, as bearing upon the inducement thereto and the effect of partial invalidity. The following excerpts from *Redell v. Moores,* 63 Neb. 219, are pertinent:

"That a part of an act, or even a part of the same section of an act, may, under some circumstances, be held unconstitutional, without invalidating the remainder, is elementary. This court has said that, 'Where a statute con-

tains provisions which are invalid or unconstitutional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the remainder upheld, * * * *except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder.'* (Italics ours.) *State v. Moore*, 48 Neb. 870; *Scott v. Flowers*, 61 Neb. 620; *State v. Lancaster County*, 6 Neb. 474; *State v. Hardy*, 7 Neb. 377; *State v. Lancaster County*, 17 Neb. 85; *State v. Hurds*, 19 Neb. 316; *Trumble v. Trumble*, 37 Neb. 340; *Low v. Rees Printing Co.*, 41 Neb. 127; *State v. Stuht*, 52 Neb. 209. In view of the doctrine announced in the cases just cited, we are not called upon to determine the effect of the decision in the case of *State v. Moores* (55 Neb. 480) on the entire act, because it follows irresistibly that the section held invalid drags down with it only such other parts as are inseparably connected with, dependent upon, or incomplete without it, or for the passage of which it served as an inducement. One question, then, that meets us at this point, is whether that portion of the act held invalid, namely, that portion conferring the appointing power on the governor, served as an inducement to the legislature for the passage of the other portions of the sections hereinbefore set forth. Counsel for the defendant insists that this question is to be determined solely by an inspection of the act itself. In this view we are disposed to concur, with this qualification, however, that the persons whose duty it may be to inspect the act with a view to the determination of that question are not required to divest themselves of all knowledge save that to be gleaned from the act alone. For, were it possible for them thus to divest themselves, the act would be unintelligible,—a jumble of words without meaning. So, when we say that the question is to be determined by an inspection of the act itself, we imply that those under whose inspection it is brought will scan it in the light of that knowledge which they possess in common with other

men. There is no presumption that courts are ignorant of all matters that transpire outside the courtroom. On the contrary, there are many matters outside the science of the law of which they are required to take judicial notice. Bishop, in his work on Statutory Crimes (3d ed.), sec. 77, says, 'They (courts) do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things.' The supreme court of Michigan, in *Sibley v. Smith,* 2 Mich. 487, say, 'Courts are authorized to collect the intention of the legislature from the occasion and necessity of the law,—from the mischief felt, and the objects and remedy in view.' The supreme court of the United States, speaking through Davis, J., in the case of *United States v. Union P. R. Co.,* 91 U. S. 72, say, 'Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason, as well as the meaning of particular provisions in it.' In *Stout v. Board of Commissioners,* 107 Ind. 343, * * * it is held that the history of a country, its topography and general conditions are elements which enter into the construction of laws made to govern it, and are matters of which the courts will take judicial notice. It has been held that the general state of opinion, public, judicial and legislative, at the time of an enactment of a measure may be considered by the courts in construing it. *Keyport and Middletown Point Steamboat Co. v. Farmers Transportation Co.,* 18 N. J. Eq. 13; *Delaplane v. Crenshaw & Fisher,* 15 Gratt. (Va.) 457. In *State v. Boyd,* 34 Neb. 435, it was held that the courts will take notice, without proof, of events which are generally known within the limits of their jurisdiction. The foregoing, we think, makes it clear, were it ever doubtful, that in the determination of the question before us we are neither required nor permitted to affect ignorance of those things which are matters of common knowledge. The attempt to confer upon the governor the power to appoint members of the

board of fire and police commissioners, and the reasons urged in support of such measure, are a part of the legislative history of the state. No other feature of the act under consideration, nor of those it was intended to supersede, attracted so much attention or invited so much discussion as that which placed the power of appointment in the hands of the governor, removing, as it was claimed at the time, the board of fire and police commissioners from the influence of local politics. It is a matter of common knowledge that this feature of the act, so far as the board of fire and police commissioners is concerned, was the chief inducement to its passage. Without that feature, its promoters would have regarded it much as they would have regarded the play of Hamlet with Hamlet left out."

In 59 C. J. 1014, the following appears: "In seeking to ascertain the legislative intent where the language of a statute is ambiguous, the courts will take into consideration all the facts and circumstances existing at the time of, and leading up to, its enactment, such as the history of the times, * * * of the proceedings attending its actual passage through the legislature as disclosed by the legislative journals."

And it is stated in 59 C. J. 1019: "Under the general rule, amendments or modifications, and changes in the frame of the bill during its passage, and the action of the legislature on amendments offered, may be considered."

See, also, *Chicago, B. & Q. R. Co. v. Amack,* 112 Neb. 437.

Taking up chapter 63, Laws 1933, we find that, as originally introduced, and as passed in the senate, it was limited by a title to "A bill for an act relating to fees and salaries; to provide a schedule of salaries for certain state officers mentioned in the Constitution; * * * and to declare an emergency." This bill was amended in the house, and after three conference committee reports had been made and rejected, the fourth conference committee report, which added to the original bill a provision covering an increase of salary for the director of the department of

agriculture and inspection, the commissioner of labor, the department of health, the state engineer, the director of banking, and the director of insurance, was approved, and there was an agreement of the senate and house, and the bill was enacted into law. In view of the rule announced in the authorities referred to, as to the proper consideration of "amendments or modifications, and changes in the frame of a bill during its passage, and the action of the legislature on amendments offered," the record amply supports the conclusion that the amendments to the original chapter 63, Laws 1933 (Senate File No. 52), which incorporated the provisions for salaries for other than constitutional officers referred to in the title as "heads of various departments mentioned in the Laws of Nebraska," constituted the controlling inducement for the passage of Senate File No. 52. These provisions, as we have seen, were wholly void and unconstitutional.

When an act is severable in its essence, the void portions may be disregarded. "Inducements," however, are different in their effect. They enter into and taint all which is comprised in the legislation they secure. The evil effects are not severable and the entire enactment must fall.

We have discussed the question of the effect of invalid portions upon the entire act where they formed an inducement to its passage. As a matter of fact, if effect is to be given to both sections 1 and 2, no part of the act is valid for any purpose, and the application of rules of law pertaining to inducement becomes pertinent only if the taking effect of the act, contrary to its express terms, may be set forward from two to seven years beyond the date of its passage. This, as we have shown, may not be done without doing violence to the legislative intent, and putting into effect a law which the legislature would not recognize as its own, and which it would not have passed with the invalid portions stricken out, had their attention been called to them. As hereinbefore noted, the act contains no saving clause nor any provision that any portion of it shall

take effect at any specified date other than that of its passage. We cannot presume that such was the intention of the legislature in the face of its positive provision.

Notwithstanding a most painstaking effort to sustain the act of the legislature or any valid portion thereof, which is our constitutional duty, we are forced to conclude that the entire act is invalid for the reasons stated.

It follows that the writ of mandamus must be granted as prayed.

WRIT ALLOWED.

SHEPHERD, District Judge, dissents.

STATE, EX REL. L. B. DAY, JUDGE OF THE SUPREME COURT OF THE STATE OF NEBRASKA, RELATOR, V. GEORGE E. HALL, TREASURER OF THE STATE OF NEBRASKA, RESPONDENT.

FILED SEPTEMBER 26, 1935. No. 29652.

Case Followed. This case is ruled by our decision in *State v. Hall*, *ante*, p. 669, to which reference is hereby made.

Original proceeding in mandamus by the state, on relation of L. B. Day, judge of the supreme court, against George E. Hall, state treasurer, to compel respondent to countersign and pay a salary warrant. *Writ allowed.*

Stewart, Stewart & Whitworth, for relator.

William H. Wright, Attorney General, and *Harvey M. Johnsen,* for respondent.

Kennedy, Holland & De Lacy and *Ralph E. Svoboda, amici curiæ.*

Heard before GOSS, C. J., ROSE and EBERLY, JJ., and FITZGERALD, MESSMORE, REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

This is an original action instituted in this court praying that a peremptory writ of mandamus issue ordering

the respondent to countersign and pay a state warrant issued to relator for his salary as judge of the supreme court of the state of Nebraska.

The petition alleges that the relator was duly elected a judge of the supreme court of the state of Nebraska from the second district at the general election, November, 1934, for a term of six years commencing January 3, 1935, and ever since such time has been a duly elected, qualified and acting judge of said court; that the respondent is the treasurer of the state of Nebraska; that on July 18, 1935, the warrant was duly issued to the Omaha National Bank, as assignee of relator, but that such assignment was solely as collateral security and relator is owner of said warrant; that respondent refuses to countersign and pay said warrant for the sole reason that section 84-726, Comp. St. Supp. 1933 (Laws 1933, ch. 63) provides that the salary of judges of the supreme court shall be $5,200 per annum, or $1,300 per quarter; that said act, including its title, is as follows:

"An act relating to fees and salaries; to provide a schedule of salaries for certain state officers mentioned in the Constitution; and the heads of various departments mentioned in the laws of Nebraska, and to declare an emergency.

"Be it Enacted by the People of the State of Nebraska:

"Section 1. It is hereby provided by law that salaries as follows shall be paid to certain state officers mentioned in the Constitution: Governor $6,000 per annum; Chief Justice and Judges of the Supreme Court, each $5,200 per annum; Tax Commissioner, $4,000 per annum; Judges of the District Court, and Attorney General $4,000 per annum; Secretary of State, Auditor of Public Accounts, Commissioner of Public Lands and Buildings, Treasurer, Superintendent of Public Instruction, each $3,400 per annum; Members of the Board of Control, each $3,200 per annum; Members of the State Railway Commission, each $3,400 per annum; Director of the Department of Agriculture and Inspection, $3,800 per annum; Commissioner

of Labor, $3,000 per annum; Director of Health, $3,600 per annum; State Engineer, $4,800 per annum; Director of Banking, $4,500 per annum; Director of Insurance, $3,600 per annum.

"Section 2. Whereas, an emergency exists, this act shall be in full force and take effect from and after its passage and approval.

"Approved May 1, 1933."

The petition further alleges that on May 1, 1933, the stated, purported effective date of said section 84-726, Comp. St. Supp. 1933, the judges of the supreme court were holding their respective offices for terms expiring as follows: Chief justice, January, 1939; three judges, January, 1937, and three judges (including relator) January, 1935; that other state officers were then holding office for terms expiring at different dates. For more complete and specific statement with reference to these matters reference is hereby made to the opinion of this court rendered at this session in the case of *State v. Hall, ante,* p. 669. Plaintiff further alleges that section 84-726 is unconstitutional for the following reasons:

1. That it is in violation of section 14, art. III of the Constitution, reading as follows: "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"—and said act being amendatory of sections 77-301, 83-107 and 75-101, Comp. St. 1929, and section 81-103, Comp. St. Supp. 1933, which were not contained in nor repealed by said act.

2. That under the provisions of sections 2, 4, 5, 7 and 13 of art. V, and section 3 of art. XVII, of the Constitution of Nebraska, the judges of the supreme court are created a distinct class for all purposes of legislation affecting them, and that said act does not operate uniformly on the members of said class, and that such unconstitutional provisions formed the inducement to the passage of the remainder of the act and render the entire act invalid.

3. That as to members of the board of control and of

the state railway commission, the act does not operate uniformly on the members of said classes, respectively, and is void as class legislation under section 19, art. IV of the Constitution, and that such unconstitutional provisions formed the inducement to the passage of the remainder of the act and render the entire act unconstitutional and void.

4. That neither said act as a whole, nor any part thereof, became effective or operative on the date expressed in the preamble or body of the act as the effective date thereof, in violation of section 27, art. III of the Constitution of Nebraska.

5. That said act is in violation of section 19, art. III of the Constitution, providing that the compensation of no public officer shall be increased or diminished during his term of office, and that such invalid provision was the inducement for the passage of the remainder of the act and renders the entire act invalid.

Respondent answered and admits the allegations of fact in the petition, but seeks to justify his refusal to countersign and pay said warrant solely on the ground that it should be for $1,300 in accordance with the act in question. It was stipulated that the case be submitted on a motion of relator for judgment on the pleadings, and consolidated for argument with the action entitled *State, ex rel. Charles W. Taylor, v. George E. Hall.*

The only question involved is the constitutionality of section 84-726, Comp. St. Supp. 1933, and this question was thoroughly discussed and decided in the *Taylor* case at the present session, wherein it was held that the section in question was unconstitutional in its entirety. This case is ruled by the *Taylor* case, and we must content ourselves by reference thereto for the discussion of the questions presented in this case and the reasons for holding the act invalid.

It follows that relator is entitled to the writ of mandamus as prayed, and the same is allowed.

WRIT ALLOWED.

SHEPHERD, District Judge, dissents.

CLAUD WRAY, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

FILED OCTOBER 11, 1935. No. 29341.

Insurance: DISABILITY: PROOF. The term "due proof of such disability," used in an insurance policy, does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts as, if established in court, would require payment of the claim.

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

Burkett, Wilson & Van Kirk and *Milton C. Murphy*, for appellant.

Hoagland, Carr & Hoagland, contra.

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

GOSS, C. J.

Plaintiff had a verdict after a jury trial. Defendant appealed from the resulting judgment.

Plaintiff was an employee of the Capper Publications, Topeka, Kansas. On October 20, 1927, this concern contracted with defendant to insure its employee for $1,000 under a policy of group life insurance and a certificate to that effect was issued by defendant to plaintiff. On March 2, 1931, the insurance on plaintiff was increased by contract and certificate to $2,000. The contract of insurance provided that if the employee, under the age of 60, shall, while insured, become totally and permanently disabled by bodily injury or disease and thereby presumably be continuously prevented from engaging in any occupation or performing any work for compensation of financial value, upon due proof of such disability before the expiration of one year from the date of its commencement, defendant would pay him 40 monthly disability instalments of $52.50 each.

Plaintiff, when about 26 years old, claims to have been injured on June 24, 1931. He testified, and the jury believed him, that he was injured by receiving a sacro-iliac sprain while pushing a truck loaded with lead plates from the press, where they had been used, to the elevator. January 4, 1932, he made out a "group disability claim" on a blank furnished by defendant and it was handled through the employer's business manager. It is admitted that this claim reached defendant shortly after it was made. It answered questions in detail necessary to proper notice to the company of the injury. It however says that he became "wholly disabled as a result of sacro-iliac sprain, caused while lifting heavy weights consisting of stereotype plates."

A deposition by the assistant chief of the disability claims department, taken on behalf of defendant and in evidence, says that the claim and papers purporting to be proofs were filed in his office January 11, 1932, and were declined on January 15, 1932, on the ground that they were not sufficient to indicate a condition of total and permanent disability. The papers consisted of claimant's statement and of a statement from the attending physician who, in filling out the questionnaire, stated that in his opinion the claimant never would be able to resume any business, but in a later numbered question as to whether the doctor believes "the claimant to be so disabled that he is wholly prevented for life from pursuing any and all gainful occupation," the doctor answers, "Unable to determine now."

The term "due proof of such disability," used in an insurance policy, does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts as, if established in court, would require payment of the claim. *Jarvis v. Northwestern Mutual Relief Ass'n,* 102 Wis. 546. The proof of loss apprised defendant of the injury to plaintiff, of his claim that its effect was total and permanent, and gave defendant complete notice so that it might either pay or prepare its

defense when and if sued. That the statement of the doctor, accompanying the due proof, did not show an absolute and unequivocal opinion that the claimant would be disabled for life does not prevent the plaintiff from suing to establish his rights under the policy. These proofs were furnished within the year's limitation fixed by the policy.

Defendant argues that due proof was never pleaded by plaintiff. It is true that the petition did not allege the term "due proof," but alleged "that due notice of said injury and disability has been given to the defendant." In its answer defendant does not demur to the statement, but contents itself with a general denial of this and other allegations of the petition not admitted in the answer, although it alleged it had never been supplied with due proof. These pleadings were sufficient to allow the question to be submitted to the jury on the facts.

Without going into details, we think the facts proved were sufficient to go to the jury and to support the verdict for plaintiff.

At the close of all the evidence defendant moved for an instructed verdict. And, upon refusal by the court, defendant requested certain instructions submitting to the jury the duty of plaintiff, as a condition precedent to recovery, to submit proofs of total and permanent disability within one year from the commencement of such disability. The court refused these instructions and, indeed, failed to submit any instruction on that precise point. This is earnestly argued to be error. But it was not, because the evidence showed conclusively that due proofs of total and permanent disability were furnished defendant by plaintiff, through his employer, well within the year, as provided in the policy. Defendant denied liability and the chief object of the litigation was to determine whether plaintiff was disabled to the extent claimed by the injury of which due proof, as contemplated by the policy, had been furnished the company within the time required.

By an instruction in which the court gave the jury the issues submitted in the case, the court first told the jury

the burden of proof was upon plaintiff to establish by a *preponderance of the evidence* the following (listing the propositions of fact numerically). After listing them, the instruction told the jury that, should they find from the evidence *beyond a reasonable doubt* that the foregoing propositions have been established, it will be their duty to return a verdict for plaintiff. Defendant claims that this instruction was erroneous. It was, but the error was prejudicial to plaintiff, not to defendant.

Many other errors relating to instructions and to evidence are asserted by defendant. We have examined them and find them not to be prejudicial. To cover them would multiply the length of this opinion.

The judgment of the district court is affirmed. Plaintiff is allowed $150 attorney fees in this court.

AFFIRMED.

JABE B. GIBSON, APPELLANT, V. DAWES COUNTY ET AL., APPELLEES.

FILED OCTOBER 11, 1935. No. 29332.

1. **Taxation**: TAX SALES: REFUND. Liability of a county for a refund of the money paid by the purchaser of real estate at a county treasurer's sale for delinquent taxes, where the title fails, is statutory and does not exist at common law.
2. ———: ———: PETITION FOR REFUND: SUFFICIENCY. A petition for the refund of taxes paid by the purchaser of real estate at a county treasurer's sale for delinquent taxes is demurrable, if it does not state facts sufficient to show the statutory conditions which make the county liable.
3. **Pleading**. A judicial decree, pleaded in a petition as part of a cause of action, prevails over plaintiff's allegations which the decree contradicts.
4. **Limitation of Actions**: TAX SALES: ACTION FOR REFUND. As between the holder of a tax sale certificate and a county from which a refund of taxes paid is sought, the statute of limitations begins to run from the time of the payment of the taxes and does not await a judicial determination that the taxes are illegal.
5. ———: ———: ———. A claim or an action against a

county by the holder of a tax sale certificate for a refund of taxes assessed against the real estate sold is barred by the statute of limitations, unless presented in some form to the county for allowance within five years from the date of the sale.

6. ———: ———: ———. Where an action for a refund of the taxes involved in a county treasurer's tax sale certificate is barred by the statute of limitations, plaintiff, the holder of the certificate, is not entitled to recover back from the county taxes paid by him subsequent to the treasurer's sale.

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

R. J. Shurtleff and *G. T. H. Babcock,* for appellant.

R. R. Wellington, contra.

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

ROSE, J.

Plaintiff presented to the county commissioners of Dawes county a claim against the county for a refund of $304.61 paid to the county treasurer for taxes assessed against 320 acres of land. For delinquent taxes levied for the years 1920 and 1921 the county treasurer sold the land to W. C. Foster November 6, 1922, and issued to him a tax sale certificate. The purchaser sold the certificate to Jabe B. Gibson, plaintiff, August 25, 1925. The purchase price at the treasurer's sale and subsequent taxes paid by the holders of the tax sale certificate for the years 1922 to 1926, both inclusive, were items inserted in the claim of plaintiff. The claim was filed with the county clerk December 22, 1930, and disallowed by the county commissioners February 7, 1934. From the disallowance plaintiff appealed to the district court and to his petition filed therein the county of Dawes, defendant, interposed a general demurrer which was sustained. Plaintiff declined to plead further and stood on his petition. From a dismissal of the action, plaintiff appealed to the supreme court.

The question presented by the appeal is the sufficiency

of the petition to state facts constituting a cause of action against Dawes county, defendant, for plaintiff's claim.

The liability of a county for a refund of taxes paid by the purchaser of real estate at a county treasurer's sale for delinquent taxes, where the title fails, is statutory and does not exist at common law. *Speidel v. Scotts Bluff County*, 125 Neb. 431. A petition for such a refund is demurrable, if it does not state facts sufficient to show the statutory conditions which make the county liable. *Monteith v. Alpha High School District*, 125 Neb. 665. There are two sections of statute imposing upon a county the duty to hold the purchaser of real estate at a tax sale harmless by refunding the amount of the payment made by him to the county treasurer, where the title fails. The statutory provisions follow:

"When by mistake or wrongful act of the treasurer or other officer land has been sold on which no tax was due at the time or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal, interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer or other officer shall be liable to the county therefor upon his official bond; or the purchaser or his assignee may recover directly of the treasurer or other officer in an action on his official bond." Comp. St. 1929, sec. 77-2030.

"Whenever, for any reason, real estate has been sold or shall hereafter be sold for the payment of any tax or special assessment levied by any county, municipality, drainage district, or other political subdivision of the state, and it shall thereafter be determined by a court of competent jurisdiction that said sale was void, it shall be the duty of said county, municipality, drainage district, or other political subdivision of the state which levied the tax or special assessment to hold said purchaser harmless by paying him the amount of principal paid by him at the sale with interest thereon at the rate of 6 per cent. per

annum. from the date of sale." Comp. St. 1929, sec. 77-2054.

The petition for a refund in the present instance does not contain specific allegations of fact showing that the county treasurer or any other officer by mistake or wrongful act sold the land on which no tax was due at the time or that the land was sold in consequence of error in describing it in the tax receipt, a mere conclusion by the pleader not being sufficient. It follows, therefore, that the petition is not sufficient to show, when attacked by demurrer, that plaintiff is entitled to relief under the section first quoted. Comp. St. 1929, sec. 77-2030. Does the demurrer admit alleged facts showing that plaintiff is entitled to a refund under the other section of the statute quoted? Comp. St. 1929, sec. 77-2054. In connection with the allegation that the tax sale certificate for the 320 acres of land was issued November 6, 1922, the petition contains the following plea:

"Action was brought in the district court for Dawes county, Nebraska, to foreclose said tax sale certificate and on hearing it was found by the court that the Whitney Irrigation District of Whitney, in said county, intervened and claimed that 302/320 of the real estate above described was exempt from taxation for the reason that it had been condemned and title acquired by said irrigation district; that a decree was rendered October 27, 1930, whereby the court found that there was due the plaintiff the sum of $304.61 with interest thereon at 15 per cent. per annum from October 27, 1930, by reason of the wrongful act of the county assessor and county treasurer, whereby the court canceled and annulled said taxes and found that said land was not subject to assessment or taxation."

The decree in the former action to foreclose the tax sale certificate is attached to the petition herein and adjudges that the taxes for the years 1920, 1921 and 1922 were liens on the entire tract of 320 acres; that subsequent taxes paid by the holder of the tax sale certificate for the years 1923 to 1926, both inclusive, were valid liens on

18/320 of the land and invalid as to 302/320 thereof. The former decree, being pleaded herein in the petition as part of plaintiff's cause of action, prevails over allegations which the decree contradicts, if any. *Carey v. Zabel*, 112 Neb. 16; *Shafer v. Wilsonville Elevator Co.*, 121 Neb. 280. From the standpoint of the demurrer and of invulnerable pleading, therefore, the petition does not show that the taxes which plaintiff seeks to recover back were all void or that his tax sale certificate was invalid. The demurrer assails the petition herein on the ground it shows on its face that the action is barred by the statute of limitations. The law has been stated as follows:

"As between a taxpayer and a school district or county, from which a recovery is sought, the statute of limitations begins to run from the time of the payment of the tax, and it is not postponed until the illegality of the tax has been judicially decided." *Monteith v. Alpha High School District*, 125 Neb. 665.

"The time within which a private holder of a tax sale certificate, other than a minor or an incompetent, may commence an action to foreclose such certificate is determined by section 6097, Comp. St. 1922 (Comp. St. 1929, sec. 77-2049), and such an action must be brought within five years from the date of the tax sale certificate." *Gibson v. Peterson*, 118 Neb. 218.

"The tax purchaser, who has neither demanded a deed within five years from the date of the sale, nor commenced proceedings to foreclose the tax certificate within the period of limitation for such actions, is not entitled to have the county refund the purchase money by reason of the invalidity of the tax sale." *Fuller v. County of Colfax*, 33 Neb. 716.

The tax sale certificate was based on delinquent taxes for the years 1920 and 1921 and was dated November 6, 1922. As to the county, the statute of limitations began to run against the claim for a refund of those taxes November 6, 1922—the date of the tax sale certificate. The claim for a refund was filed in the office of the county

clerk December 22, 1930, more than eight years after the claim arose. While the former action to foreclose the tax sale certificate was commenced prior to November 1, 1927, as shown by the petition herein, the county of Dawes was not a party thereto. Its first opportunity to plead the statute of limitations to defeat plaintiff's claim for a refund arose after the present action had long been barred. Neither the payment of taxes levied after the tax sale certificate was issued nor the foreclosure action prevented the running of the statute of limitations as to the county. The claim and the action for a refund of the taxes involved in the tax sale certificate being barred by the statute of limitations, plaintiff is not entitled to recover back the taxes which he subsequently paid. In view of the statutes and decisions cited, the barring of the action is shown on the face of the petition. The demurrer, therefore, was properly sustained.

AFFIRMED.

D. P. WETZEL, APPELLANT, V. DAWES COUNTY ET AL., APPELLEES.

FILED OCTOBER 11, 1935. No. 29333.

Limitation of Actions: TAX SALES: ACTION FOR REFUND. Action by the holder of a county treasurer's tax sale certificate against the county for a refund of illegal taxes paid, *held* barred by the statute of limitations, where the plaintiff's claim was not presented to the county until more than five years after the date of the certificate, the bar being complete before the taxes were adjudged illegal in a suit to which the county was not a party.

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

R. J. Shurtleff and *G. T. H. Babcock*, for appellant.

R. R. Wellington, contra.

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

ROSE, J.

Plaintiff presented to the county of Dawes a claim for a refund of $95.20 paid to the county treasurer for delinquent taxes, interest and costs. The taxes had been levied against a tract of land which the county treasurer sold to plaintiff, the holder of the tax sale certificate. In an action by him in the district court for Dawes county to foreclose the certificate, it was decreed that the land was not subject to the taxes for which it had been sold. Plaintiff presented his claim for a refund to the county commissioners for allowance and, from an order rejecting it, he appealed to the district court. To the petition filed therein by plaintiff, Dawes county, defendant, interposed a general demurrer which was sustained and the action dismissed. From the judgment of dismissal, plaintiff appealed to the supreme court.

On appeal, plaintiff takes the position that his petition states facts sufficient to constitute a cause of action against the county for the refund demanded, and defendant contends, among other grounds of demurrer, that the action is barred by the statute of limitations as shown on the face of the petition.

The petition and the decree of foreclosure attached to it show the following facts: The land was sold for taxes assessed prior to November 1, 1926. That was the date on which the tax sale certificate was issued. The decree of foreclosure was rendered October 20, 1932. The claim for a refund was filed with the county clerk October 26, 1932, and rejected February 7, 1934. The county, defendant herein, was not a party to the foreclosure suit. More than five years, therefore, elapsed between the date of the tax sale certificate, November 1, 1926, and the date on which plaintiff presented his claim to the county, October 26, 1932. It is thus shown on the face of the petition that, under rulings in *Gibson v. Dawes County, ante*, p. 706, the action for the refund was barred by the statute of limitations when plaintiff presented his claim to the county and when the decree of foreclosure was rendered in the

suit to which the county was not a party. In this view of the facts and the law, the demurrer was properly sustained.

AFFIRMED.

FRED HAFFKE V. STATE OF NEBRASKA.

FILED OCTOBER 11, 1935. No. 29527.

1. **Criminal Law**: INTOXICATION: WITNESSES: COMPETENCY. In a prosecution against defendant for driving a motor vehicle while intoxicated, a witness who had known him for years, had observed him at night driving an unlighted truck alternately into the curbs on different sides of a public street at the times and places charged in the information and had heard him trying to argue, when immediately arrested, that he was sober, may testify to the opinion that he was intoxicated.
2. **Evidence** outlined in opinion *held* sufficient to sustain the conviction of defendant for driving a motor vehicle while intoxicated.
3. **Criminal Law**: TRIAL: ORDER OF PROOF. A defect in the foundation for the introduction of an exhibit admitted in evidence in a criminal prosecution may be cured by subsequent testimony of defendant, if he thus supplied what was missing in the first instance; the order of introducing proofs not being prejudicial.
4. ———: ———. A partially filled bottle containing a liquid labeled "Whisky," from which defendant had drunk, *held* properly admitted in evidence, under circumstances described in the opinion, in a prosecution against him for driving a motor vehicle while intoxicated.

ERROR to the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed.*

J. A. Capwell, for plaintiff in error.

William H. Wright, Attorney General, and *Milton C. Murphy, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Cass county, Fred Haffke, defendant, was convicted of unlawfully operating a motor vehicle on public highways in Cass county, Nebraska, November 13, 1934, while intoxicated. For that offense he was sentenced to serve a term of 30 days in the county jail and in addition his driver's license was revoked. As plaintiff in error, defendant presents for review the record of his conviction.

It is urged as a ground of reversal that the evidence is insufficient to prove the intoxication of defendant beyond a reasonable doubt. The sheriff and his deputy testified that defendant was intoxicated at the times and places charged in the information, but defendant argues that their testimony was inadmissible for want of a proper foundation or of evidential facts showing their competency to so testify. The record contains evidence tending to prove the following facts: Complaint of drunken drivers in the streets of Plattsmouth was heard by the sheriff, who directed his deputy to "pick them up." About 6:15 the same evening, November 13, 1934, the deputy found defendant and a companion named "Hopkins" in the cab of a truck, the latter driving, and took them to the sheriff's house, where the sheriff engaged them in conversation. The sheriff said he was sure they had been drinking, but thought they were capable of taking the truck home and told defendant he would let him go, if he would take the truck home and stay there. The deputy took defendant to the truck and went home with Hopkins. Approximately an hour later the deputy, in a car, drove over a curb to prevent a collision with the truck while being driven by defendant on the wrong side of the street. While the deputy was backing into the street, defendant disappeared. The deputy immediately went for the sheriff and the two of them made a search for the truck, overtaking defendant operating it on a public street. They observed the truck was driven by defendant into a curb twice on one side of the street and into a curb twice on the other side. It was dark and

there was no light on the truck. Defendant was told he was arrested for driving while drunk and tried to argue with the sheriff to the contrary. The deputy had known defendant for twelve years and the sheriff had known him for two years. These officers observed defendant's conduct and condition and were competent to testify to the opinion that he was intoxicated at the time and place charged in the information. *Rhodes v. State,* 124 Neb. 147. The record makes clear the sufficiency of the evidence to sustain the conviction.

It is also argued that a bottle, partially filled with a liquid labeled "Whisky," was erroneously admitted in evidence. If the foundation was insufficient in the first instance, it was subsequently supplied by testimony of defendant who identified the contents as whisky; the order in which the evidence was introduced not being prejudicial error. The deputy sheriff testified that, when defendant was first stopped in the truck, he dropped the bottle on the parkway and that it was produced in court in the same condition it was in when picked up by the witness. Defendant was asked on the witness-stand if he had anything to drink before he was first stopped by the officer, and answered: "We had a couple drinks of whisky and of course that beer and that beer kind of upset my stomach." He said further that they had whisky on the way to Fort Crook; that it was the other fellow's whisky; that they never drank anything but beer on the way back; that they got the two drinks of whisky out of the bottle. There was therefore sufficient foundation for the admission of the bottle in evidence and it tended to prove a competent circumstance in connection with other proofs. Error prejudicial to defendant has not been found in the record.

AFFIRMED.

FRANK MCCARTNEY V. STATE OF NEBRASKA.

FILED OCTOBER 11, 1935. No. 29536.

1. **Criminal Law**: INDORSEMENT OF WITNESSES ON INFORMATION. In a criminal prosecution, the trial court may, in its discretion, permit the names of additional witnesses to be indorsed upon the information after trial has begun, and such action cannot be availed of as error where defendant makes no showing of prejudice or does not ask for postponement or continuance of the trial.
2. ———: WITNESSES: CAUTIONARY INSTRUCTION. The mere fact that witnesses in a criminal prosecution are regular police officers of a city will not justify an instruction that the jury, in weighing their testimony, should exercise greater care than in weighing the testimony of other witnesses.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Thomas F. Hamer, for plaintiff in error.

William H. Wright, Attorney General, Paul P. Chaney and *Lester A. Danielson, contra.*

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

GOOD, J.

Frank McCartney, plaintiff in error (hereinafter referred to as defendant), was convicted upon each of three counts of an information, each charging a violation of the liquor laws. Sentences conforming to the statute were imposed. Defendant brings the record of his conviction to this court for review.

It is first contended that the court erred in permitting the county attorney to indorse on the information the name of a witness, Knolie Shaw Nelson, after the trial had commenced. The record discloses that after the impanelment of the jury Nelson was called to the witness-stand, sworn, and asked to state his name. Thereupon, an objection was made to Nelson testifying because his name was not indorsed upon the information. It appears that the county attorney had been informed that the name of the witness was C. K. Nelson; that this name was indorsed upon the

information, and that the prosecuting attorney was not informed of the correct name until it was disclosed by Nelson on the witness-stand.

Prior to 1915 the statute required the prosecuting attorney to indorse names of witnesses upon the information prior to commencement of the trial. There was no authority for indorsing names after trial was begun. The cases cited in support of defendant's contention upon this proposition are *Stevens v. State,* 19 Neb. 647, and *Sweenie v. State,* 59 Neb. 269. Each of those cases was decided under the prior statute, and they are not applicable to the present statute, which permits the prosecuting attorney to indorse upon the information the names of other witnesses as the court, in its discretion, may prescribe. Comp. St. 1929, sec. 29-1602. Since the enactment of that section, this court has frequently held that, where the names of witnesses are indorsed upon the information after the commencement of the trial and no application is made for postponement or continuance of the cause, and no prejudice shown, prejudice will not be presumed, and that the court, in its discretion, may permit the names of additional witnesses to be indorsed upon the information after the trial has begun; that such action may not be availed of as error where the accused makes no showing of prejudice or does not ask for continuance or postponement. See *Kemplin v. State,* 90 Neb. 655; *Sheppard v. State,* 104 Neb. 709; *Hutter v. State,* 105 Neb. 601; *Ridings v. State,* 108 Neb. 804; *Frey v. State,* 109 Neb. 483; *Barnts v. State,* 116 Neb. 363; *Allen v. State,* p. 722, *post.*

In the instant case, it appears that defendant made no application for postponement or continuance of the trial; nor was any showing made that he was prejudiced in any wise by the indorsement of the name of the witness Nelson on the information. The record discloses that Nelson was one of the police officers who made the arrest of defendant and took him to the police station. Certainly, defendant would have reason to know that such police officer might be called as a witness. In any event, there is no showing

that defendant was prejudiced by the indorsement of the correct name of the witness upon the information and permitting him to testify.

Defendant complains of the refusal of the trial court to instruct the jury that greater care should be used in weighing the evidence of police officers than that of other witnesses.

In *Preuit v. People,* 5 Neb. 377, this court held: "Where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested." This rule has been followed in *Kastner v. State,* 58 Neb. 767, *Sandage v. State,* 61 Neb. 240, and *Fruide v. State,* 66 Neb. 244. This court has held, however, that the rule is not applicable to officers who are performing a public duty required of them by statute, and that it has no application to county attorneys, sheriffs, deputy sheriffs, police officers, or police detectives, who are regularly employed in the public service. That such rule is not applicable to a county attorney, sheriff or his deputy was held in *Keezer v. State,* 90 Neb. 238, and in *Flanagan v. State,* 117 Neb. 531. In *Trimble v. State,* 118 Neb. 267, it was held that the rule was not applicable to a city detective, regularly employed by the city, and who had no pecuniary interest in the result of the case. This holding was reaffirmed in *Nelson v. State,* 118 Neb. 812. To a like effect is *Barnes v. State,* 124 Neb. 826. Defendant also cites and relies upon *Neiden v. State,* 120 Neb. 619. That case, however, deals with the evidence of an accomplice, and not with that of police officers. In the instant case, the witnesses were regular members of the police force of the city of Kearney. Under these authorities, the requested instruction was properly refused.

The record is free from error. Judgment

AFFIRMED.

CHARLES F. VON NORDHEIM, APPELLANT, V. GEORGE R. CORNELIUS: HAROLD A. ROSENAU, APPELLEE.

FILED OCTOBER 11, 1935. No. 29338.

Bills and Notes: NEGOTIABILITY. Although a note otherwise negotiable is not rendered nonnegotiable merely by reference to collateral security, a note and a mortgage executed at the same time as a part of one transaction are to be construed as one instrument, and terms in the mortgage may render the note nonnegotiable as to all with notice thereof.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Waring & Waring, contra.

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

DAY, J.

This is an action on a note in which the defense was failure of consideration. Upon a trial to a jury, a verdict was returned in favor of defendant. The plaintiff alleged in his petition that he was a holder for value in due course. The answer denied this allegation.

It appears that Rosenau signed a conditional sale contract with Cornelius for an oil burner and the note here was a part of the same paper. The note and contract were executed as one instrument and assigned to the plaintiff as an entirety. The oil burner contracted for was never furnished. Later, after maturity and after collection had been attempted, another burner was installed. But that was a different and less complete burner and was installed under a different contract upon which another asserts that the defendant is liable to him.

It then appears that there was no consideration for the note, for that the contract was never performed. The defendant paid $50 cash upon the execution of the contract. There is no dispute that these are the facts. An examin-

ation of the contract and the note discloses that Rosenau agreed to purchase an oil burner which Cornelius agreed to furnish. It has long been the rule in this jurisdiction that, although a note otherwise negotiable is not rendered nonnegotiable merely by reference to collateral security, a note and a mortgage executed at the same time as a part of one transaction are to be construed as one instrument, and terms in the mortgage may render the note nonnegotiable as to all with notice thereof. *Roblee v. Union Stock Yards Nat. Bank,* 69 Neb. 180. In the instant case the note and the conditional sale contract were printed on the same sheet of paper. The plaintiff severed the note from the mortgage after he purchased it. He was charged therefore with knowledge of its terms, one of which was that Cornelius should furnish the oil burner as described therein. The burner that was eventually installed was not a consideration for this note, as it was sold on another contract to Rosenau. The plaintiff was not a holder in due course. There was no consideration for the note. It is not demonstrated that there is any error in the record.

AFFIRMED.

OTTO DOERFFLER V. STATE OF NEBRASKA.

FILED OCTOBER 11, 1935. No. 29531.

1. Criminal Law: CIRCUMSTANTIAL EVIDENCE: INSTRUCTIONS. In the absence of a request, failure to give instruction relative to weighing circumstantial evidence is not error.
2. ———: EVIDENCE OF SEPARATE OFFENSES. Except as to crimes involving motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses by accused is not admissible.

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

Glebe & Elliott, for plaintiff in error.

William H. Wright, Attorney General, and *Milton C. Murphy, contra.*

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

DAY, J.

This is a prosecution under the liquor laws. The plaintiff in error was convicted in the trial court of a violation of chapter 93, Laws 1933. The constitutionality of the act was challenged, but in *Allen v. State,* p. 722, *post,* argued before the court the same day, that question has been resolved in favor of its validity. The discussion in that case need not be repeated here.

The plaintiff in error operated a grocery store in a building occupied also by a bakery, a meat market, barber shop, and a lunch counter. City police officers of Scottsbluff searched the building and found nine pints of whisky in the space occupied by the lunch counter. It is claimed that the only evidence to support the charge is circumstantial evidence. The defendant did not request the trial court to so instruct the jury. In the absence of a request, failure to give instruction relative to weighing circumstantial evidence is not error. *Nunnenkamp v. State, ante,* p. 264; *Fetty v. State,* 121 Neb. 228.

Evidence was introduced as to a search made of defendant's home about a week after the time of the crime herein charged. It is a well-established rule in this jurisdiction that, "Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible." *Swogger v. State,* 116 Neb. 563.

The evidence of another crime was within the exception because it related to motive and criminal intent. It occurred within a week of the crime charged and was not too remote as to time. *Goldsberry v. State,* 66 Neb. 312.

An examination of the record does not reveal any reversible error with respect to the assignments of error made by the plaintiff in error and argued in the brief.

AFFIRMED.

CHAUNCEY H. ALLEN V. STATE OF NEBRASKA.

FILED OCTOBER 11, 1935. No. 29533.

1. **Criminal Law**: COUNTY COURTS: JURISDICTION. In a case where the punishment prescribed by statute is more than the jurisdiction of the county court, a judgment of conviction and sentence thereunder is void.
2. ———: JURISDICTION. A judgment of a court which has no jurisdiction of the subject-matter is not a bar to a second prosecution for the same violation of the law.
3. ———: WITNESSES. Where the name of a witness has been indorsed on the information before trial but omitted from the copy served on the defendant, it is not error for such witness to testify, over defendant's objection, in the absence of a showing of prejudice or where a continuance was not requested at the time.
4. ———: CONTINUANCE. The necessity for a continuance in a criminal case must be determined from the facts and circumstances presented, and a denial is not reversible error, unless it appears from the record that defendant was prejudiced thereby.
5. **Statutes**: AMENDMENT. A provision, germane to the subject-matter, which might have been made a part of the original act may be added by amendatory legislation.

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

Frank J. Reed, for plaintiff in error.

William H. Wright, Attorney General, Paul P. Chaney and *Lester A. Danielson, contra.*

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

DAY, J.

The plaintiff in error was convicted in the district court for Scotts Bluff county for a violation of the liquor laws. It is contended that the judgment is erroneous because (1) a former conviction in the county court for the same county is a bar to this prosecution, (2) the action of the trial court in permitting an indorsement of a witness' name on the complaint at the time of trial and refusing a

continuance was error, (3) and chapter 93, Laws 1933, under which the complaint was filed was unconstitutional and void.

It appears that a complaint was filed in the county court charging a crime under the same set of facts. The defendant in that trial was found guilty and sentenced to pay a fine. The county court did not have jurisdiction to try the defendant for this violation of the liquor law. The complaint charged a violation of section 53-102, Comp. St. Supp. 1933. This section provides that it shall be unlawful for any person to keep for sale any intoxicating liquors. The penalty prescribed for a violation is, for a first offense, a fine not less than $500 nor more than $1,000, and imprisonment for not less than thirty days nor more than one year in jail. Comp. St. Supp. 1933, sec. 53-116. This complaint was not drawn under section 53-111, Comp. St. 1929, for that section prohibits the possession of intoxicating liquor regardless of the purpose for which it is kept. The jurisdiction of the county court is determined by the Constitution and the statutes. By section 16, art. V of the Constitution of Nebraska, it is provided: "County courts shall * * * not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over five hundred dollars, or both." *In re Chenoweth,* 56 Neb. 688, it was said: "This section of the Constitution does not of itself confer upon the county courts of the state any criminal jurisdiction whatever. It leaves it to the legislature to define the criminal jurisdiction of the county courts within certain limitations." Section 27-502, Comp. St. Supp. 1933, confers the following power upon them in criminal cases: "County judges in their respective counties shall have and exercise the ordinary powers and jurisdiction of justices of the peace in civil cases, and in criminal cases shall have jurisdiction where the punishment may not exceed six months' imprisonment or a fine over five hundred dollars, or both." Therefore it appears that the county court was without jurisdiction to try a criminal case where the punishment prescribed ex-

ceeded the limits of its jurisdiction. In a case where the punishment prescribed by statute is more than the jurisdiction of the county court, a judgment of conviction and sentence thereunder is void. *State v. Smith,* 114 Neb. 659; *Whetstone v. Slonaker,* 110 Neb. 343. A judgment of a court which has no jurisdiction of the subject-matter is not a bar to a second prosecution for the same violation of the law. *Peterson v. State,* 79 Neb. 132; *Steinkuhler v. State,* 77 Neb. 331.

The names of witnesses for the state were indorsed upon the information, but were not indorsed upon the copy which was served on the defendant, as provided by section 29-1602, Comp. St. 1929. No objection was made to proceeding to trial. The first objection, made after the jury were impaneled, was to the testimony of the first witness called, because his name was not indorsed upon the copy of the information which was served upon the defendant. The objection was overruled and the state was given leave to indorse the names of witnesses upon the copy of the information. Thereupon the defendant moved for a continuance for the reason that he was surprised and could not safely proceed to trial.

The only witness in this case was M. C. Morgan, a deputy sheriff of Scotts Bluff county. He served the search warrant under which the liquor in evidence in this case was found in defendant's drug store. He was a witness at the trial mentioned above in the county court. The defendant could not have been greatly surprised that he should have been called as a witness. Furthermore, there is no showing indicating that the defendant was prejudiced by reason of this omission. It does not appear that any witness exists whose testimony would have been material to this case. The seriousness of this omission is not impressive to us since Morgan was the only witness in the case. There were no witnesses for the defendant and none was suggested then or since who could not be procured because the court refused to grant a continuance during the trial. Where the name of a witness has been indorsed on the

information before trial but omitted from the copy served on the defendant, it is not error for such witness to testify, over defendant's objection, in the absence of a showing of prejudice or where a continuance was not requested at the time. *Frey v. State,* 109 Neb. 483. See, also, *Rownd v. State,* 93 Neb. 427; *Sheppard v. State,* 104 Neb. 709. As stated herein, there was no showing of prejudice either at the time the motion for continuance was presented and denied or on the motion for new trial. It would be futile and unwarranted to reverse the judgment here if on another trial the evidence would be the same. The necessity for a continuance in a criminal case must be determined from the facts and circumstances presented, and a denial is not reversible error unless it appears from the record that defendant was prejudiced thereby. *Smith v. State,* 123 Neb. 17.

The constitutionality of chapter 93, Laws 1933, is challenged on the ground that it is amendatory of sections 53-101 and 53-102, Comp. St. 1929, and is not germane to the subject-matter. These two sections relate to liquor, but provide no penalty for violation. The penalty is provided by section 53-151, Comp. St. 1929. The plaintiff in error relies upon *Day v. Metropolitan Utilities District,* 115 Neb. 711, in which this court said: "It is a rule, firmly established in this, and generally recognized in other, jurisdictions, that, when the title of a legislative act is to amend a particular section of an existing statute, the proposed amendment must be germane to the subject-matter of the section sought to be amended. * * * The reason for the application of the rule is that the title expresses a purpose to deal only with the subject-matter contained in the section sought to be amended." The cited case announces a well-established rule in this jurisdiction. But subject-matter was germane. In 25 R. C. L. 843, sec. 90, is found the following definition: "The 'subject' of an act is the matter or thing forming the groundwork of the act, which may include many parts or things, so long as they are all germane to it and are such that if traced back they will lead

the mind to the subject as the generic lead." The same general rule was pronounced by this court in the case of *Affholder v. State*, 51 Neb. 91, when it said: "This constitutional provision should be liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the purposes of the act as expressed in its title." Now, section 53-102, Comp. St. 1929, was a part of an act for the regulation or prohibition of commerce in intoxicating liquor. Section 53-151, Comp. St. 1929, provided a penalty and provided that it should apply except where another penalty is provided. This provides another and an additional penalty for violation of the liquor laws. A provision germane to the subject-matter which might have been made a part of the original act may be added by amendatory legislation. *State v. Hevelone*, 92 Neb. 748. The unconstitutionality of chapter 93, Laws 1933, has not been demonstrated. No prejudicial error appears in the record.

AFFIRMED.

CENTRAL BRIDGE & CONSTRUCTION COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

MIDWESTERN & PACIFIC CONSTRUCTION COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 11, 1935. NOS. 29252, 29253, 29254.

1. **Carriers: RATES: JURISDICTION.** The Nebraska state railway commission has the power, under the provisions of section 75-

203, Comp. St. 1929, to make an award of damages against a railroad company for exacting an overcharge from a shipper.

2. ———: ———: DISCRIMINATION. "The modern common law imposes upon common carriers the duty of equality in freight rates to all shippers similarly circumstanced, for the transportation of the same class of goods the same distance; and our statutes prohibiting such discrimination are declaratory of the common-law rule." *Sullivan v. Minneapolis & R. R. R. Co.*, 121 Minn. 488.

3. ———: ———: REMEDY. The shipper's common-law right of action for an overcharge in rates is not taken away by our rate-regulating statutes which provide no civil remedy to the shipper therefor.

4. ———: ———: ———. Sections 75-510 to 75-512, inclusive, Comp. St. 1929, grant to the railway commission an additional power, cumulative in nature, to award reparations where the lawful existing rate is retroactively set aside, and, in the absence of legislative intent therein expressed, it cannot change the effect of prior statutes governing other classes of claims.

5. ———: ———: ———: LIMITATIONS. "Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations." *City of South Omaha v. McGavock*, 72 Neb. 382.

6. ———: ———. The fixing or establishing of a rate by the railway commission in making an award for an overcharge is a legislative function conferred upon the commission by statute, and has the force of a statute on the subject.

7. ———: ———. The findings of the railway commission, in making an award in an overcharge case, that the shipper has been damaged, and the determination of the amount thereof, are judicial in their nature and, in a suit to enforce the award, are *prima facie* evidence only of the facts therein stated, under the provisions of section 75-507, Comp. St. 1929.

8. **Limitation of Actions.** An action to enforce an award of the railway commission, made under the provisions of section 75-203, Comp. St. 1929, may be commenced at any time within five years after exaction of the overcharge of which complaint is made.

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

opinion, 128 Neb. 779, vacated and judgment of district court affirmed.

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

Lester L. Dunn, contra.

William H. Wright, Attorney General, Edwin Vail, C. A. McGraw, T. W. Bockes, J. A. C. Kennedy, Guy C. Chambers, J. W. Weingarten and *Dana Van Dusen, amici curiæ.*

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

CARTER, J.

The cases under consideration on this appeal were tried together in the court below and briefed and argued together in this court. The judgments appealed from are identical in form except as to the amounts. Each of the plaintiffs filed claims before the state railway commission to recover back certain freight charges which it had paid, but which it now claims were excessive. The state railway commission ordered a refund of the excessive amount which the company failed to pay. Plaintiffs then filed suit in the district court to enforce payment of the claims and recovered judgments for the amounts thereof. The defendant prosecutes these appeals from each of the judgments entered.

It is not disputed in the evidence that an overcharge was made in the hauling of gravel for each of the appellees, due to the fact that the mileage from the gravel pits to the points of destination was incorrectly figured. It is the contention of the defendant that these cases were filed under the reparations statute, the same being sections 75-510 to 75-512, inclusive, Comp. St. 1929, and that appellees are limited to the remedies provided therein.

The state railway commission was created by constitutional amendment in 1906. Const. art. IV, sec. 20. The powers of the commission were defined by legislative act,

pursuant to the constitutional provision, in 1907. Laws 1907, ch. 90. This act, which we will hereafter designate as the act of 1907, contained, in part, the following provisions: "The commission shall have the power, and it shall be its duty to make all necessary classifications and to fix all necessary rates, charges and regulations to govern and regulate the freight and passenger tariffs of railway companies and common carriers, the power to correct abuses and prevent unjust discriminations, extortions and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as hereinafter provided, through proper courts having jurisdiction." Comp. St. 1929, sec. 75-203. It will be noted that the only method of enforcement directly expressed in this act was by the infliction of penalties. The act did give authority to the railway commission "to correct abuses and prevent unjust discriminations, extortions and overcharges." This provision authorizes the railway commission to make awards in proper cases. To hold otherwise would defeat the very purpose of the act as therein expressed. There was no express provision in the act granting the shipper the right to sue in the courts to recover overcharges which might be awarded by the railway commission.

It can hardly be argued that enforcement of the act by the infliction of penalties upon the offending railroad would in any manner recompense the shipper for the wrong he has suffered. There is no question that an action existed at common law for the recovery of overcharges exacted by a railroad company.

In *Tift v. Southern R. Co.*, 123 Fed. 789, the court said: "The difference in the obligation of a common carrier and that of a private individual is that the former has undertaken a duty to the public. Having undertaken that duty, it was settled by the common law that the common carrier must carry for all, to the extent of his capacity, without unjust or unreasonable discrimination either in charges or in the facilities for actual transportation."

In *Sullivan v. Minneapolis & R. R. R. Co.*, 121 Minn. 488, the same proposition was announced in the following language: "The modern common law imposes upon common carriers the duty of equality in freight rates to all shippers similarly circumstanced, for the transportation of the same class of goods the same distance; and our statutes prohibiting such discrimination are declaratory of the common-law rule."

We therefore conclude that immediately following the passage of the act of 1907, heretofore referred to, the common-law action was still available. The shipper's common-law right of action for damages for a discrimination or overcharge in rates is not taken away by our rate-regulating statutes which provide penalties only for their enforcement and furnish no civil remedy to the shipper therefor. *Sullivan v. Minneapolis & R. R. R. Co., supra.* The measure of recovery under the existing common-law rule would be the difference in the rate charged and the rate fixed by the railway commission, if one had been fixed. In other words, the statutes regulating rates are in derogation of the common law to the extent that the shipper in his suit for damages is bound by the rates established by the commission and could not establish the reasonableness of the rate by evidence, as was the case under the common-law rule.

However, the legislature later passed chapter 229, Laws 1921, commonly called the reparations act, now sections 75-510 to 75-512, inclusive, Comp. St. 1929, which we will hereafter refer to as the 1921 statute. This act provides as follows: "That if, after hearing on a complaint under sections 6126, 6127, 6128, 6129 or sections 6137, 6138, 6139, 6140, Revised Statutes of Nebraska for 1913, the Nebraska state railway commission shall determine that any party complainant has on and after the taking effect of this act and within two years next preceding the filing of the said complaint paid unjust or unreasonable rates or charges to any defendant railroad or express company in this state on intrastate traffic or has on and after the tak-

ing effect of this act and within two years next preceding the filing of the said complaint suffered damages by reason of the maintaining, publishing, demanding, charging, receiving or retaining by such carrier of any rate or rates, charges, rules, regulations, services or practices on intrastate traffic which are found by the commission to be unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise unlawful, the commission shall make an order directing the railroad or express company to pay to the complainant the sum to which he is entitled on or before a day named." Comp. St. 1929, sec. 75-510.

The sections of the statute referred to in the above quotation provide for the filing of complaints before the railway commission to determine the reasonableness or unreasonableness of rates, charges and regulations to regulate and govern the freight and passenger tariffs of railway companies or common carriers. The 1921 statute grants to the railway commission the additional power to grant reparations where the lawful and existing rate is retroactively set aside. The statute is plain that a claim must be filed within two years, where it arises by virtue of the retroactively setting aside of a lawful and existing rate, in order to confer jurisdiction on the railway commission to make an award thereon. The two-year period is not a statute of limitation but an express limitation upon the jurisdiction of the railway commission in such cases. The limitation is a limitation of the right as well as the remedy and, unless the party seeking relief under the new remedy therein granted places himself strictly within the limitations, he has no cause of action. This was so held in the case of *City of South Omaha v. McGavock*, 72 Neb. 382, the court saying: "Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations." The remedy pro-

vided in such cases is cumulative in nature and grants an additional right to the shipper. It cannot, however, in the absence of a legislative intent therein expressed, change the effect of the prior statutes governing other classes of claims. We conclude, therefore, that the railway commission has the power to make awards under both the 1907 and the 1921 statutes.

The appellees contend that, the appellant having failed to appeal, the award of the railway commission is final. To this we cannot agree. In the making of every award there is necessarily a determination of a rate involved and the assessment of the damages based on that rate. The determination of the rate is, under our law, a legislative function possessed by the railway commission. The courts do not have the power to act in a legislative manner to perform this function. Necessarily, therefore, the fixing or establishing of a rate by the railway commission has the force of a statute on the subject. On the other hand, the finding of the railway commission that the shipper has suffered a damage, and the determination of the amount thereof, are judicial in their nature. This part of the finding is confined to a *prima facie* status and is merely a rebuttable presumption. Comp. St. 1929, sec. 75-507.

The case at bar therefore involves the application of an established rate to an admitted mileage. The 1921 statute, and the two-year limitation therein, can have no application. The question of granting reparations, where an existing rate is retroactively set aside, is not in this case. That statute is cumulative in its nature and as a result can take nothing from the rights of the parties existing prior to its passage, in the absence of a legislative intent expressed therein to so do.

We therefore conclude that appellees have the right to maintain a common-law action to recover back the overcharges made in the case at bar. The action having been commenced within five years from its accrual, the statute of limitations is no defense.

The only question remaining is whether the evidence was

sufficient to sustain the judgment. The record shows that the transcript of the proceedings of the railway commission was received in evidence without objection. In addition thereto, appellant admitted in each case the date of shipment, the car number and initial, the weight of the shipment, the rate charged and the amount of the charges made, each of which admissions is shown in the record. The legal existing rate fixed by the commission having been offered in evidence, a *prima facie* case was made that is sufficient to sustain the judgment. The former opinion, appearing in 128 Neb. 779, is hereby vacated and the judgment affirmed in accordance with this opinion.

AFFIRMED.

PENN MUTUAL LIFE INSURANCE COMPANY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED OCTOBER 25, 1935. No. 29353.

Municipal Corporations: STREET IMPROVEMENTS: ASSESSMENTS: COLLATERAL ATTACK. "Where a property owner has notice that his property is to be assessed for benefits by reason of a public improvement, and the law affords him an opportunity to appear and protest, and, if aggrieved by the action of the authorities, to appeal to the courts, but neglects to avail himself of such provisions, he may not thereafter, in a collateral proceeding, attack the validity of such assessment, except for fraud, actual or constructive, a fundamental defect, or an entire want of jurisdiction." *Wead v. City of Omaha*, 124 Neb. 474.

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

Sidney W. Smith and *Weaver & Giller*, for appellant.

Seymour L. Smith, A. C. R. Swenson and *Harold C. Linahan, contra.*

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

ROSE, J.

This is a suit in equity to cancel a municipal assessment of $12,357.21 for special benefits to real estate owned by plaintiff at the southwest corner of Twentieth and Dodge streets in the city of Omaha. The property of plaintiff has a frontage of 146 feet on Twentieth street and 198 feet on Dodge street, and was assessed for benefits accruing from a public improvement by which Twentieth street was widened from Dodge street to Leavenworth street. Without direct authority granted by a vote of the electors, the city council proceeded under the statute authorizing the improvement, if special benefits are found to equal 90 per cent. of the cost. Comp. St. 1929, sec. 14-358. The theory on which plaintiff seeks relief in equity is that the city council, in their plan for the improvement, included in the improvement district nonassessable public property without which only 88.6 per cent. of the cost could be exacted from private owners for special benefits and that consequently the assessment against the real estate of plaintiff is void for want of jurisdiction and for fraud.

To the petition defendant interposed a general demurrer which was sustained and the suit dismissed, plaintiff having refused to plead further. From the judgment of dismissal plaintiff appealed to the supreme court.

Under pertinent facts well pleaded in the petition and admitted by the demurrer, is plaintiff equitably entitled to a decree canceling the assessment of its property for special benefits? From the entire petition it is clear that lack of jurisdiction or perpetration of fraud invalidating the assessment is not well pleaded unless shown by general allegations that nonassessable public property was included in the improvement district, thus reducing the percentage of special benefits 1.4 per cent. below the statutory requirement of 90 per cent. to 88.6 per cent.

Under the right of eminent domain conferred by the city charter, the city council had power to widen Twentieth street. The amount of the appraised damages to property required for that purpose exceeded $100,000, and in that

event the council were empowered to make the improvement without a vote of the electors, if special benefits ascertained pursuant to statute equaled 90 per cent. of the cost. Comp. St. 1929, sec. 14-358. The petition shows that Twentieth street was in fact widened; that ordinances were passed pursuant to the plan of improvement adopted; that findings, appraisements and assessments were made; that assessments were equalized; that the board of equalization was a statutory tribunal to hear and determine objections and complaints relating to assessments. Plaintiff did not specifically deny knowledge or notice of the proceedings which are presumed to be regular in absence of facts showing the contrary, but alleged that other property owners obtained redress by presenting their grievances to the board of equalization.

It is alleged, however, that several itemized pieces of real estate belonging to the government or subdivisions thereof, which were not subject to assessments for special benefits, were included in the improvement district, thus invalidating the proceedings and assessment. In this connection plaintiff invokes statutory provisions to the effect that such property "shall not be subject to special assessment" and "shall not be counted in determining sufficiency of petition or protest." Comp. St. 1929, sec. 14-326. Reference is also made to section 14-533 of the same statute. The latter clause quoted appears applicable to procedure initiated by petition, but does not seem to apply to action taken by the council in the present instance without a petition, where the special benefits are found to equal 90 per cent. of the cost. Plaintiff has not pointed out a specific provision of statute prohibiting the inclusion of nonassessable public property in the improvement district for the purpose of estimating the necessary percentage of benefits accruing to property. If exempt property should have been excluded, the action of the council including it should be attributed to a mere irregularity or to an error of judgment or of law, rather than to intentional fraud defeating jurisdiction.

If the proceedings of the council invaded any property right of plaintiff, the latter had a remedy by appeal. Comp. St. 1929, sec. 14-539. Where special benefits are assessed by a valid ordinance, appeal is the exclusive remedy of property owners. Comp. St. 1929, sec. 14-538. The law was recently stated as follows:

"Where a property owner has notice that his property is to be assessed for benefits by reason of a public improvement, and the law affords him an opportunity to appear and protest, and, if aggrieved by the action of the authorities, to appeal to the courts, but neglects to avail himself of such provisions, he may not thereafter, in a collateral proceeding, attack the validity of such assessment, except for fraud, actual or constructive, a fundamental defect, or an entire want of jurisdiction." *Wead v. City of Omaha,* 124 Neb. 474. See, also, *Murphy v. Metropolitan Utilities District,* 126 Neb. 663.

It is not specifically alleged in the petition that plaintiff's property was not specially benefited to the extent of $12,357.21, the amount of the assessment. Neither plaintiff nor its predecessor in title made any timely objection to any of the proceedings, though there was a legal tribunal with power to grant proper relief. Plaintiff did not appeal from the assessment, but resorted to equity for a decree canceling it long after completion of the improvement, long after the receiving of the benefits and long after the assessment of other private property in the improvement district.

The better view of the petition, when considered with city ordinances and other proceedings of the city council pleaded and with the city charter, is that the suit is a collateral attack on the assessment which is not shown to be void. In this view of the petition, plaintiff is not entitled to relief in equity and the trial court did not err in sustaining the demurrer.

AFFIRMED.

MARIE DUFFY, APPELLANT, V. RUTH SCOTT CODY, APPELLEE.

FILED OCTOBER 25, 1935. No. 29361.

Dismissal and Nonsuit. Before the final submission of a case to the jury or court, a dismissal by plaintiff without prejudice to a future action is not a matter of judicial grace or discretion, but is a statutory right. Comp. St. 1929, sec. 20-601.

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

R. B. Hasselquist and *Donald S. Krause,* for appellant.

V. E. Spittler and *S. Arion Lewis, contra.*

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

ROSE, J.

This is an action to recover from defendant $20,000 in damages for alienating the affections of plaintiff's husband. The answer to the petition was a general denial. After evidence had been adduced on both sides, the trial court, on motion of defendant, discharged the jury and dismissed the action for want of evidence. Plaintiff appealed.

The determining question presented on appeal is raised by the assignment of error that plaintiff, before the final submission of the case to the jury or court, was denied her statutory right to a dismissal without prejudice to a future action. The legislation is in this form:

"An action may be dismissed without prejudice to a future action: First. By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court." Comp. St. 1929, sec. 20-601.

The right thus granted to a plaintiff is not a matter of judicial grace or discretion, but is absolute, if exercised "before the final submission of the case." *Plattsmouth Loan & Bldg. Ass'n v. Sedlak,* 128 Neb. 509; *Beals, Torrey & Co. v. Western Union Telegraph Co.,* 53 Neb. 601; *Adams v. Osgood,* 55 Neb. 766.

Before final submission of a case, the right of plaintiff to a dismissal without prejudice to a future action must be respected, whether an exercise thereof will harrass defendant by prolonged and expensive litigation, or enable justice to prevail when it would otherwise be defeated. *Plattsmouth Loan & Bldg. Ass'n v. Sedlak,* 128 Neb. 509. The right was granted by the legislature, not by rule of court.

When plaintiff herein demanded and exercised her right to a dismissal, the case had not been finally submitted to the court or jury. Plaintiff adduced her evidence in chief and rested. Defendant asked the trial court to direct a verdict in her favor for insufficiency of the evidence to make a *prima facie* case in favor of plaintiff. The question was argued in absence of the jury and a nonsuit denied. Defendant adduced her evidence in defense and rested. The trial court inquired: "Is there any rebuttal?" The answer was, "Yes." Plaintiff took the stand in rebuttal. After direct and cross-examination the witness was excused. Without any further action by the parties or the trial court counsel for plaintiff stated:

"If the court please, plaintiff at this time, before she has rested her case, requests that this action be dismissed without prejudice, at plaintiff's costs."

Dismissal at the costs of plaintiff without prejudice to a future action was denied. The record shows plaintiff did not rest. Asked if she rested, her counsel replied:

"I have asked to dismiss. I have nothing to rest now. I am dismissing my case."

Plaintiff did not waive her dismissal but stood upon it. Later, the trial court sustained a motion by defendant to discharge the jury and dismiss the case on its merits for want of evidence. The record shows conclusively that plaintiff demanded and exercised the right to dismiss her case without prejudice to a future action, before the final submission of the case to the jury or court, within the meaning of the statute quoted. The judgment from which the appeal is taken is therefore erroneous to the prejudice of plaintiff and for that reason is reversed and the case

dismissed without prejudice to a future action, defendant to pay the costs in both courts incurred subsequently to the overruling of plaintiff's motion to dismiss.

REVERSED.

ROBERT MILLER, APPELLANT, V. CENTRAL COAL & COKE COMPANY, APPELLEE.

FILED OCTOBER 25, 1935. No. 29653.

1. **Master and Servant:** WORKMEN'S COMPENSATION: COMMUTATION. "In entering into an agreement under the workmen's compensation act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make a settlement at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation." *Perry v. Huffman Automobile Co.*, 104 Neb. 214.
2. ———: ———: ———. "In the approval of a commutation of an employee's compensation from periodical payments to a payment in gross, the public has an interest which it is the duty of the court to protect without regard to the wishes of the parties." *Perry v. Huffman Automobile Co.*, 104 Neb. 214.
3. ———: ———: ———. "Under the workmen's compensation act, in cases of death or permanent disability, commutation or payment in a lump sum by approved agreement is a departure from the general rule and should only be sanctioned upon the statutory terms relating to the exception." *Perry v. Huffman Automobile Co.*, 104 Neb. 214.
4. ———: ———: ———. In a hearing upon application for lump sum settlement under the workmen's compensation law, the trial court should inquire into the nature and extent of the injury, the extent of the employee's disability, and whether the settlement is for the best interests of the injured workman or his dependents.
5. **Appeal:** TRANSCRIPT. A properly certified transcript of the record of the trial court imports verity.
6. ———. The supreme court, in reviewing judgment of district court without bill of exceptions, will only determine whether judgment entered is supported by the pleadings.

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

Gerald E. La Violette and *William P. Lynch*, for appellant.

Brogan, Ellick & Shoemaker, contra.

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

GOOD, J.

From a judgment dismissing his application to vacate a judgment approving a lump sum settlement in a case arising under the workmen's compensation law, plaintiff has appealed.

Plaintiff, while in the employ of defendant, received an injury compensable under the workmen's compensation law. The compensation commissioner made an award to plaintiff for total and permanent disability, which, on appeal to the district court, was affirmed, and, on appeal by defendant to this court, was affirmed in *Miller v. Central Coal & Coke Co.*, 123 Neb. 793.

In 1934 defendant made application to the district court for modification of the award, on the ground of a decrease in plaintiff's disability. Upon a hearing, the application was dismissed, the court finding that plaintiff's disability was then total and permanent. More than six months thereafter, plaintiff and defendant agreed upon a lump sum settlement and that plaintiff's disability was then permanent and 45 per cent. of total. The application for approval of the lump sum settlement was prepared, signed and verified by plaintiff, signed and verified by attorneys for defendant, and was presented to and approved by the compensation commissioner; was then filed in the district court and a hearing had upon such application. The district court approved and confirmed the lump sum settlement. It is this order which plaintiff seeks, in this proceeding, to vacate.

It is plaintiff's contention that the last determination of the extent of plaintiff's disability was by the district

court in 1934, and that it was then permanent and total; that in the agreement for a lump sum settlement a 45 per cent. disability was stipulated for the sole purpose of fixing the lump sum settlement at $1,800, and plaintiff contends that, under the workmen's compensation act, in a case of total disability, the injured employee cannot, for the purpose of making a lump sum settlement, agree upon a percentage of disability less than he actually has at that time. With the latter part of this contention we agree.

In *Perry v. Huffman Automobile Co.*, 104 Neb. 214, we held:

"In entering into an agreement under the workmen's compensation act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make a settlement at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation. * * *

"In the approval of a commutation of an employee's compensation from periodical payments to a payment in gross, the public has an interest which it is the duty of the court to protect without regard to the wishes of the parties. * * *

"Under the workmen's compensation act, in cases of death or permanent disability, commutation or payment in a lump sum by approved agreement is a departure from the general rule and should only be sanctioned upon the statutory terms relating to the exception.

"Under the workmen's compensation act, the nature and the extent of the injury are material inquiries upon an application for the approval of an agreed commutation from periodical payments to a lump sum for a permanent disability."

However, in the instant case, the record discloses that a hearing was had in the district court upon the application for confirmation of the lump sum settlement. From the findings made on that hearing we quote as follows:

"This matter coming on for hearing this 21st day of December, 1934, upon the application of the plaintiff and the defendant for approval of lump sum settlement, the court having considered the duly verified application of the parties, evidence having been adduced, plaintiff being present in court and represented by counsel, and defendant being represented by counsel, the court, being fully advised in the premises, finds that said settlement is in conformity with the compensation schedule, and that said settlement is for the best interests of the plaintiff, and should, therefore, be approved, ratified and confirmed. The court further finds that the said application has been submitted to the compensation commissioner of the state of Nebraska, and has by said compensation commissioner been approved."

It thus appears that evidence was adduced upon that hearing, but the bill of exceptions brought to this court does not contain the evidence taken at that hearing. On the oral argument it was stated that no evidence was taken. The record indicates otherwise and imports absolute verity. We have frequently held that, in the absence of a bill of exceptions, we can only determine whether the judgment entered is supported by the pleadings. The only pleading in this case is the application verified by both parties. The recitals in the application would indicate that plaintiff's disability was only 45 per cent. The trial court heard the evidence adduced and made its findings in accordance with the pleadings or application. We must assume, therefore, that every finding made by the trial court was supported by sufficient competent testimony.

Plaintiff seems to contend, however, that, since at the prior application for modification of the judgment the court then found plaintiff's disability to be permanent and total, we must assume that situation to continue. With this contention we are unable to agree. No doubt, plaintiff could, at the time the lump sum settlement was agreed upon, have made an application for a modification of the judgment for periodical payments of compensation. Had

the court then found that plaintiff's disability was total and permanent, the lump sum settlement must have been that which was required under the statute for such disability. If plaintiff's disability had decreased until it was only 45 per cent., we see no reason why, in the application for a lump sum settlement, that matter could not have been inquired into, which it doubtless was, and, if plaintiff's disability was then but 45 per cent., a lump sum settlement upon that basis could have been properly made, provided the court found that it was for the best interests of the plaintiff or his dependents. Moreover, the present record before us fails to show whether plaintiff's disability was more than 45 per cent. at the time the lump sum settlement was agreed upon and confirmed by the district court. While, no doubt, it is the duty of the district court, when an application for a lump sum settlement is made, to inquire into the facts and to be satisfied that no advantage is being taken of the injured workman or his dependents, under the record before us we must assume that the court performed that duty.

No sufficient reason is shown in this record for vacating the order confirming the lump sum settlement. The record discloses no error prejudicial to plaintiff. Judgment

AFFIRMED.

MCCONNON & COMPANY, APPELLEE, V. ARTHUR BELLAMY: ISAAC N. DEMPCY ET AL., APPELLANTS.

FILED OCTOBER 25, 1935. No. 29346.

1. **Evidence** in the record examined, and *held* to sustain the judgment of the district court.
2. **Appeal**: REFUSAL OF INSTRUCTION. "It is elementary that error cannot be predicated on the refusal of the court to give a tendered instruction, where the court of its own motion properly instructed the jury on the points covered by the instruction offered and refused." *Jorgensen v. Robinson Seed Co.*, 112 Neb. 573.

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

Beeler, Crosby & Baskins, for appellants.

William E. Shuman, Halligan, Beatty & Halligan and *Bert L. Overcash, contra.*

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

EBERLY, J.

This is an action at law upon a written contract of guaranty alleged to have been executed by defendants Dempcy and Fickenscher. To plaintiff's petition defendants filed a general denial. The trial jury returned a verdict for plaintiff in the amount prayed, and from the order of the trial court overruling their motion for a new trial, defendants appeal.

Appellants present for our consideration the claimed insufficiency of the evidence to support the verdict, and the fact that the court's instructions failed to state the issues raised because the contract in suit was not identified with sufficient clearness.

A careful reading of the evidence set forth in the bill of exceptions discloses proof ample to sustain the jury's finding. To set it forth at length would serve no good purpose, and on this point we content ourselves with the conclusion just stated.

We are unable to sustain appellants' contention that the court's instructions failed to state the issues raised. Instructions given by a court are to be read together and construed as an entirety.

Instruction No. 2 given by the court sets forth, in part: "That prior to May 6, 1930, said plaintiff had negotiated with one Arthur Bellamy, looking to the plaintiff's selling to said Bellamy certain goods, and before making any sales to said Bellamy, said petition alleges that the plaintiff entered into a written contract with the defendants, Isaac N. Dempcy and Paul J. Fickenscher on May 6, 1930, where-

in said defendants guaranteed the payments of any goods that may be sold by the plaintiff to said Arthur Bellamy." This instruction also sets out the amount and value of the goods delivered thereunder, and the amount unpaid and alleged to be due from the defendants to the plaintiff.

Instruction No. 3 properly sets forth the defendants' answer as a general denial with a prayer for dismissal of the action.

By instruction No. 4 the jury were instructed that before the plaintiff could recover against the defendants Dempcy and Fickenscher, or either of them, it must establish by a preponderance of the evidence the following:

"That on the 6th day of May, 1930, the defendants, Isaac N. Dempcy and Paul J. Fickenscher, or either of them, entered into a contract which is represented by exhibit 107, with the plaintiff, which contract guaranteed all payments of merchandise sold by plaintiff and delivered to one Arthur Bellamy."

The bill of exceptions discloses that exhibit 107 is the written contract pleaded in plaintiff's petition. It had been introduced in evidence. Its terms were before the jury, and the apparent parties thereto were positively known by them. The language employed in the instruction positively identified it by the exhibit number indorsed thereon when received in evidence. By the last paragraph of instruction No. 4 the jury were required to find "from the evidence" under these instructions, by a preponderance of the evidence, that the defendants had entered into the contract represented by exhibit 107, as a prerequisite to returning a verdict for plaintiff.

As to the two instructions requested by defendants, which were refused, the controlling rule, in view of the entire record, is:

"It is elementary that error cannot be predicated on the refusal of the court to give a tendered instruction, where the court of its own motion properly instructed the jury on the points covered by the instruction offered and refused." *Jorgensen v. Robinson Seed Co.*, 112 Neb. 573.

No substantial error appearing in the record, the judgment of the district court is

AFFIRMED.

CASSIUS H. MECK, APPELLEE, V. GERTRUDE SARAH WIIG ET AL., APPELLANTS.

FILED OCTOBER 25, 1935. No. 29347.

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

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

Edith Beckman, for appellants.

Lower & Sheehan, contra.

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

EBERLY, J.

This is an action in partition. The appeal presents for determination the correctness of the action of the trial court in confirming the respective shares of the parties, Cassius H. Meck, Gertrude Sarah Wiig (nee Meck), and Delma Marie Meck, in and to the premises which constituted the homestead of the deceased Mary Meck. Gertrude Sarah Wiig (nee Meck) and Delma Marie Meck appeal.

The facts out of which this controversy arises include the following: Mrs. Mary Meck, the mother of the parties to this litigation, died on October 22, 1915. At the time of her death she was the owner in fee simple of a lot in Omaha, Nebraska, on which her family had then resided for many years, and which constituted the family homestead. Her family at that time, in addition to herself, was comprised of her husband, George S. Meck, and her three children, Cassius H. Meck, Gertrude Sarah Meck, and Delma Marie Meck. See *Shearon v. Goff*, 95 Neb. 417.

After the death of the mother, the son, Cassius H. Meck, his wife joining, quitclaimed his interest in the homestead premises to his father, George S. Meck. Thereafter, George S. Meck died testate, leaving a last will and testament, by the terms of which all of his interest in the homestead was devised to his son, Cassius H. Meck. Based on these facts, the decree of the district court appealed from determines that Cassius H. Meck was the owner of a five-ninths interest in the premises in suit, and that Gertrude Sarah Wiig (nee Meck) and Delma Marie Meck were each the owner of an undivided two-ninths interest therein.

The controlling statutes are:

"If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will." Comp. St. 1929, sec. 40-117.

"When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a nonresident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following: * * * Second. One-third part to the husband or wife if the survivor is the parent of all the children of the deceased and there be two or more children, or one child and the issue of one or more deceased children surviving." Comp. St. 1929, sec. 30-101.

In construing the two statutory provisions quoted, Morrissey, C. J., in *In re Estate of Grobe,* 101 Neb. 786,

says, in part: "The decedent's statute does not change the homestead statute at all, and these two statutes may be harmonized by holding that the homestead law gives the residuary estate to those persons to whom the law gives property that is not a homestead. The surviving spouse is not an heir under the ancient definition of the term, but takes the property of the deceased spouse whenever the conditions are such that an heir would take. Under section 1265 (now Comp. St. 1929, sec. 30-101), the ancient right of dower is enlarged into a contingent interest in the fee. On the death of the husband the widow becomes the owner, where there are no children, of a half interest in the property that is not a homestead, and because she takes by operation of law, and not strictly as an heir, she is not excluded from taking under the homestead law. There is no inconsistency between the statutes. In the instant case it appears to make no difference whether the widow first takes under the homestead statute or under the inheritance statute. The result is the same regardless of the order in which these statutes are applied. If any difference would result it would seem that the homestead statute ought to be first applied. Under the homestead statute the widow is entitled to the present worth of her life estate in the property, after the debts are paid, and she is entitled to half of the remainder under the inheritance statute."

It follows that, by force of the statutes quoted, upon the death of Mary Meck, intestate, on October 22, 1915, the property in this action passed under the statute of descent, subject to the statutory rights of homestead in the surviving husband, as follows: One-third to the husband, George S. Meck, and two-thirds to the surviving children or two-ninths to each child. Thereafter Cassius H. Meck quitclaimed his undivided two-ninths interest to his father, George S. Meck, who then, subject to the homestead right, was vested with an undivided five-ninths interest in the fee of the premises in suit. On the death of George S. Meck, testate, his last will devised this five-ninths interest to Cassius H. Meck, and constituted him owner in fee

simple of an undivided five-ninths interest in the premises. See, *Donovan v. Bank of Palmyra,* 104 Neb. 652; *In re Estate of Grobe,* 101 Neb. 786; *Whitford v. Kinzel,* 92 Neb. 373.

The decree of the district court appealed from being in harmony with the foregoing facts, it follows that the same is correct, and the judgment entered in the trial court is

AFFIRMED.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLANT, V. B. GRUNWALD, INC., APPELLEE.

FILED OCTOBER 25, 1935. No. 29339.

1. **Trial.** Where both parties at the close of all the evidence, without reservation, move for a directed verdict, each invites the court to discharge the jury, determine the facts, and apply the law thereto.
2. **Appeal.** A finding of fact in a law action by a court, where a jury is waived, will not be disturbed unless clearly wrong.

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

Gaines, McGilton, McLaughlin & Gaines, for appellant.

Wear, Garrotto & Boland, contra.

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

DAY, J.

This is an action to recover premium on a contractor's bond. At the close of all the testimony, both parties moved for a directed verdict. The trial judge then entered a judgment in favor of the defendant.

B. Grunwald, Inc., contracted with Douglas county to install heating equipment in the county hospital. This contract did not cover all plumbing work in the hospital. The contract price was $20,798. B. Grunwald, Inc., applied for and the Fidelity & Deposit Company executed a surety bond for the faithful performance of this contract

in the penal sum of $20,798, the premium for which, in the sum of $311.97, was paid. The contract with the county contained this provision: "It is understood and agreed that the owner may at its option within thirty days of the date of this instrument accept any one or all of the proposals set out as separate bids Nos. I to VI, inclusive, at the respective prices set out in the proposal, such additions to be part of this contract and subject to all the conditions thereof." The application for the bond by B. Grunwald, Inc., provided for premium for a term of two years, as above indicated, "and an annual premium in advance for each year after said term at the rate of three-fourths of one per cent. of said contract price, and an additional term and annual premium at said rates, based on any increase of said contract price, as shown by the certificate of the engineer or architect in charge, and to be adjusted upon completion of said contract." Now, B. Grunwald, Inc., in addition to the performance of the original contract, did other work in the amount of $20,584.82. Upon this additional work the plaintiff claims a premium due, which is the basis of this action.

The determination requires a finding of fact and an application of the terms of the contract. At the close of all the testimony both parties moved for a directed verdict. Where both parties at the close of all the evidence, without reservation, move for a directed verdict, each invites the court to discharge the jury, determine the facts, and apply the law thereto. *Adams v. City of Omaha,* 119 Neb. 753; *Knies v. Lang,* 116 Neb. 387.

A finding of fact in a law action by a court, where a jury is waived, will not be disturbed unless clearly wrong. *Societe Titanor v. Paxton & Vierling Iron Works,* 124 Neb. 570. A glance at the digest reveals that this rule is well established in this jurisdiction. The evidence supports the finding that the additional work was done under other contracts with Douglas county than the one for which the bond was executed. It did not amount to an increase in the contract price. An examination of the bond reveals

that the obligation thereof relates directly, explicitly and solely to the contract for installing heating equipment in the boiler-room of the county hospital and not to a contract for other and different work. It cannot be said that the finding of the trial court is clearly wrong, supported as it is by sufficient evidence to sustain it.

AFFIRMED.

IN RE ESTATE OF BENGT SWANSON.
HEIRS OF BENGT SWANSON, APPELLEES, V. MELVIN O. SWANSON ET AL., ADMINISTRATORS, APPELLANTS.

FILED OCTOBER 25, 1935. NO. 29342.

Executors and Administrators. Evidence examined upon objections to administrators' final report and determined to support the finding of the trial court.

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

R. O. Reddish, for appellants.

Boyd & Metz and *A. C. R. Swenson, contra.*

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

DAY, J.

The administrators of the estate of Bengt Swanson, deceased, filed their final report and accounts, to which the heirs objected in three particulars, as follows: (1) That the report does not account for $10,000 realized from the sale of wheat produced on real estate of deceased during 1929; (2) that the administrators should not have credit for $11,537.27 paid on principal and interest on account of a mortgage against certain real estate of deceased; and (3) that $559.59 of the balance for which the administrators are accountable is held in the form of a receiver's certificate of a failed bank, which the heirs are not bound to take. The trial court found in favor of the adminis-

trators on No. 1 and against them on Nos. 2 and 3. The administrators appealed upon the second proposition and the heirs cross-appealed as to item No. 1. There is no issue here as to the third item.

The issue as to item No. 1, relating to the failure to account for $10,000 realized from the sale of wheat, is determinable as a question of fact. The wheat in question was grown by one Jelinek upon 900 acres of land sold to him by the deceased under a contract whereby Jelinek was to pay $10,000 on the purchase price in 1929 from the crop. The record reveals that there is no tangible evidence as to the amount of wheat grown on the land or its value. It does appear in the evidence without rebuttal that 4,500 bushels of wheat grown were sold before Swanson's death and that Jelinek used over 6,000 bushels for seed from the wheat grown on this land. This occurred prior to Bengt Swanson's death and prior to the issuance of letters of administration. There is no evidence to support a finding that the failure to collect this claim was because the administrators did not use due diligence. The finding of the trial court is the one required by the record.

Bengt Swanson, during his life, had purchased about 2,100 acres of land from John O'Keefe and had executed a purchase money mortgage on this land for about $30,000. At the time of his death this debt was delinquent. O'Keefe wanted a payment of $10,000 and the interest. Swanson had sold on contract to Jelinek and others a large part of this land. O'Keefe did not file a claim against the estate for the amount due him. The administrators made the following payments on this account, without authorization of the county court.

November 19, 1929	Interest	$ 100.00
October 28, 1930	Interest	2,093.30
October 28, 1930	Principal	5,000.00
May 1, 1931	Interest	1,843.97
May 1, 1931	Principal	2,500.00
Total		$11,537.27

These payments are the basis of the second objection to the final report by the heirs, which was sustained by the trial court. The administrators contend that the payments were made for the benefit of and in the best interests of the estate; that it was necessary to preserve the assets of the estate and to enable the estate to perform contracts of the deceased for the sale of portions of the mortgaged premises; and that the payments were made in the exercise of good faith, prudence, and diligence.

It is also contended that the payments were made with the approval and consent of the heirs. This contention may be dismissed from consideration at the outset, since the evidence is conclusive that such was not the fact. It is unnecessary, therefore, to note other objections to this defense.

Courts have sometimes held that an administrator may be given credit for payments made without an order of the probate court, made in good faith, to clear real estate of a mortgage lien. A recognized authority states the rule as follows: "Where the personal representative honestly and in the exercise of due prudence and diligence redeems mortgaged or otherwise encumbered property, the value of which is fairly in excess of the mortgage debt, he may be allowed credit for the outlay in his accounts, but outlays because of his own bad judgment or remissness of duty and without benefit to the estate are not thus favored." 24 C. J. 112. It seems unnecessary to announce here the law applicable, because under no theory advanced by the administrators would the evidence justify their actions in this case. A detailed discussion of the evidence applicable to this issue would extend this opinion beyond proper limits and serve no useful purpose to the bench or bar. It will be sufficient for all purposes to state our conclusions of fact.

At the time the payments were made the real estate was encumbered for much more than it was worth. They were not made in good faith and were not justified by the circumstances at the times of payment. The payments were

not necessary to enable the estate to perform contracts of the deceased, for, when the first payment was made, the vendees under the contract were in default—they were a year in default in October, 1930, and one and one-half years in default in May, 1931. The last two dates were when the substantial payments were made. Furthermore, the payments did not enable the estate to perform Swanson's contract, because no portion of the premises were released upon the payments. They did not preserve any of the real estate, because the mortgage debt was delinquent after the payments and subject to foreclosure, no extension was obtained, and it has since been foreclosed. The administration of this estate was not well managed. One of the administrators was an officer of a bank, and, as such, his duty to the bank and its customers was in constant conflict with his duty as administrator. We arrive at the conclusion that the judgment of the trial court was the correct one.

AFFIRMED.

RUDOLPH SEVERSIKE, APPELLANT, V. OMAHA FLOUR MILLS COMPANY, APPELLEE.

FILED OCTOBER 25, 1935. No. 29576.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY.** In order for an injury to be compensable under the workmen's compensation act, it must be caused by an accident arising out of and in the course of the workman's employment.
2. ———: ———: ———. Compensation cannot be recovered under the workmen's compensation act if the employee, when injured, had departed from the master's service and was performing service for himself.

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

Wear, Boland & Nye, for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

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

CARTER, J.

In this case the appellant, Rudolph Seversike, brought suit against the appellee, Omaha Flour Mills Company, to recover benefits alleged to be due under the workmen's compensation act for the loss of his left arm. The trial court found that the injury complained of did not arise out of and in the course of his employment by the appellee. From an order dismissing the action, appellant brings the case to this court on appeal.

In order for an injury to be compensable under the workmen's compensation act, it must be caused by an accident arising out of and in the course of the workman's employment. Comp. St. 1929, sec. 48-109. The burden of proof rests upon the injured workman to show that he comes within the provisions of the law. These propositions have been decided so many times by our court that the citation of authority to support them is unnecessary.

The record shows that the appellant had been employed by the Omaha Flour Mills Company for about eight years. His employment consisted of doing bakery service work, "shooting trouble," giving demonstrations, balancing formulas, explaining advertising and merchandising ideas, and general ideas tending to improve the bakery business. This service was available to all bakeries using the products of the Omaha Flour Mills Company. Appellant resided and made his headquarters at Sac City, Iowa, but rendered such services for bakeries in Iowa, Nebraska, Wyoming, Colorado, South Dakota, Minnesota, Missouri, Wisconsin and Illinois, as directed by the managing officers of the Omaha Flour Mills Company, whose main office was at Omaha, Nebraska. Appellant was paid a salary of $225 a month by appellee for his services. The record further shows that some time prior to December, 1933, appellant had obtained a mortgage on a bakery in Sac City, Iowa, which it became necessary for him to foreclose. He then obtained a leave of absence from appellee for the pur-

pose of establishing his bakery in Sac City as a going concern. The record shows that it required more time than he anticipated and that an extension of his leave of absence was granted. On January 21, 1934, while on leave of absence and while he was "shooting trouble" in his Sac City bakery, he caught his left arm in a dough mixer and suffered injuries that necessitated its amputation. The record further shows that after the happening of the accident, and after the bakery had been placed in operation, appellant's bakery was used to some extent to make experiments for the benefit of the Omaha Flour Mills Company and as a demonstration bakery for customers and prospective customers of the appellee company. During the period that appellant was on leave of absence, he drew his full salary from the Omaha Flour Mills Company. Appellant admits that he was the sole owner of the Sac City bakery, that he employed all of the help and retained all the profits. The appellee had no interest whatever in the ownership, management or profits of the bakery. The appellant contends and the appellee denies that the injury arose out of and in the course of his employment with the Omaha Flour Mills Company.

The contention of appellant is that, at the time the injury complained of was incurred, he was in the employ of the appellee, drawing his full monthly salary and engaged in the work that he was hired to perform. Appellee contends that he was on vacation, working in his own bakery for himself and was in no way under the control or management of appellee. Appellant testifies that some time after the accident appellee used the bakery to some extent for experimental and demonstration purposes. We fail to see where the subsequent dealings between the parties could be material to a determination of the issue in the case presented to the court.

We are driven to the conclusion, after a consideration of all the evidence, that at the time of the accident appellant was on leave of absence from his employment with the Omaha Flour Mills Company, that he was engaged in

establishing a business for himself in which appellee had no interest in the ownership or share in the profits. While it is true that he was engaged in work more or less identical with his duties under the employment agreement with appellee, yet he was performing the service for his own benefit on his own time. While it is also true that he drew pay at the regular rate at the time the injury was incurred, yet the testimony is that it was customary for the company to pay full salaries to its older employees while they were on vacations or leaves of absence. We therefore conclude that appellant's injury did not arise out of and in the course of his employment with the Omaha Flour Mills Company. The evidence is clear that appellee had received no benefit from appellant's bakery at the time of the injury. Any benefits that subsequently accrued were incidental to and not the primary purpose of appellant's work. Under such circumstances the appellee is not liable. *Hammond v. Keim*, 128 Neb. 310; *Hall v. Austin Western Road Machinery Co.*, 125 Neb. 390; *Babcock v. School District*, 123 Neb. 491; *Pappas v. Yant Construction Co.*, 121 Neb. 766. The evidence sustains the contention of appellee that at the time of the injury appellant had departed from his master's service and was performing valuable service for himself. As to whether appellant's injury arose out of and in the course of his employment by appellee, the evidence preponderates in favor of appellee. Appellant's injury therefore is not compensable under the workmen's compensation act. The judgment of the trial court is

AFFIRMED.

C. W. MILLER ET AL., APPELLEES, V. IOWA-NEBRASKA LIGHT & POWER COMPANY, APPELLANT.

FILED OCTOBER 29, 1935. No. 29360.

1. **Statutes.** In determining whether an act amending a previous act of the legislature is broader than its title, the court will consider the titles to both the amending and the amended acts.

2. ———. Where the title to an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, it is immaterial whether or not the provisions of the act are covered by the title to the act amended or supplemented.
3. ———. Chapter 143, Laws 1925, is not violative of the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
4. **Electricity**: RATES. Chapter 143, Laws 1925, examined and *held* not to limit the fixing of rural electric rates to those cases where a physical connection has been ordered by the commission.
5. ———: ———. Chapter 143, Laws 1925, being sections 70-501, 70-502, Comp. St. 1929, confers upon the Nebraska state railway commission jurisdiction, upon application of consumers, to hold hearings and determine what are reasonable rates for the furnishing of electric energy to rural users along the transmission lines of companies engaged in generating and transmitting electric current for sale.
6. **Statutes**: CONSTRUCTION. Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.
7. **Electricity**. In a hearing on a controverted question of fact before the state railway commission, it should refrain from a determination of such fact until hearing has been had on the merits.

APPEAL from the Nebraska State Railway Commission. *Affirmed in part and reversed in part.*

Flansburg, Lee & Sheldahl, for appellant.

Ralph W. Slocum, for appellees.

William H. Wright, Attorney General, and *Edwin Vail,* for Nebraska State Railway Commission.

Kennedy, Holland, De Lacy & Svoboda, amici curiæ.

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

GOOD, J.

This is an appeal from an order made by the Nebraska

state railway commission. The principal question for determination is: Does the state railway commission have jurisdiction over rural electric rates?

The parties to this proceeding are the Nebraska state railway commission (hereinafter called the commission), the Iowa-Nebraska Light & Power Company (hereinafter called the company), and a number of rural users of electric current, customers of the company, who will hereinafter be referred to as the complainants.

The complainants filed with the commission a complaint, charging that they were users of electric current, furnished by the company to their places of residence along its transmission lines, some distance outside the corporate limits of the city of Lincoln. In their application they set forth the rates which they were being charged for electric energy, and alleged that such rates were exorbitant and unreasonable, and requesting the commission to fix and determine reasonable rates for electric energy furnished them by the company. They also charged that the company, in violation of statute, was continuing to make a service charge to each of the complainants for the service rendered him, but in the guise of a so-called minimum charge.

To this complaint the company filed an answer, in which it challenged the jurisdiction of the commission over the subject of electric rural rates; admitted that it was furnishing electric energy to complainants from its transmission lines, and that the complainants resided outside of the incorporated limits of any city, town or village; denied that its rates were unreasonable or exorbitant, and denied that it was exacting a service charge in the guise of a minimum charge. To this answer the complainants filed a reply in the nature of a general denial.

After evidence had been taken on the part of the complainants, the company and complainants stipulated that the commission should determine the question of jurisdiction, and that either party might appeal from such order, to determine the jurisdiction of the commission, and if it should be finally determined that the commission had

jurisdiction, then a further hearing should be had with reference to rates. The commission entered an order that it had jurisdiction over the subject-matter, and also determined that the company, in the guise of a minimum charge, was, in fact, making a service charge to each of the complainants for the electric energy furnished him. From this order, the company has appealed.

The commission was created in 1906 by a constitutional amendment. The powers conferred on the commission by the Constitution relate solely to common carriers. It is conceded by all the parties to this proceeding that companies engaged in generating and transmitting electric energy for sale are not common carriers. It follows that, if the commission has jurisdiction over rural electric rates, it must be found in statutory provisions.

In 1923 the legislature enacted chapter 170, Laws 1923, bearing this title: "An act to provide that electric transmission lines and power companies of Nebraska shall afford and give to all persons, associations and corporations upon reasonable and equal terms, service facilities and physical connection to their lines running between cities and villages within this state, and to provide for the enforcement of the provisions of this act." The principal object and purpose of this act was to require persons, associations, companies and corporations, engaged in generating and transmitting electric current for sale in the state, to furnish physical connection between their power lines to properties near or adjacent thereto outside the limits of incorporated cities and villages. It is contended by the complainants that this act conferred jurisdiction upon the commission to fix reasonable rates to be charged to consumers of electricity for light, heat or power purposes furnished to rural consumers of electric energy. We deem it unnecessary to determine whether that act was sufficient to confer such jurisdiction upon the commission.

The 1925 session of the legislature enacted chapter 143, Laws 1925 (now sections 70-501, 70-502, Comp. St. 1929), bearing this title: "An act to amend sections 1 and 2,

chapter 170, Laws of Nebraska for 1923, relating to electric transmission lines and power companies; clothing the Nebraska state railway commission with power and authority to make findings concerning rates and service concerning electric current distributed for light, heat or power purposes from such lines or companies; and to repeal said original sections." And in the latter part of section 2 of that act it is provided: "And the Nebraska state railway commission shall, upon application of any consumer, proceed to make an investigation and hold the necessary hearings and make a finding and order as to what reasonable rates shall be charged to consumers of electricity for light, heat, or power purposes, * * * and the said railway commission shall, from time to time, make such reasonable regulations as to the service which shall be given to such consumers by such lines or companies."

The company contends that, if the provisions of the 1925 act are sufficiently broad to give the commission jurisdiction over rural electric rates, the act is unconstitutional because it violates section 14, art. III of the Constitution, which, among other things, provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." As supporting this contention the company cites *Miller v. Hurford,* 11 Neb. 377, and *State v. Tibbets,* 52 Neb. 228. An examination of those cases discloses that the titles to the amendatory acts under consideration were ones only for the amendment of certain acts or sections of previous acts. In the instant case, the title to the 1925 act is not one solely for the amendment of sections 1 and 2 of the act of 1923, but contains matter added thereto.

So far as we are aware, this court has not previously passed upon the precise question. It has, however, been before other courts of last resort. In *Jones v. Mayor and Council of Columbus,* 25 Ga. 610, it was held: "The title of an act amending a former act of the legislature may be looked to, as well as that of the original act, to ascertain if the amending act has any matter different from what is

expressed in the title." Similar rulings have been made in *Frank v. Maguire*, 201 Cal. 414, *Miller & Lux, Inc., v. Sacramento and San Joaquin Drainage District*, 182 Cal. 252, and *Andrews v. Board of Commissioners*, 7 Idaho, 453.

The applicable rule is stated in 59 C. J. 819, in this language: "Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented."

It has frequently been held that the object and purpose of the quoted constitutional provision was to prevent surreptitious legislation; that, under the guise of a purely amendatory act, matter not germane to the section or sections amended could not be included. The title to the 1925 act is broader than the title to the act of 1923 and is sufficient to embrace the proposition of conferring jurisdiction over rates and service concerning electric current distributed for light, heat or power to rural users thereof. We think it clear that, if the title to the 1923 act had contained the additional matter inserted in the title to the 1925 act, the legislature of 1923 might have conferred jurisdiction on the commission with reference to rates for service and furnishing electric current in rural communities, because the subject of controlling rates was germane to the general subject on which the legislature was acting. In enacting the 1925 act the legislature was clothed with power to enlarge the title to the previous act of 1923, so long as it related to the same general subject. Certainly, any one reading the title to the 1925 act would be informed that the proposed act would deal with the subject of regulating rates for electric energy in rural communities. The reason for the holding in the Nebraska cases above cited does not here exist.

The company also contends that the commission has heretofore construed the act of 1925 as not conferring jurisdiction, and that such construction by the commission

should be controlling. In case of doubtful meaning of a statute, contemporaneous construction given it by those whose duty it is to enforce it may be persuasive. However, it is also a rule that "A resort to contemporaneous construction is both unnecessary and improper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone." 59 C. J. 1022. We think that this rule is applicable to the present record.

We are of the view, therefore, that chapter 143, Laws 1925, does not contravene the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

It is argued by the company that the intention of the legislature was to limit the fixing of rural rates, in any event, to those cases where a physical connection was ordered by the commission, as provided in subsections (a), (b), (c) and (d) of section 1 of the act of 1925. With this view we are unable to agree. The language of the title clearly indicates that it was the intention of the legislature to clothe the commission with power and authority to make findings concerning rates and service concerning electric current distributed for light, heat or power purposes from the lines of companies engaged either in the generating or transmitting of electric current for sale in the state for power or other purposes. The latter part of section 2 of the act above quoted, in our opinion, clearly confers upon the commission, upon application of any consumer, power to make investigation and hold the necessary hearings, and make a finding and order as to what reasonable rates should be charged to consumers of electric current for light, heat or power purposes, and, from time to time, to make such reasonable regulations as to the service which should be given to such consumer.

We therefore hold that the act of 1925 does confer upon the commission jurisdiction, upon application of consumers, to hold hearings and determine what are reasonable rates for the furnishing of electric current to rural users along the transmission lines of companies engaged

in the generation and transmission of electric current for sale.

The commission further found and determined that the company, in the guise of a minimum charge, was exacting a service charge, in violation of section 70-506, Comp. St. Supp. 1933. Said section provides, among other things, that charges for electric energy in certain designated classes shall be based solely on the amount of such energy actually furnished to the purchaser, and prohibits any service charge, but does authorize a minimum charge to be collected. Section 70-508, Comp. St. Supp. 1933, provides penalties for a violation of said section 70-506. Such sections do not purport to give to the commission any power to inflict the penalties. The act of 1925 confers upon the commission the power to regulate rates, and under that power the commission is authorized to determine whether the so-called minimum charge is reasonable. Under the stipulation of the parties, that after the determination of the question of jurisdiction a hearing should be had, we think that the commission acted prematurely in making any determination of the question of the minimum charge. No action should have been taken thereon until a full hearing was had.

It follows that the order of the commission in determining that the company was exacting a service charge for current in the guise of a minimum charge is vacated, and the order in all other respects is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

WARD MCDOWELL, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 29, 1935. No. 29238.

Estoppel. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not

permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen*, 103 Neb. 791.

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

Beghtol, Foe & Rankin, for appellant.

Clinton J. Campbell and *John J. Wilson, contra.*

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

EBERLY, J.

The petition in this case declares upon a policy of accident insurance issued by the defendant insurance company to plaintiff; alleges that plaintiff suffered an accident on April 5, 1931; that since that date he has, as a result thereof, been wholly disabled and is entitled to recover on the policy a weekly indemnity of $25 for "total disability;" that after the accident defendant accepted and allowed plaintiff's claim for total disability, and thereafter regularly paid such indemnity up to and including March 19, 1933; that at this time payments were stopped and defendant refused to continue the same. The prayer of the petition is for judgment against defendant in the sum of $25 a week from and after March 19, 1933.

In its answer, in addition to a general denial, defendant admits, as alleged in said petition, that it has paid plaintiff weekly indemnity provided in said contract up to and including March 19, 1933, "but alleges and says that since said 19th day of March, 1933, *said plaintiff has suffered only partial disability, for which reason defendant has refused to pay plaintiff total disability under said policy, as claimed by plaintiff.*"

The second and third paragraphs of defendant's answer plead defenses based upon a provision of the policy in suit relating to "change of occupation to greater hazard," which is in the following terms:

"This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the company's classi-

fication of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the company for such more hazardous occupation."

The plaintiff, by reply, in addition to a general denial, pleads estoppel, and challenges the correctness of the application of the provisions of the policy quoted to the facts of the record, as made by the defendant.

On these issues the cause was tried to a jury and a verdict was returned for plaintiff in the amount claimed, and from the judgment of the trial court overruling its motion for a new trial, defendant appeals.

The sole errors relied upon by the appellant arise from instructions of the trial court in submitting the defenses contained in the second and third paragraphs of the answer, which were based solely upon the provisions of the policy above quoted relating to "change of occupation to greater hazard."

A careful reading of the bill of exceptions discloses that no claim was ever made by defendant company under the provisions of the policy in suit relating to "change of occupation to greater hazard," quoted above, until after the institution of this suit. True, the weekly payments of indemnity, which had been regularly made to plaintiff, were stopped on March 19, 1933. The negotiations that ensued between the parties were by correspondence, which forms a part of the record before us. The sole reason given by defendant at this time for its refusal to continue the $25 weekly payments was that the assured was then only partially disabled. However, it does fairly appear that the insurance company was fully advised of the facts which now appear as the basis of relief claimed under paragraphs

two and three of the answer filed by it. Yet, with knowledge of what these facts were, and properly chargeable with the necessary implication such facts carried, the defendant employed the following language in a letter dated April 28, 1933, addressed to the assured, in explanation of its position:

"However, we find that you are now basing your claim for your total disability upon your inability to perform the duties of a vacuum cleaner salesman, canvassing from house to house and giving demonstrations, and it is necessary to point out to you that you were never insured for such duties and such duties do not come within the 'Select' classification at which your policy was issued. You would, therefore, only be entitled to make claim for disability based on your inability to perform duties which come within the 'Select' classification, and as it is now indicated that you could perform some duties of that type, we consider that your condition now is one of partial disability only and that any further payments paid beyond March 19, 1933, should be paid on that basis.

"We appreciate the fact that you would not be able to perform all of your duties as an assistant manager or department manager, but you surely could perform some of them and we would like very much to have you give the matter of the payment of further benefits proper consideration in connection with the duties for which we insure you and your present condition and we will promptly forward our check in payment of benefits beyond March 19, 1933, on the basis of partial disability for the period covered by the last statement of claim you submitted to us as soon as we hear from you."

It fairly appears from the above that the sole reason for its course of conduct was that the assured was then but partially disabled. Indeed, this conclusion finds appreciable support in the language hereinbefore quoted from defendant's answer. No other reason appears to have been given until after the institution of the suit.

The statements quoted from the letter were made, as

appears from the record, by the duly authorized agent of defendant.

This jurisdiction is committed to the view that "A classification of the occupation of an applicant for accident insurance by the general agent of the company on full information of the facts binds the insurer." *Travelers Ins. Co. v. Snowden,* 60 Neb. 263.

It would seem that this principle would be applicable in negotiations between the assured and the company after the occurrence of an accident, with reference to the company's liability therefor.

And in the instant case, when the company, through its agent, with knowledge of the facts, placed its refusal to continue payments on the single ground of "partial disability," the assured was entitled to proceed on that basis.

"The fact that an accident insurance policy provides for recovery of the amount which the premium would purchase under a proper classification does not affect the rule that the company is bound by the classification made by its agent." *Arneberg v. Continental Casualty Co.,* 29 A. L. R. 93 (178 Wis. 428).

We are committed to the rule: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen,* 103 Neb. 791. See, also, *Yates v. New England Mutual Life Ins. Co.,* 117 Neb. 265; *Powers v. Bohuslav,* 84 Neb. 179; *Pittenger v. Salisbury & Almquist,* 125 Neb. 672; *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841.

With knowledge of all the facts, the insurance company, in effect, tacitly waived the defense of "change of occupation to greater hazard" when its agent presented as its sole reason for refusing to continue the weekly payments the fact that the assured had ceased to be totally disabled and was entitled to receive indemnity for partial disability

only, and insisted on reducing the payment of indemnity theretofore made to that amount. This fact is expressly admitted and indeed alleged in the portion of defendant's answer hereinbefore quoted.

The latter feature brings the instant case within the exception to the rule, that the defense of estoppel *in pais* must be pleaded when there is an opportunity to plead it, which exists when the estoppel involved necessarily inheres in the matter of defense which is pleaded by the defendant. Facts so pleaded need not be reiterated by the opposing party in his subsequent pleading to secure full benefits of the inferences they sustain.

"A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." *City Nat. Bank of Hastings v. Thomas,* 46 Neb. 861. See, also, *Seng v. Payne,* 87 Neb. 812; *Smith v. Liberty Life Ins. Co.,* 118 Neb. 557; *Krekeler v. Ritter,* 62 N. Y. 372; *Farmers Bank v. Glenn,* 68 N. Car. 35; *Bank of Antigo v. Ryan,* 105 Wis. 37.

In discussing a similar question this court, speaking through Howell, J., employed the following language:

"Its reply to plaintiff was, in effect, the company is not concerned about how the insured died or when he died, because the policy lapsed for nonpayment of the premium note which 'became due July 14, 1914.' Whether the reason was a good one, or bad, it precluded itself from setting up another after litigation started.

"In *Powers v. Bohuslav,* 84 Neb. 179, Good, C., now an honored member of this court, was dealing with a suit for commissions on a brokerage contract for the sale of land. The broker secured a purchaser, and the landowner refused to convey the land, giving a certain reason therefor. When sued, he set up another and different defense. On page 184, the court said: 'Defendant, having failed to object upon the ground that the purchaser was willing to pay all cash, instead of deferring a part of the purchase price,

until after litigation was instituted, will not now be heard to make such defense.' In that case, the reply was a general denial, and no estoppel was pleaded.

"In *Hilmer v. Western Travelers Accident Ass'n*, 86 Neb. 285, 291, this court, speaking through Root, J., with reference to another case in this court, in which the insurance company denied the policy was in force, said: 'The company also urged a defense based upon an agreement in the policy. Manifestly it was not just to permit the company to insist that the policy was void for one purpose and valid for another.' Further in the opinion, on page 292, it was said: 'But, if a person before suit refuses to satisfy a demand for particular reasons stated by him to the plaintiff, he will not be permitted after litigation has commenced to change his ground and defend upon entirely different considerations.'

"Strictly speaking, inconsistencies of the kind we are talking about are not to be said to fall under estoppel or election. They partake of both, but it seems to be a rule of procedure based upon manifest justice. 10 R. C. L. 698, sec. 26." *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265.

It follows that this rule of procedure, based on manifest justice, is applicable to and decisive under the record before us.

The issue of the character of plaintiff's injury was duly submitted to, and clearly determined by, the jury favorably to plaintiff, and defendant, as already suggested, does not challenge this part of the procedure. Therefore, under the uncontradicted facts of this record, we are precluded from the consideration of the questions which appellant presents on this appeal, as they pertain wholly to matters upon which it had no right to be heard.

By the former opinion in this case, reported *ante*, p. 23, now vacated, appellee was awarded an attorney's fee. In view of additional services, that award is increased to $150 in this court, the same to be in addition to the $150 allowed in the district court.

It follows that the judgment of the trial court is right, and it is

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLEE, V. MASSACHUSETTS BONDING AND INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 29, 1935. NOS. 29314-29321.

1. **Bailment.** "It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed, either in the same, or in an altered, form; or its delivery to some third person, with the express or implied consent of the bailor." 6 C. J. 1085.
2. ———: CONSIDERATION. "All contracts of bailment, whether the bailee's services are rendered gratuitously, as in the case of a naked bailment and simple deposit, or for hire, are supported by a sufficiently good and legal consideration, which consists in the detriment occasioned to the bailor by his yielding up the present possession or custody of the article bailed upon the faith of the engagement of the bailee to redeliver." 3 R. C. L. 82, sec. 11.
3. ———: ———: PAROL EVIDENCE. "Even though the instrument does not state any consideration or set forth what the consideration is, parol evidence may be admitted to show that there was a consideration, and of what it consisted." 22 C. J. 1169.
4. ———. Under the circumstances of this bailment transaction, there being other consideration for the contract, mutuality of obligation was not essential.
5. **Assignments:** COLLATERAL SECURITY. "It is a general rule that, in the absence of an agreement to the contrary, the assignee for value of a note, bill, judgment, decree or other evidence of indebtedness, for the payment of which the assignor holds collateral security, is in equity entitled, by virtue of the assignment to him of the principal obligation or evidence of indebtedness, to the collateral as such, although not named in the instrument of assignment, and regardless of his knowledge or lack of knowledge of the existence of such collateral." *Edwards v. Bay State Gas Co.*, 184 Fed. 979.
6. ———: ———. "In the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of the assign-

ment; and he may enforce them although the assignee at the time was ignorant of their existence." 2 R. C. L. 633, sec. 43.

7. **Bonds**: CONSTRUCTION. "It may be stated generally that, where a bond and another contract or instrument relate to and form one and the same transaction, or the bond refers to such other instrument or is conditioned for the performance of specific agreements set forth therein, such instrument with all its stipulations, limitations, or restrictions becomes a part of the bond, and the two should be read together and construed as a whole." 9 C. J. 36.

8. **Insurance**. "Bonds guaranteeing the contracts of third persons, given by paid surety companies to indemnify the owners of property against loss from the failure of contractors to perform the conditions of building or other similar contracts, are essentially contracts of insurance, although they may resemble in form contracts of suretyship, since such corporations are in effect insurers, and the strict rules peculiar to contracts of suretyship do not apply in determining their rights and liabilities; rather, the rules of liberal construction and of construction against insurer, if an ambiguity exists, does apply." 5 Couch, Cyclopedia of Insurance Law, p. 4262.

9. ———: RIGHT OF ACTION. If a bond is given to guarantee the performance of a contract, the holder of the bond, who has been injured by a breach of such contract, has an immediate direct cause of action thereon without first exhausting his remedies against the parties liable on the contract.

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

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

Kennedy, Holland & De Lacy, Clarence A. Davis and *Edward J. Svoboda,* for appellant.

Stiner & Boslaugh, Butler & James, L. R. Stiner and *F. C. Radke, contra.*

Heard before GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and MESSMORE and RYAN, District Judges.

EBERLY, J.

Eight cases in which E. H. Luikart appears as receiver, plaintiff, and the Massachusetts Bonding and Insurance Company, as defendant, were by stipulation of parties argued and presented to this court as one cause. While the

transactions involved are not identical, they involve facts of similar legal import. All result from a particular course of business observed by Robert Z. Drake, which each transaction in litigation discloses as substantially identical. A careful consideration of the records, the briefs and arguments of the parties impels us to the view that in each case the judgment of the trial court is to be affirmed. The reasons for these conclusions we will proceed to state, with special reference to case No. 29314 for convenience. The language employed applies to each of the other cases, which likewise will be ruled by the conclusions herein stated.

The plaintiff alleges, as his cause of action, ownership by purchase, for a valuable consideration, of a written instrument consisting of four parts, viz.: A certificate, a draft, an acceptance indorsed on the face of the draft, and a bond. The following is a true copy of this instrument, together with indorsements on each part thereof:


CERTIFICATE

ORIGINAL

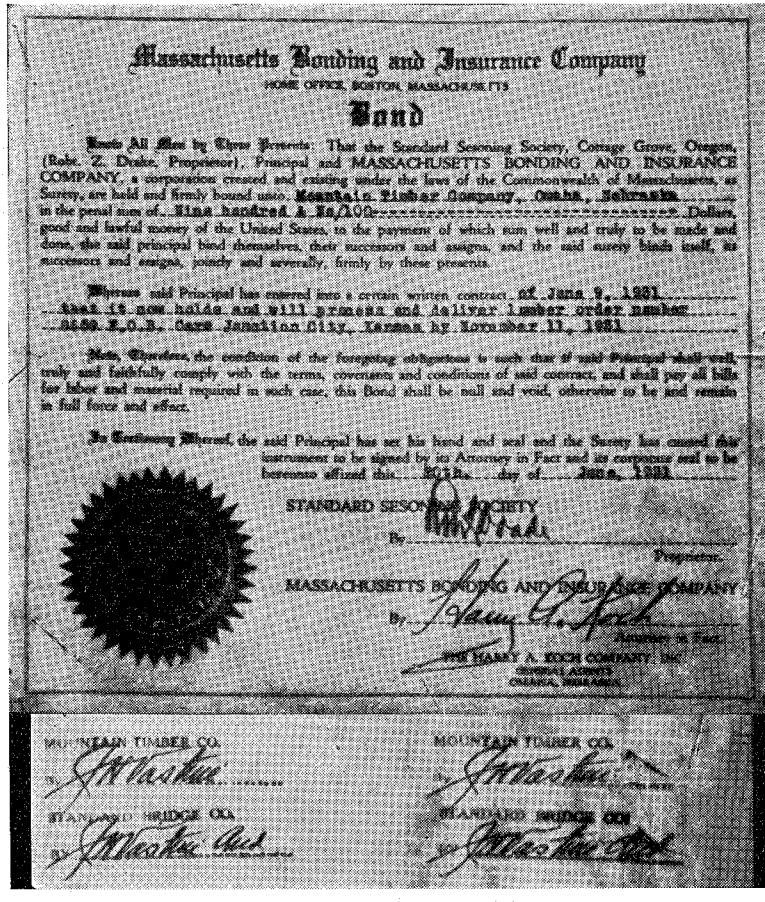
STANDARD SEASONING SOCIETY

Pay to the Order of Ourselves

TRADE ACCEPTANCE

TO Sherman Bros. Lumber Company

Portland, Oregon



Massachusetts Bonding and Insurance Company
HOME OFFICE, BOSTON, MASSACHUSETTS

Bond

Know All Men by These Presents: That the Standard Seasoning Society, Cottage Grove, Oregon, (Robt. Z. Drake, Proprietor), Principal and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation created and existing under the laws of the Commonwealth of Massachusetts, as Surety, are held and firmly bound unto Mountain Timber Company, Omaha, Nebraska in the penal sum of Five hundred & No/100 Dollars, good and lawful money of the United States, to the payment of which sum well and truly to be made and done, the said principal bind themselves, their successors and assigns, and the said surety binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Whereas said Principal has entered into a certain written contract of June 9, 1931 that it now holds and will promptly and deliver lumber order number 8698 F.O.B. Cars Junction City, Kansas by November 11, 1931

Now, Therefore, the condition of the foregoing obligations is such that if said Principal shall well, truly and faithfully comply with the terms, covenants and conditions of said contract, and shall pay all bills for labor and material required in such case, this Bond shall be null and void, otherwise to be and remain in full force and effect.

In Testimony Whereof, the said Principal has set his hand and seal and the Surety has caused this instrument to be signed by its Attorney in Fact and its corporate seal to be hereunto affixed this 10th day of June, 1931

STANDARD SEASONING SOCIETY
By _____
Proprietor.

MASSACHUSETTS BONDING AND INSURANCE COMPANY
By _____
Attorney in Fact.

THE HARRY A. KOCH COMPANY, INC.
OMAHA, NEBRASKA

MOUNTAIN TIMBER CO.
By _____

STANDARD BRIDGE CO.
By _____

MOUNTAIN TIMBER CO.
By _____

STANDARD BRIDGE CO.
By _____

The plaintiff alleges nonperformance of the obligations contained in the written instrument, the failure of the defendant to perform the conditions of the bond, the bankruptcy of Drake, the failure to deliver the lumber as required, and the value of the lumber at the time and place of delivery as to which default was made.

The defendant's answer admits substantially the general method of doing business of the parties involved, and admits that it executed, as surety, the bond in suit; but "al-

leges that the certificate contract referred to in said bond was void for lack of mutuality as between Mountain Timber Company and Standard Sesoning Society, and * * * was likewise void for lack of consideration, and that, the certificate being void, the bond was likewise void."

Issues were joined by the plaintiff and a trial to a jury resulted in a directed verdict for the plaintiff. From the order of the district court overruling its motion for judgment on the motion for a new trial, the defendant appeals.

The evidence in the record is to be considered in the light of the following facts:

It appears without dispute that Drake was a bankrupt, duly adjudged as such prior to the institution of this action; that the lumber was never delivered as required by the "certificate;" and that the "trade acceptance" was wholly unpaid.

All of the instrumentalities concerned were largely owned and substantially controlled by Robert Z. Drake. The Standard Bridge Company is merely a trade-name under which Mr. Drake was then carrying on his business of building bridges and selling bridge materials, particularly bridge lumber. Of necessity, Mr. Drake dealt generally with states, counties, or municipalities which had bridges to construct and maintain. The Standard Sesoning Society is also merely a trade-name under which Mr. Drake operated a plant in Oregon for the processing and conditioning of green lumber for the market. He had patented the method of "processing" employed, and the lumber so cured, as is disclosed by the undisputed evidence, was tougher, lighter, and generally better for market than lumber not thus treated. The Mountain Timber Company is a Nebraska corporation of which Mr. Drake was president, chief stockholder, and the owner of practically all of its $1,000,000 bond issue outstanding. It had formerly owned timber lands, and had been engaged in the lumbering and milling business, but for some time prior to the occurrences in suit it had discontinued these operations and restricted its business activities to the purchase and sale of lumber

from various producers thereof. The Sherman Brothers Lumber Company is an Oregon corporation, and was at one time an independent company operating a mill and doing a lumber business on the west coast. Prior to the dates here in question, stock control of this company had been secured by Drake through the agency of the Mountain Timber Company. The moneys employed in the purchase of its stock were furnished by Drake. All the lumber business of Mr. Drake, operating under trade-names—the Mountain Timber Company, and the Sherman Brothers Lumber Company—was carried on pursuant to Mr. Drake's direction, and, it appears, under his unlimited and paramount control.

The evidence adduced in the case now being considered, and which is typical of the other cases now presented to this court, supports the following conclusions as to the facts which constitute the transaction here in suit: On or prior to June 9, 1931, Geary county, Kansas, contracted with Robert Z. Drake to purchase 24,000 feet of lumber at $37.50 per thousand, to be delivered f. o. b. Junction City, Kansas, by November 11, 1931. The terms of this contract were then transmitted to the Mountain Timber Company, together with necessary funds, and that corporation purchased sufficient green lumber of proper kind and description to fill this Geary county contract. Upon purchase, this lumber was delivered to the seasoning house at Cottage Grove, Oregon, then operated by Robert Z. Drake as sole proprietor. It was received, appropriated to the Geary county contract by marks affixed to each piece, and the "processing" commenced. On that day the instrument denominated "certificate," already herein set forth, signed by Standard Sesoning Society, by Earl Jackson, Manager, was issued and delivered to the Mountain Timber Company. It also appears that on June 9, 1931, a draft bearing that date, payable on November 11, 1931, in the amount of the Geary county sale, was drawn by the Mountain Timber Company on Sherman Brothers Lumber Company, who also accepted same on the date of issuance.

This draft is denominated a "trade acceptance." It recites: "The obligation of the acceptor of this bill arises out of the purchase of goods from the drawer." These instruments were drawn on a single page blank form, the upper part being, when completed, the "certificate," and the lower part the "trade acceptance;" all of which is shown by the copies in this opinion set out. The completed instrument, together with the acceptance indorsed thereon, was delivered to the Mountain Timber Company. Whereupon on June 20, 1931, the Standard Sesoning Society, by Robert Z. Drake, proprietor, as principal, and the defendant, Massachusetts Bonding and Insurance Company, as surety, executed and delivered the bond in suit to the Mountain Timber Company.

The important recitals and conditions of this bond are as follows:

"Whereas said Principal has entered into a certain written contract of June 9, 1931, that it now holds and will process and deliver lumber order number 9659 f. o. b. cars Junction City, Kansas, by November 11, 1931.

"Now, therefore, the condition of the foregoing obligation is such that if said Principal shall well, truly and faithfully comply with the terms, covenants and conditions of said contract, and shall pay all bills for labor and material required in such case, this bond shall be null and void, otherwise to be and remain in full force and effect."

This bond was thereupon physically attached to the "certificate" and "trade acceptance." The "certificate" and "trade acceptance," each indorsed by the Mountain Timber Company and the Standard Bridge Company, were then sold to the South Omaha State Bank which purchased in reliance upon the face of each instrument, including the bond.

The "trade acceptance" system is not a new scheme or method. In substance it prevails in England, France, and other countries. Such paper in England is known as a "bill." Our bankers usually characterize it as a "draft;" while in Canada it is ordinarily termed a "trade paper."

It existed in the United States prior to the Civil war, and while its use may have been largely eliminated by changing conditions following the Civil war, legally it has never been a stranger to our jurisprudence.

"A trade acceptance is a form of obligation revived in this country in recent years under the regulations of the federal reserve bank board." *Atterbury v. Bank of Washington Heights*, 241 N. Y. 231.

In passing, it may be noted that the federal reserve board has defined the term "trade acceptance" as "a draft or bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by such purchaser." Trade Acceptances, R. H. Treman, p. 21.

"The federal reserve board has defined a 'banker's acceptance' as 'a draft or bill of exchange of which the acceptor is a bank or trust company, or a firm, person, company or corporation engaged in the business of granting bankers' acceptance credits,' arrangement having been made with the bank or other party to 'accept,' thus lending its credit, for which satisfactory security is given and a commission paid. The 'bankers' acceptance' will be used in the handling of commodities, such as grain, cotton, copper, etc., and in other large transactions, but its use in financing ordinary domestic commercial transactions between buyer and seller will be limited and comparatively infrequent as compared with the trade acceptance, and the consideration of its use, therefore, is not attempted here." Trade Acceptances, R. H. Treman, p. 22.

In this connection the custom of merchants, as determined by the federal reserve board rulings, appears to be as follows:

"A draft drawn by a lumber corporation upon a sales corporation which it and a number of other lumber concerns have organized will, when accepted, become a trade acceptance, even though the selling corporation is a stockholder of the sales corporation, provided the latter is organized in good faith and not merely to act as an agent for the purpose of evading the law. (Opinion of Counsel,

Federal Reserve Bulletin, January, 1918, page 33.)" Trade Acceptances, R. H. Treman, p. 66.

Further, "A bill of exchange drawn by the seller of goods and accepted by the purchaser of those goods is a trade acceptance, regardless of whether or not the purchaser intends to resell the goods or to use them for his own purpose. Therefore, a retail dealer may finance the sale of his goods to a retail customer by means of the trade acceptance." Trade Acceptances, R. H. Treman, p. 67.

"Its purpose is to make the book account liquid and permit the seller to raise money on it before it is due under the terms of sale." *Levitt v. Johnstown Office Supply Co.*, 103 Pa. Super. Ct. 76.

In the instant case, we are dealing with an incident arising out of a form of transaction well known to industry, and which public policy evidenced by federal legislation approves. In the present record fraud is neither alleged nor established by the proof.

The appellant challenges the validity of the "certificate" as void for lack of mutuality and lack of consideration, contending that, the "certificate" being void, the bond is void. But the transaction before us amounts to a bailment.

"It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed, either in the same, or in an altered, form; or its delivery to some third person, with the express or implied consent of the bailor." 6 C. J. 1085.

Here the green lumber received by the Standard Seasoning Society is to be processed, and by the express terms of the certificate is to be delivered "free of all charges by November 11, 1931, f. o. b. Junction City, Kansas, to Mountain Timber Company of Omaha, Nebraska, or their order." This brings the transaction squarely within the definition above quoted. See *Sturm v. Boker*, 150 U. S. 312; *General Motors Acceptance Corporation v. Hupfer*, 113 Neb. 228; *Holcomb & Hoke Mfg. Co. v. N. P. Dodge Co.*, 123 Neb. 142; *Powder Co. v. Burkhardt*, 97 U. S. 110;

Sattler v. Hallock, 160 N. Y. 291; *Ferry & Co. v. Forquer,* 61 Mont. 336, 29 A. L. R. 642; *Stewart v. Stone,* 127 N. Y. 500.

"Also, it may be observed that all contracts of bailment, whether the bailee's services are rendered gratuitously, as in the case of a naked bailment and simple deposit, or for hire, are supported by a sufficiently good and legal consideration, which consists in the detriment occasioned to the bailor by his yielding up the present possession or custody of the article bailed upon the faith of the engagement of the bailee to redeliver." 3 R. C. L. 82, sec. 11. See, also, 6 C. J. 1106; *Magdeburg v. Uihlein,* 53 Wis. 165.

In addition, the undisputed evidence is that the bailee was entitled, by agreement of parties, to receive 5 per cent. of the total amount realized from the sale of the lumber. This proof was admissible, the rule being that, where a written agreement contains no recital of consideration, it is competent to establish the actual or real consideration by parol evidence. See 22 C. J. 1166.

"Even though the instrument does not state any consideration or set forth what the consideration is, parol evidence may be admitted to show that there was a consideration, and of what it consisted." 22 C. J. 1169. See, also, *Horn v. Hansen,* 56 Minn. 43; *Board of Trustees of Seventh Day Baptist Memorial Fund v. Saunders,* 84 Wis. 570; *Goodman v. Smith,* 94 Neb. 227; *Hartman v. Lipovsky,* 122 Neb. 823.

Under the circumstances of this bailment transaction, there being other consideration for the contract, mutuality of obligation was not essential. *Elson & Co. v. Beselin & Son,* 116 Neb. 729; 6 R. C. L. 686, sec. 93; Williston, Contracts, sec. 140.

Therefore, it follows that the contract of bailment was an actual, valid, subsisting contract, and the certificate properly set forth the obligations which its terms imposed upon the bailee.

Having been determined a valid instrument, the bailment contract, as evidenced by the certificate, construed

with the terms of the accepted draft and the bond, in the light of the surrounding circumstances, evidences the intent of all parties that the proceeds of the lumber covered thereby should stand as security to the "Mountain Timber Company of Omaha, Nebraska, or their order," for the amount of the "trade acceptance."

It will be noted that both the accepted draft and the certificate (each physically attached to the bond) were properly indorsed by the Mountain Timber Company at the time of the sale and delivery thereof to the bank now represented by plaintiff. At this time ample consideration was paid therefor by the bank. This constituted, under the circumstances, a valid transfer to the purchasing bank of all the rights vested in the Mountain Timber Company by the terms of the four instruments which, together, then constituted the so-called "trade acceptance." See, *Small v. Smith,* 120 Minn. 118; *Sheldon v. Padgett,* 144 Minn. 141; *Curtis v. Zutavern,* 67 Neb. 183; 5 C. J. 905.

"In the absence of any stipulation or provision in the contract of assignment concerning the securities or other incidents, an unqualified assignment of a chose in action carries with it, as incident to the chose, all securities and liens held by the assignor as collateral to the claim, and all rights incidental thereto. * * * Whatever is necessary to make the assignment effectual will pass as an incident of the thing assigned." 5 C. J. 948.

"It is a general rule that, in the absence of an agreement to the contrary, the assignee for value of a note, bill, judgment, decree or other evidence of indebtedness, for the payment of which the assignor holds collateral security, is in equity entitled, by virtue of the assignment to him of the principal obligation or evidence of indebtedness, to the collateral as such, although not named in the instrument of assignment, and regardless of his knowledge or lack of knowledge of the existence of such collateral." *Edwards v. Bay State Gas Co.,* 184 Fed. 979.

"The assignment of a debt ordinarily carries with it all liens, and every remedy or security that could have been

used, or made available, by the assignor as a means of indemnity or payment, although they are not specifically named in the instrument of assignment, and although the assignment is not by any instrument in writing. In the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of the assignment; and he may enforce them although the assignee at the time was ignorant of their existence." 2 R. C. L. 633, sec. 43. See, also, *Gibson v. Stevens,* 8 How. (U. S.) 383; Williston, Sales (2d ed.) 988; *Heisen v. Smith,* 138 Cal. 216; *National Market Co. v. Maryland Casualty Co.,* 100 Wash. 370; *Frerking v. Thomas,* 64 Neb. 193; Vold, Sales, 330, 333.

The bond in suit includes the following, as part of its recitals: "Whereas said Principal has entered into a certain written contract of June 9, 1931, that it now holds and will process and deliver lumber order number 9659 f. o. b. cars, Junction City, Kansas, by November 11, 1931." This refers to the bailment certificate. One of the conditions set forth in the bond is that the "Principal shall well, truly and faithfully comply with the terms, covenants and conditions of said contract."

"It may be stated generally that, where a bond and another contract or instrument relate to and form one and the same transaction, or the bond refers to such other instrument or is conditioned for the performance of specific agreements set forth therein, such instrument with all its stipulations, limitations, or restrictions becomes a part of the bond, and the two should be read together and construed as a whole. * * * Thus a bond given by a contractor should be construed in connection with the contract or undertaking it is intended to secure." 9 C. J. 36. See, also, *O'Shea v. North American Hotel Co.,* 109 Neb. 317; 28 C. J. 933; *Nye-Schneider-Fowler Co. v. Roeser,* 103 Neb. 614.

"Bonds guaranteeing the contracts of third persons, given by paid surety companies to indemnify the owners of property against loss from the failure of contractors to

perform the conditions of building or other similar contracts, are essentially contracts of insurance, although they may resemble in form contracts of suretyship, since such corporations are in effect insurers, and the strict rules peculiar to contracts of suretyship do not apply in determining their rights and liabilities; rather, the rules of liberal construction and of construction against insurer, if an ambiguity exists, does apply." 5 Couch, Cyclopedia of Insurance Law, p. 4262. See, also, 12 A. L. R. 382, note; *Royal Indemnity Co. v. Northern Ohio Granite & Stone Co.*, 100 Ohio St. 373; *Maryland Casualty Co. v. Fowler*, 31 Fed. (2d) 881; *West v. Detroit Fidelity & Surety Co.*, 118 Neb. 544; 77 A. L. R. 42, note; *Ford Hospital v. Fidelity & Casualty Co.*, 106 Neb. 311; *O'Shea v. North American Hotel Co.*, 109 Neb. 317.

Lord Mansfield early declared: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and * * * if he does not know it, he ought to inform himself." *Noble v. Kennoway*, 2 Doug. (Eng.) 513, quoted with approval in *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488. And a court of high standing has added to the principle, thus early declared, that such insurer is presumed to have drawn its contract to cover the needs of the parties. *Park Saddle Horse Co. v. Royal Indemnity Co.*, 81 Mont. 99.

But, construed in the light of the principles of construction announced, the bond fully and completely covers the requirement of the "certificate" that the lumber shall be delivered as specified to the "Mountain Timber Company, of Omaha, Nebraska, or their order." It follows, therefore, that the defendant is liable to the person designated to receive the lumber by the Mountain Timber Company. The sale, indorsement, and delivery by that company of the instruments in suit to the bank is an ample authority entitling it or its representative to enforce the right of action against the defendant for a failure to perform the conditions thereof. *Forburger Stone Co. v. Lion Bonding & Surety Co.*, 103 Neb. 202; *Sailling v. Morrell*, 97 Neb.

454; *Fowler v. Doran*, 123 Neb. 37; *O'Shea v. North American Hotel Co.*, 109 Neb. 317; *Hartford Accident & Indemnity Co. v. Board of Education*, 15 Fed. (2d) 317; *Maryland Casualty Co. v. Fowler*, 31 Fed. (2d) 881; *Ideal Brick Co. v. Gentry*, 191 N. Car. 636; *Daughtry v. Maryland Casualty Co.*, 48 Fed. (2d) 786; *Clinton Bridge Works v. Kingsley*, 188 Ia. 218; *Royal Indemnity Co. v. Northern Ohio Granite & Stone Co.*, 100 Ohio St. 373; *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493.

So, also, if a bond is given to guarantee the performance of a contract, the holder of the bond has an immediate direct cause of action thereon without first exhausting his remedies against the parties liable on the contract. *Home Savings Bank v. Shallenberger*, 95 Neb. 593; 50 C. J. 74; *Klatte v. Franklin State Bank*, 211 Wis. 613; *Federal Surety Co. v. Basin Construction Co.*, 91 Mont. 114.

It thus appears that plaintiff's petition sets forth a proper cause of action which the evidence introduced fully sustains, and which, as to amount of recovery, is amply supported by uncontradicted competent evidence in the record. Therefore, the judgment of the trial court was correct, and it is

AFFIRMED.

DARLENE M. STUDLEY, APPELLANT, V. RUSSELL A. STUDLEY, APPELLEE.

FILED OCTOBER 29, 1935. No. 29352.

1. **Criminal Law**: SENTENCE. A sentence to the reformatory for women at York, Nebraska, as created by chapter 238, Laws 1919, is a sentence to imprisonment in a "prison, jail or house of correction," within the meaning of section 42-301, Comp. St. 1929.
2. ———: ———. A sentence of "not less than one year nor more than ten years," made under the provisions of the indeterminate sentence law of this state, is a definite sentence for the maximum term thereof.
3. **Divorce**: CULPABILITY OF PETITIONER. "A court of equity will

not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other party has been grossly more culpable. In such case the court will deny relief to either." *Peyton v. Peyton*, 97 Neb. 663.

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

Harry E. Siman, for appellant.

Troyer & Pardee, contra.

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

CARTER, J.

Appellant filed her petition for a divorce in the district court for Wayne county on September 26, 1933, wherein she alleged as ground therefor that the appellee had been convicted of a felony under the laws of Nebraska on July 8, 1930, and had been sentenced to a term in the penitentiary exceeding three years. There is no dispute that these allegations constitute a ground for divorce under the provisions of section 42-301, Comp. St. 1929. Appellee alleged as a defense that on March 4, 1931, the appellant was convicted of a felony under the laws of Nebraska and was sentenced to serve a term in the reformatory for women at York, Nebraska, of not less than one year nor more than ten years, and that said felony was committed in connection with the same transaction for which the appellee was sentenced. The answer also shows that appellant served eighteen months of the sentence in the reformatory at York. To the answer the appellant filed a general demurrer which was overruled. The appellant elected to stand on her demurrer and the trial court entered a judgment dismissing the action. From the judgment thus entered the appellant appeals.

The question for determination is whether the allegations of the answer are sufficient to constitute a defense. Section 42-301, Comp. St. 1929, provides in part as fol-

lows: "A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on application by the petition of the aggrieved party in either of the following cases: * * * Third. When one of the parties has been sentenced to imprisonment in any prison, jail or house of correction for three years or more." The record discloses that appellant was sentenced to serve not less than one year nor more than ten years in the reformatory for women at York. At the time appellant was sentenced to the reformatory for women, section 83-1403, Comp. St. 1929, provided: "A female of fifteen years of age and upwards convicted by any court or magistrate * * * or convicted of any felony * * * may within the discretion of the courts or magistrates and compatible and in accord with the indeterminate sentence law of this state, be sentenced and committed to the Nebraska reformatory for women, to be there confined under the provisions of law relating thereto, but subject to removal to the penitentiary, in cases of felony, as hereinafter provided. * * * The board of control may cause to be removed to the penitentiary any prisoner in said reformatory, convicted of felony and appearing to be incorrigible."

It will be noted that, under our statute as it then existed, a woman who had been convicted of a felony could be sentenced to the state penitentiary or to the reformatory for women at York. If she was sentenced to the reformatory, power was granted to the board of control to remove her to the penitentiary if she became incorrigible. It was also necessary that a sentence to the reformatory for women be in accordance with the indeterminate sentence law of this state, which applies only to certain classes of persons convicted of felonies and sentenced to the penitentiary. Comp. St. 1929, sec. 29-2620. Clearly, in our opinion, a sentence to serve a term in the reformatory for women must be regarded as a penalty and punishment for the crime of which the party committing it has been convicted. Such a sentence therefore is a sentence to im-

prisonment in a "prison, jail or house of correction," within the meaning of section 42-301, Comp. St. 1929.

The appellant also contends that a sentence of "not less than one year nor more than ten years" is not a sentence for three years or more as required by section 42-301, Comp. St. 1929, to be a ground for divorce. We hold to the contrary. In *People v. Warden of Sing Sing Prison,* 78 N. Y. Supp. 907, the court said: "A sentence under Pen. Code, section 687a, providing for indeterminate sentences, is not void for the uncertainty of the duration of the term, as the sentence is a definite one, for the maximum duration of such term." In *People v. Lasch,* 202 N. Y. Supp. 416, the court said: "The relator having been committed to the reformatory under an indeterminate sentence, the maximum for the crime of grand larceny, second degree, being five years, the sentence is a definite one for the maximum term * * * which has not expired." We are therefore driven to the conclusion that the sentence pleaded in the answer was one for three years or more.

The appellant further contends that, even if the allegations of the answer stated a recriminatory defense, the rule of comparative rectitude would apply. Granting, for the sake of argument, that the rule of comparative rectitude was available in this state, yet it could avail nothing in the case at bar for the reason that it is alleged, and stands admitted by the demurrer, that the conviction and sentence for crime pleaded in the answer grew out of the same transaction as the conviction and sentence charged in the petition. It would appear therefore that each would have equal standing if the comparative rectitude of the parties was to be measured.

This court has held, however, that if the conduct of both parties to a divorce action has been such as to furnish grounds for a divorce, neither is entitled thereto although the conduct of one has been grossly more culpable than the other. In *Wilson v. Wilson,* 89 Neb. 749, quoting from *Nagel v. Nagel,* 12 Mo. 53, this court said: "Upon an application for a divorce, where both parties are found guilty

of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill." In *Goings v. Goings*, 90 Neb. 148, this court held: "In an action for a divorce, where an answer and cross-petition of recrimination is filed by which a divorce is sought by the defendant, if it be shown by the evidence that neither party is blameless, and the decree of the district court denied a divorce to either, dismissing both the petition and cross-petition, the decree will to that extent be affirmed." Also, in the case of *Peyton v. Peyton*, 97 Neb. 663, we have held: "A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other party has been grossly more culpable. In such case the court will deny relief to either."

We conclude, therefore, that the recriminatory matters pleaded in appellee's answer state a defense and that the demurrer thereto was properly overruled. We have carefully examined other alleged errors and find that they are without merit.

The judgment of the district court is

AFFIRMED.

ALVIN A. BINGAMAN, APPELLEE, V. SECURITIES INVESTMENT CORPORATION, APPELLANT.

FILED OCTOBER 29, 1935. No. 29354.

Contracts. In a suit based upon a conditional promise to pay, the burden of proof is on the plaintiff to show that every condition precedent has been complied with before a recovery can be had thereon.

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

Francis P. Matthews and *William P. Kelley*, for appellant.

Harry Silverman, contra.

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

CARTER, J.

In this case the appellee, Alvin A. Bingaman, brought suit against the appellant, Securities Investment Corporation, to recover a judgment on 45 credit reserve certificates executed by appellant and delivered by it to the appellee. The jury returned a verdict against appellant for $580.35, the amount of the certificates, with interest. From the overruling of its motion for a new trial, appellant brings the case to this court for review.

The appellant admits the execution and delivery of the certificates and alleges that they have all been paid or credited in full on other indebtedness of the appellee. The reply was a general denial. Appellant assigns as error the overruling of its motion for a directed verdict, and the additional assignment that the verdict of the jury is not sustained by the evidence.

Appellee was a dealer in automobiles and the appellant was engaged in the automobile finance business. Appellee entered into a written agreement with the appellant whereby the appellant was to purchase certain notes and mortgages received by appellee from the buyers of automobiles purchased from him. Appellee agreed also to repurchase any or all motor vehicles repossessed by appellant for failure to make instalment payments due, on their delivery at his place of business within 120 days after the purchaser's default. It was also agreed that appellant should retain an amount equal to 4 per cent. of the purchase price of any and all notes purchased, which amounts were to be evidenced by nonnegotiable credit reserve certificates to be executed and delivered to appellee. Such certificates were to be redeemed in cash upon payment of the note and mortgage in full by the owner of the motor vehicle upon which the certificate was issued and subject to a right of set-off against any other indebtedness that was due appellant by the appellee. Appellant contends that appellee failed to prove as a condition precedent that the notes and mort-

gages, sold to appellant on the motor vehicles described in the certificates, were paid in full and that appellant was therefore entitled to a directed verdict.

The suit at bar was one at law to recover on the credit reserve certificates. Each certificate provided by its own terms that it was payable on condition that all notes had been paid by the purchaser of the motor vehicle described in the certificate that had been made payable to the dealer and indorsed to the Securities Investment Corporation. The evidence of appellee does not show that the notes described in the certificate were paid in full. The question is whether the failure to show a compliance with the condition mentioned would entitle appellant to a directed verdict.

The general rule is that the burden rests on the plaintiff to show the fulfilment of a condition precedent to his right of recovery. 13 C. J. 764. In the case of *Valley Meat Co. v. Stanger*, 47 Idaho, 692, the court, in a case involving the same proposition, said: "Where contract for sale of cattle with provision for repurchase authorized buyer to retain unpaid portion in case of seller's failure to repurchase, with further provision that seller was not required to repurchase cattle that were not fat, seller in subsequent action to recover amount retained had burden of proving that cattle were not fat so as to justify refusal to repurchase."

In the case of *Kinnison Bros. v. Steger*, 11 S. W. (2d) (Tex. Civ. App.) 527, the court said: "It is believed that the memorandum by its terms specified that payment was to depend on the contingency or condition of John P. Steger's receiving the money from the Baptist Church with which to pay appellants. The circumstances under which it was given emphasize that purpose and meaning of the memorandum. * * * The fulfilment of the condition became a prerequisite to liability on this new promise sued on, and the burden of proof was upon appellants to establish the happening of the events upon which the condition was based."

Also, in the case of *Lamar v. King*, 168 Ala. 285, the court held: "Where in connection with the common counts plaintiff also sought to recover on a special contract to pay $1,000 upon performance of services with a certain result, the date of payment to be fixed by a certain event, in order to recover the plaintiff was bound to show that everything had been done and every event had happened on which payment was conditioned." See, also, *Bryan v. Capital Trust & Savings Bank*, 144 Minn. 434.

In the case before us, payment in full of the notes described in the certificate was a condition precedent to a recovery in a suit based on the certificate. If the notes were not paid, appellee could not recover. Appellee was the moving party and had the burden of proving the facts necessary to a recovery. One of the facts necessary to be proved was that the notes described in the certificate were paid. This the appellee failed to do. The trial court should have directed a verdict against him.

Appellee contends for the rule that, where the subject-matter of an allegation is such as to be peculiarly within the knowledge of the adverse party, the burden is on him to give evidence respecting it. We do not concur in this view where the suit is brought upon a conditional promise to pay. In the case of *Strauss v. United Telegram Co.*, 164 Mass. 130, cited by appellee in his brief, the court distinguished the rule governing suits on conditional promises from those containing absolute promises to pay with a condition subsequent attached, in the following language: "If the bonds in question had contained simply a promise to pay interest out of the income earned, it may be conceded that the promise would be merely conditional, and the burden would be on the plaintiff to show that sufficient income had been earned to warrant the payment of interest. *Corcoran v. Chesapeake & Ohio Canal Co.*, 1 MacArthur (D. C.) 358. But the bonds in question contain an absolute promise to pay interest on certain days specified. The words which follow, 'Said interest shall be cumulative, and if any of the payments cannot be made on the dates

named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so,' may afford a defense to the company, if it can show that income has not been earned, but cannot be regarded as constituting the earning of income a condition precedent to the maintaining of an action, or as imposing the burden of proof upon the holder of a bond."

The general rule in the case of a condition subsequent, the happening of which is to defeat the cause of action, is that the burden of proof rests upon the defendant to show the fulfilment of the condition. Such is the holding of the court in the case last above cited. Other cases cited by the appellee contain the same distinction and can have no application in a case where a condition precedent is involved. The contention of appellee is without merit under the state of facts existing in the case at bar.

REVERSED.

JOHN F. WHEELER ET AL., APPELLEES, V. EDWARD V. BOILER ET AL., APPELLANTS.

FILED NOVEMBER 8, 1935. No. 29344.

1. **Appeal.** In the absence of a bill of exceptions, this court will determine only whether the pleadings sustain the judgment rendered thereon.
2. **Record** examined and judgment affirmed.

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

Fred W. Anheuser, for appellants.

Dorsey, Baldrige & Chew, Edward Sklenicka and *Ellery H. Westerfield, contra.*

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

GOSS, C. J.

Defendants appeal from the order of the district court

refusing to allow a moratorium stay and striking from the files the written request for stay, under House Roll No. 600, chapter 65, Laws of Nebraska 1933 (Comp. St. Supp. 1933, sec. 20-21,159).

Appellants brought up only the transcript. There is no bill of exceptions.

The petition attaches a copy of the contract. From it we learn that on November 5, 1930, defendants agreed to buy, and plaintiffs agreed to sell and convey when the purchase price of $8,250 was paid, certain described lots. $2,000 was paid down and defendants agreed to pay $500 on or before January 1, 1932, and each January 1st thereafter, to pay interest at 6 per cent. semiannually each May 5 and November 5, beginning in 1931, and to pay all taxes, after the county taxes of 1930, when due. The contract provided for forfeiture of all amounts paid and for termination of the right of possession upon failure of the purchasers to keep their part of the agreement.

The petition, filed February 25, 1933, alleged failure to pay anything due on the contract after the payment of the $500 due January 1, 1932, alleged failure to pay any interest after May 5, 1932, alleged failure to pay the 1932 city taxes which became delinquent July 1, 1932, as well as certain instalments of special taxes. Plaintiffs prayed strict foreclosure and a decree for possession and for a writ of assistance.

Defendants did not answer but defaulted. The decree entered May 17, 1933, found due plaintiffs from defendants $6,114.37, with interest at 6 per cent.; found plaintiffs entitled to a decree of strict foreclosure; ordered defendants to pay said sum on or before February 16, 1934, and decreed that if defendants failed to pay said sum, with interest and costs, they would be forever barred from all interest in the property and should be removed by the sheriff.

May 26, 1933, defendants filed a written request for nine-months' stay (which was evidently respected); and on March 13, 1934, defendant Edward V. Boiler filed a re-

quest for a stay under the 1933 moratorium. On April 27, 1934, the court sustained the motion of plaintiffs to strike the last named stay and defendants appealed.

Section 1 of House Roll No. 600, chapter 65, Laws 1933 (Comp. St. Supp. 1933, sec. 20-21,159), requires the moratorium to be allowed in foreclosures of land contracts "unless upon hearing on said application, good cause is shown to the contrary." No bill of exceptions having been brought up, we cannot discover what transpired on the hearing of the application for the moratorium.

In the absence of a bill of exceptions, this court will determine only whether the pleadings sustain the judgment rendered thereon. *Troyer Furniture Co. v. Orchard & Wilhelm Co.*, 121 Neb. 301; *Gaines v. Warrick*, 113 Neb. 235.

The pleadings and transcript sustain the judgment of the district court. It is

AFFIRMED.

CARTER, J., dissenting.

This action involves the foreclosure of a contract to purchase real estate. The appellants filed an application for a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1933. Appellees filed a motion to strike the application for the reason that the foreclosure was fully terminated at the time it was filed and that it was therefore filed too late. After arguments were heard, the trial court sustained the motion to strike the application and denied the stay. From this order appellants prosecuted the appeal now before the court. The record conclusively shows that the trial court decided the issue below on the motion to strike the application. I do not know of any procedure that requires the filing of a bill of exceptions in this court to secure a review of such an order. The matter having been determined below on a motion to strike the application from the files, there is no evidence to incorporate into a bill of exceptions. Neither does the transcript filed in this court show or infer that there was any evidence taken. In my judgment the majority opinion

decides the appeal on a point foreign to this case. The appeal should be decided on the point of law that was before the district court. I therefore dissent.

ARCHIE ROBERTS, APPELLEE, V. LEO KUBIK ET AL., APPELLANTS.

FILED NOVEMBER 8, 1935. No. 29355.

1. **Appeal:** HEARSAY EVIDENCE. Testimony of a doctor, reciting a history of injury given witness by plaintiff, *held* not to have been prejudicially erroneous, where other and primary testimony covered the facts given in the history and where no instruction relating to the admission was requested.
2. **Trial:** INSTRUCTIONS. "Where the issues of fact raised by the pleadings are correctly stated to the jury, the failure to give an instruction defining plaintiff's theory of the case is not an error in a record failing to disclose the tender of a proper instruction of that kind." *Prairie Life Ins. Co. v. Heptonstall*, 105 Neb. 829.
3. **Remittitur** of part of judgment ordered restored.

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

William N. Jamieson and *Joseph E. Strawn*, for appellants.

Paul I. Manhart, contra.

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

GOSS, C. J.

This is an action for damages for negligence in driving an automobile against plaintiff. Plaintiff had a verdict and judgment for $2,250. The court ordered a remittitur of $600 which was made and defendants appealed. Plaintiff cross-appealed to secure a restoration of the amount remitted.

There was competent evidence that defendant, Leo

Kubik, was driving his mother's car with permission, stopped it at the curb, leaving the engine running, came up on the sidewalk where Archie Roberts was and engaged in an altercation with him; that, at the instance of Kubik, his companion, Siedlik, held Roberts on the sidewalk, with a gun leveled at him, while Kubik returned to his car, drove it over the curb and parking and struck Roberts, standing in the middle of a six-foot brick sidewalk. He then reversed his car and drove away. The blow of the car knocked Roberts down. He fell on the walk, striking his head thereon, breaking his jaw and doing other damage to him. The evidence was sufficient to justify a verdict for plaintiff and sufficient, without reciting it, to warrant the jury in the conclusion that Tillie Kubik, the owner of the car, was liable for the negligent act committed by her son.

It is true that there was evidence that Roberts, who was an amateur boxer, had been knocked out in a contest a few weeks earlier; that Siedlik had struck him on the jaw when the altercation took place on the sidewalk; and that defendants' evidence tends to show that the impact of the automobile did not knock Roberts to the sidewalk. The answer to this is that the jury believed the testimony on behalf of plaintiff.

Error is claimed because of the testimony of Doctor Nolan, who examined plaintiff shortly before the trial. The doctor obtained from plaintiff a brief history of the manner in which plaintiff claimed he had been injured and then made a rather complete physical examination of plaintiff, including an examination of X-rays. The witness was permitted to recite the history given him and then proceeded to testify as to what he discovered in the physical condition of plaintiff's jaw, muscles, nerves, and the like. The recital of the history was objected to as well as the expressions of opinion by the doctor from time to time as to what he found concerning the physical condition of the patient. The court overruled the objections to the recital of the history, expressly stating in the presence of the jury that the history "isn't intended to be proof of the facts

given in the history. It isn't evidence at all and nobody would accept it as evidence of the facts stated." No instruction was requested by defendant relating to the admission of this testimony. The facts of history, as recited by the doctor, were given as primary evidence by witnesses for plaintiff and were particularly covered by the testimony of plaintiff who testified to every fact recited by the doctor. We find no prejudicial error in this point.

Appellant Tillie Kubik now argues that the judgment should be reversed as to her because she could not be held liable for the "malicious tort" of her son. The petition on which the cause was tried was based upon simple negligence. The answer of Tillie Kubik was a general denial. The case was tried on this theory. The court instructed the jury upon the conventional points of negligence. Tillie Kubik requested no instruction upon the question now presented. Indeed, she requested no instructions whatever. We think the point now suggested comes too late to be considered. "Where the issues of fact raised by the pleadings are correctly stated to the jury, the failure to give an instruction defining plaintiff's theory of the case is not an error in a record failing to disclose the tender of a proper instruction of that kind." *Prairie Life Ins. Co. v. Heptonstall,* 105 Neb. 829.

By the cross-appeal plaintiff asks to have the amount remitted from the judgment restored. Plaintiff received a severe fracture of the lower jaw. It is much more serious than a fracture of the upper jaw, which is fixed to other bones of the head. The jaw was put in a cast and he was under the care of a doctor for several weeks. His more or less promising career as a boxer was ended by the injury because the jaw is liable to refracture in such a violent business. He suffered great pain and discomfort for weeks. There was evidence that the adjacent nerves were and are still affected. No good reason was assigned by the trial court for requiring the remittitur as a condition for affirming the reduced judgment. We are of the opinion that the remittitur ought to be restored so that the

judgment will be for the $2,250 as fixed by the verdict of the jury. The judgment of the district court is generally affirmed, with directions to allow judgment for plaintiff for $2,250, as originally entered by the trial court.

AFFIRMED AS MODIFIED.

CARTER, J., dissenting.

In my judgment, the statement of facts contained in the majority opinion shows that the defendant, Leo Kubik, and his companion, Alex Siedlik, were engaged in a felonious assault upon the plaintiff at the time the injuries complained of were inflicted. The record shows that Leo Kubik is the son of Tillie Kubik and that he was driving his mother's car with her permission. I agree that, under the family purpose rule, Tillie Kubik is liable for the negligence of Leo Kubik in driving the car. She is not liable, however, for personal injuries inflicted by Leo Kubik while he is engaged in the commission of a criminal assault upon another, even though the family purpose car is one of the instrumentalities used in committing the offense. The facts of this case, as reflected by the majority opinion, do not disclose any negligence on the part of Leo Kubik that can be imputed to Tillie Kubik by virtue of her ownership of the car. In the court below, Tillie Kubik put the matter of negligence at issue by a general denial. At the close of plaintiff's case she moved for a directed verdict which should have been sustained. She preserved the error in her motion for a new trial, which is all that is required to secure a review in this court. I feel that the judgment against Tillie Kubik is not supported by the evidence and that it is affirmatively shown that the use of the car in the case at bar was clearly outside the scope of the family purpose doctrine. I therefore dissent.

EARL F. TRIPLETT, APPELLEE, V. WESTERN PUBLIC SERVICE COMPANY: HENNINGSON ENGINEERING COMPANY, APPELLANT.

FILED NOVEMBER 8, 1935. No. 29221.

1. Trial: OBJECTION TO EVIDENCE. "Where an objection to the introduction of evidence is once made and overruled, it is not necessary to repeat the objection to further testimony of the same nature by the same witness in order to save error, if any, in the ruling of the court whereby such testimony was received." *Zediker v. State*, 114 Neb. 292. See Comp. St. 1929, sec. 20-1141.
2. Negligence: APPEAL: HEARSAY EVIDENCE. In an action to recover damages caused by a prairie fire alleged to have been negligently started by employees of defendant, hearsay testimony as to the origin of the fire, when remote as to time and place, *held* not admissible in evidence over a proper objection and prejudicially erroneous.

APPEAL from the district court for Thomas county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Kennedy, Holland & De Lacy, Evans & Doyle and *Ralph E. Svoboda*, for appellant.

Hamer & Tye, contra.

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

ROSE, J.

This is an action to recover damages caused by a prairie fire which burned over a large tract of hay land owned by Earl F. Triplett, plaintiff, in Thomas county. The Western Public Service Company and the Henningson Engineering Company were defendants. In the petition it was alleged that on March 9, 1930, the latter, as employee of the former, was engaged in constructing a pole and wire line to conduct electric current from Seneca to Dunning and that employees of the engineering company negligently threw burning matches and cigarettes in dry grass and thus started the fire. General denials were among the defenses

pleaded. The action was dismissed as to the Western Public Service Company, defendant. Upon a trial of the cause the jury rendered, in favor of plaintiff, a verdict for $807.34. From a judgment thereon the Henningson Engineering Company, the other defendant, appealed.

On appeal the record was reviewed and the judgment was affirmed for the reasons stated in an opinion reported in *Triplett v. Western Public Service Co.*, 128 Neb. 835. On motion for a rehearing a second argument was requested by the court and the appeal was again taken under advisement after elaborate rearguments on both sides.

A ruling of the trial court in admitting testimony calls for reconsideration. The cause of the fire was a vital issue. In the course of the trial below, John Crawford, a ranchman, was a witness who testified to a conversation between himself and F. C. Rasmussen, construction foreman for Henningson Engineering Company. Crawford was asked, concerning the conversation: "Anything said as to the origin of the fire, as to how it started?" and answered, referring to Rasmussen and two boys who were employees under him: "He said one of the boys had started a fire." This answer was the only direct evidence as to how the fire was started. In the former opinion it was said: "No objection was made by the defendant's counsel to this particular question, and no motion was made to strike out the answer." *Triplett v. Western Public Service Co.*, 128 Neb. 835. While what was thus said in the former opinion is strictly true, reasons for considering the inadmissibility of the evidence quoted from Crawford's testimony were vigorously presented at the bar on reargument. Preceding this testimony on the same page of the record, Crawford was asked in regard to the identical conversation: "What was the conversation, John?" To this question the following objection was made: "Objected to as not binding upon the defendants, incompetent, irrelevant, immaterial, hearsay and no part of the *res gestæ*." The objection was overruled. The question applied to the identical conversation to which the question and answer

relating to the origin of the fire applied. Both questions called for testimony of the same nature. To the first question there was a proper objection. A statute provides:

"Where an objection has once been made to the admission of testimony and overruled by the court, it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received." Comp. St. 1929, sec. 20-1141.

The rule under the statute has been stated as follows:

"Where an objection to the introduction of evidence is once made and overruled, it is not necessary to repeat the objection to further testimony of the same nature by the same witness in order to save error, if any, in the ruling of the court whereby such testimony was received." *Zediker v. State,* 114 Neb. 292.

In view of the statute and the precedent cited, there does not seem to be any escape from the conclusion that the record presents for review the ruling admitting Crawford's testimony as to the origin of the fire. Rasmussen was not at the scene of the fire when it started, nor for some time afterwards. What he said to Crawford, therefore, was not admissible as *res gestæ.* It was too remote in time and place. If Rasmussen had any knowledge as to the starting of the fire, he acquired it by hearsay and what he said about it to Crawford was not admissible in evidence. The admission of the testimony in question was clearly erroneous. It was also prejudicial. Since the judgment below must be reversed for the error pointed out, and the cause remanded for further proceedings, the former opinion is vacated.

REVERSED AND REMANDED.

PAINE, J., dissents.

BYRON LIESENFELD V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1935. No. 29451.

1. **Criminal Law: BURGLARY: PROOF.** In a criminal prosecution, burglary may be proved by circumstantial evidence.
2. ———: ———: ———. Circumstantial evidence outlined in opinion *held* sufficient to sustain a conviction for burglary.
3. **Burglary: TRIAL: INSTRUCTIONS.** In a prosecution for burglary, the giving of an instruction, directing the jury to consider direct and circumstantial evidence and stating that "by direct evidence is meant the evidence of eyewitnesses," *held* not a ground for reversing a conviction, though there was no direct evidence of the principal fact, where eyewitnesses to links in a chain of evidential circumstances connecting defendant with the felony testified to such circumstances.

ERROR to the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Walter C. Weiss and *Waring & Waring*, for plaintiff in error.

William H. Wright, Attorney General, and *Paul P. Chaney, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

ROSE, J.

In a prosecution by the state in the district court for Thayer county, Byron Liesenfeld, defendant, was convicted of burglary. For that offense he was sentenced to serve a term of three years in the penitentiary. By petition in error he has presented for review the record of his conviction.

The evidence is challenged as insufficient and the failure of the trial court to direct an acquittal is assigned as error. An earnest argument is directed to the proposition that the evidence on which defendant was convicted is circumstantial and does not exclude every rational hypothesis except that of defendant's guilt.

Defendant was prosecuted under the statute providing

that whoever wilfully, maliciously and forcibly breaks and enters into a private building with intent to steal property of any value shall be punished. Comp. St. 1929, sec. 28-538. The information charged that defendant, October 26, 1934, thus entered a building belonging to August Hergott in Thayer county with intent to steal property of value belonging to him. Property feloniously taken from the building was wheat.

The state relies on a series of circumstances to sustain the conviction. The following facts or inferences are fairly deducible from the evidence: Hergott, on his farm in Thayer county, owned a building, an old dwelling-house, about 20 rods south of a highway running east and west. In the west room of the building, in which there was a window, he had 330 bushels of 1931 wheat on the afternoon of October 25, 1934. The doors and windows of the building were then all nailed up. The next forenoon, October 26, 1934, the window in the west room showed that it had been broken open. Part of the wheat was missing. A hole had been punched in the siding between the window and the ground. Near the window, boards on the outer wall bore indentures which appeared to have been caused by blows. Car tracks made by smooth treads in the center had diamond shaped figures at the edges. Tracks of a trailer ended near the window. The sheriff drew on paper impressions of the car tracks. Between 1 and 2 o'clock on the morning of October 26, 1934, defendant went into a place where a taxi business was being conducted in Fairbury, Jefferson county, said he had a trailer north or west of town, and asked Charles C. Melander, who was in charge, to bring the trailer in and store it in the garage. For that service defendant offered his car, but Melander used his own. The trailer, nearly full of wheat, was found by the roadside two miles north of Fairbury and was pulled into the garage about 3:15 the same morning. A sample of wheat in the trailer was there taken by a police officer. Defendant left the garage with his car and the trailer about 8:15 the same morning and was at the Lea

Milling Company's place of business, in Fairbury, from 8:20 to 8:35. There defendant sold the wheat and received for it a check for $32.25. Irons projecting from the rear of the trailer were about knee high from the ground. The hole and indentures in the siding of the building under the west window were also about knee high from the ground. Smooth centers of the treads on the tires of the wheels on defendant's trailer and diamond shaped figures on the edges of the tires were peculiarities in the car tracks by Hergott's building, from which old wheat, raised in 1931, had been taken. The grains of wheat taken from the trailer were small. Samples from both the building and the trailer were identified and submitted to the jury for comparison. The wheat in defendant's trailer was moved late at night. Defendant did not haul it at night into Fairbury, a county seat where there were police officers of both county and city, though his own car was equipped with a trailer attachment, but he did haul it early next morning in daylight from the garage to the place where he sold it, a distance of a few blocks.

The law is that burglary may be proved by circumstantial evidence. The links in the chain of circumstances outlined herein were admissible in evidence. The weight of such circumstances in connection with all other evidence in the record was a question for the jury. Taken as a whole, the evidence adduced by the state, if believed by the jury, was sufficient to exclude every rational hypothesis except the guilt of defendant. In this view of the record the evidence is sufficient to sustain the conviction.

An instruction to the jury on reasonable doubt, stating that they are not at liberty to disbelieve as jurors, if they believe as men, is challenged as erroneous. Instructions of that nature have often been criticized by the supreme court but have not been held so prejudicial as to result in reversals. When the entire charge to the jury is considered in the present instance, the giving of that part of the instruction of which complaint is made was not prejudicial error.

Another instruction directs the jury to "consider the circumstantial evidence as well as the direct evidence that has been introduced before you." This instruction is assailed on the ground that it is erroneous because there is no direct evidence of the principal fact charged. In the same instruction the trial court said: "By direct evidence is meant the evidence of eyewitnesses." Circumstantial evidence was also defined. The jury knew that no witness had seen defendant breaking open the window or entering the building or taking wheat. They knew also that eyewitnesses had seen the window after it had been broken open and had seen the car tracks, the tires on defendant's trailer and other links in the chain of evidential circumstances. The jury were distinctly told that there was no attempt to state all the law in one instruction and that the instructions must be considered as a whole. The instruction containing the words "direct evidence" stated: "In order to justify a verdict of guilty based upon circumstantial evidence, the circumstances must be consistent with each other and consistent with the theory of guilt, and inconsistent with any reasonable theory of innocence." Other instructions stated the elements of the crime charged and that there could be no conviction unless each and every one of them was proved beyond a reasonable doubt. Considering the entire instruction in which the words "direct evidence" appeared, the instructions as a whole and the evidence adduced, the better view seems to be that the use of those words did not confuse or mislead the jury or prejudice defendant.

All assignments of error have been considered without finding a substantial reason for reversing the judgment.

AFFIRMED.

NELS ERICKSON, APPELLEE, V. THORWALD J. HANSEN ET AL., APPELLANTS: MARGARET HANSEN ET AL., APPELLEES.

FILED NOVEMBER 8, 1935. No. 29376.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless shocking conscience of court, or amounting to evidence of fraud.
2. ———: ———: MORATORIUM. In a mortgage foreclosure, one having no interest in the premises and no personal liability for lien thereon is not entitled to the aid of the moratory statute.
3. ———: ———: ———. Defendant in a foreclosure action is not entitled to the benefit of the moratory statute where the mortgage lien equals or exceeds the actual value of the mortgaged premises, and where the premises are sold under decree for the full amount of the mortgage lien, interest and costs.

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

Radcliffe & Wehmiller and *W. G. Badham*, for appellants.

Heaton & Heaton, contra.

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

This is an appeal from an order confirming sale of mortgaged premises under a decree of foreclosure, and from a denial of a stay under the moratory law. Comp. St. Supp. 1933, sec. 20-21,159.

The mortgage in question was executed by Thorwald J. Hansen and wife. After decree of foreclosure, Hansen Investment Company, which had become the owner of the fee, requested and obtained the nine-months' stay provided by statute. After the expiration of this stay, the premises were sold to the plaintiff for $6,299.01, being the full amount of plaintiff's lien, interest and costs. Before confirmation Hansen Investment Company filed objections to

the confirmation of sale, on the ground that the mortgaged premises did not sell for their fair and reasonable value, and alleged that, if resold, they would bring a greater amount. Mr. Hansen filed a request for a stay of proceedings until the 1st day of March, 1935, under section 20-21,159, Comp. St. Supp. 1933, being the statute providing for a moratorium. At a hearing, at which evidence was taken, the court entered its order confirming the sale and denying the application of Mr. Hansen for a stay under the moratory statute.

The evidence as to the value of the mortgaged premises is in conflict. However, the far greater weight of the evidence is to the effect that the amount paid by the plaintiff was in excess of the actual value of the premises. The finding of the court, that the premises sold for a fair value and would not bring more at a subsequent sale, is amply sustained by the evidence.

The applicable rule is: Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless shocking conscience of court, or amounting to evidence of fraud. *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25; *Lemere v. White,* 122 Neb. 676.

We think the court did not commit error in denying Mr. Hansen's request for a stay under the moratory law. The moratory law, by its terms, may be invoked by the owner of the real estate or persons liable on the mortgage or notes secured thereby. The evidence discloses that Mr. Hansen had parted with his interest in the land and was no longer the owner. Since the property sold for sufficient to pay the mortgage debt, interest and costs, he had no liability to the mortgagee and no interest to protect.

In *Clark v. Hass, ante,* p. 112, it was held: "Where, upon a hearing on an application for a moratory stay of proceedings under section 20-21,159, Comp. St. Supp. 1933, it appears that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application." In the opinion it was said (p. 114):

"The very purpose of the moratory act was to protect the interests of mortgagors where, because of the existing emergency, their lands would be sold to satisfy mortgage liens of a much less amount than the value of the mortgagor's interest. But a mortgagor who has no actual equity in the land has no valuable interest to protect." It clearly appears that Mr. Hansen had no personal interest to protect and was not in a position to invoke the aid of the moratory statute.

It seems to be contended that Mr. Hansen's application for a moratory stay should inure to the benefit of the Hansen Investment Company. It may be observed that this company, the owner of the fee, did not invoke the aid of the law and, had it done so, it would have been of no avail, since a defendant in a foreclosure action is not entitled to the benefit of the moratory statute where the mortgage lien equals or exceeds the actual value of the mortgaged premises, and where the premises are sold under decree for the full amount of the mortgage lien, interest and costs.

The record discloses no error. Judgment

AFFIRMED.

LILLIE J. KINGSLEY ET AL., APPELLANTS, V. CLARA E. NOBLE ET AL., APPELLANTS: MARY E. KLONE, APPELLEE.

FILED NOVEMBER 8, 1935. No. 29170.

1. **Husband and Wife: ANTENUPTIAL CONTRACTS: AVOIDANCE.** Ignorance on the part of the prospective wife of her legal rights in the property of the intended husband, or of her share in his estate if she survives as his widow, will not, of itself, entitle her to avoid her antenuptial contract.
2. ———: ———: ———: **BURDEN OF PROOF.** When each party to an antenuptial contract, legally executed under section 30-106, Comp. St. 1929, is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or his representatives to sustain the contract, and to that extent our holding in the case of *In re Estate of Enyart*, 100 Neb. 337, is hereby overruled.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Reversed.*

G. M. Spurlock and *W. W. Wyckoff*, for appellants.

Sandall & Webster, contra.

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

PAINE, J.

This is the second decision in this case, the first being found *ante*, p. 130. The issues were made up in a partition suit, but the real contest is over an antenuptial contract. The trial court found this contract, which is set out in full in our first opinion, was null and void, and the judgment was affirmed in our first opinion.

Hermon H. Klone had been married twice, with an issue of seven children from each marriage. His second wife died on April 13, 1915, when he was 72 years of age, but within a couple of months he began looking for another wife. He discussed the matter with H. W. Brott, and this resulted in Mr. and Mrs. Brott sending word to Mary E. Downey, a widow, 56 years of age, with four grown children, to come to their home and meet Mr. Klone, with matrimony in view. Mr. Klone called upon her four times at this place in the next few weeks, and told her at once frankly that he was a widower and looking for a wife. The parties met a fifth time, two weeks before the marriage, at the home of her daughter on a farm near Polk, where she had been staying, and once again when Mr. and Mrs. Brott took her to see the ten-room, all-modern home where Mr. Klone lived in York. Mr. Klone went out to her daughter's near Polk, and they had a few minutes' visit alone that evening. He remained over night and at 7 o'clock the next morning, August 4, 1915, they left for Seward to be married.

At noon they stopped at York on their way from Polk to Seward, and went to the office of W. L. Kirkpatrick, attorney for Mr. Klone, and there the antenuptial contract,

which had been most carefully prepared, was read to both parties, and signed, and acknowledged by the county judge, who came over from the courthouse for that purpose. This very complete antenuptial contract lists all of the property of Mr. Klone, consisting of 160 acres in Washington county, Colorado, valued at $1,500, 400 acres of York county land, valued at $60,000, and a one-third interest in the dwelling in York at $3,000, and also $5,000 worth of personal property, thus itemizing his total property holdings at the value of $69,500.

The contract gave to the prospective wife this quarter-section of Colorado land, which was deeded to her that day by her intended husband, and in consideration of marriage, and set out that the parties "contemplate said marriage for the sole purpose of establishing a home of their own wherein they may have the convenience, comfort and companionship of each other, but they do not, by said marriage, intend to endow or confer upon each other any of the usual interests, estates, and marital rights in the property and estate of each other." They lived together at York for 17 years, 5 months, Mr. Klone dying January 5, 1933, when about 90 years of age.

Mrs. Klone now makes a post-mortem attack upon this antenuptial contract, and attempts to set it aside for the reason that it is unconscionable, unfair, inequitable, and fraudulent, that she had no opportunity to consult with any one who could advise her, that it failed to make adequate provision for her during widowhood, and that the provisions for her are grossly disproportionate to the wealth of said Hermon H. Klone.

Mr. Klone sold her Colorado land and placed the proceeds, $2,000, in a certificate of deposit for her, and she still has left of this a certificate of deposit of $1,160. He gave her a present at one time of another certificate of deposit for $1,000, which she invested in a small home at Polk, and under his will she is to receive $1,500 in cash, making a total of $4,500.

The testimony discloses that Attorney Kirkpatrick ad-

vised Mr. Klone that his property should all be set out in the contract and given high values, and that the property he was giving his intended wife should be listed at a low value, which was done. Mr. Klone had sold none of his real property, and at his death his estate was appraised as follows: Real estate, $26,350; personal property, $9,636.88; total, $35,986.88, which was much less than it was valued in the contract, while her Colorado land sold for 33 1/3 per cent. more than it was listed for in the contract. There was, therefore, without any question a full disclosure in the antenuptial contract of all of his holdings, with an extremely high value placed on all of it.

The real property was all accumulated by Mr. Klone, with the assistance of his first two wives and the 14 children. The only increase in his property after his third marriage was in his personal property. However, Mrs. Klone testified on direct examination that she had no idea that he had certificates of deposit in his bank box of $1,500 and $4,900 until after his death, as he was a very thrifty German and always led her to think that he was mighty short of funds, and thereby induced her to rely upon her own funds in many instances.

In his will Mr. Klone gave each of his ten daughters only the sum of $300, while to his son Frederick he gave $1,500, to his son Frank, $2,000 and a farm, to his sons Philip and Hermon, Jr., each a farm, the latter son having died June 20, 1926, after the codicil was written, leaving four girls, three being still minors at the time of the trial.

Mrs. Klone testified that at the time of signing the marriage settlement she knew nothing whatever about Mr. Klone or his property. However, the evidence discloses that H. W. Brott, who brought them together, was interested in Mrs. Klone, as his daughter had married Mrs. Klone's son, and that Mr. Brott had been sheriff, member of the county board and of the city council, and a bank director, and was engaged in the real estate business and posted on farm values, and when Mrs. Klone had these visits at the home of Mr. Brott, who sent for her to meet

Mr. Klone with the idea of marriage, she had a well-informed friend at hand, from whom she could have acquired full information as to values of real estate.

She testified that she had known H. G. Hopkins, county judge, very well for 40 years, and they used to go to the same church, and the county judge testified that he knew her, but could not remember of ever speaking to Mr. Klone until the noon he was called over to take their acknowledgments to the antenuptial contract. The contract itself sets out that it "has been carefully read and explained to the parties, and each of them, by the said H. G. Hopkins;" so that she had one in whom she had confidence at hand, who could have explained any detail in the contract before she signed it. W. L. Kirkpatrick testified that Judge Hopkins read it to her, and then he asked whether she had any questions, and her reply was: "It isn't necessary, that's the agreement I have with Mr. Klone, anyhow I understand it."

In the first opinion in this case, *ante,* p. 130, it is set out that certain things are essential to support the validity of an antenuptial contract: First, they must be fairly entered into; second, the terms must be just and reasonable; third, the property provided for the prospective spouse must bear a just and reasonable proportion to the estate of the prospective husband; fourth, the husband must make a full disclosure as to his property.

The reargument upon this case, and the discussion at consultation between the members of this court, have led us to doubt the soundness of the holding that the property provided for a prospective spouse *must* bear a just and reasonable proportion to the estate of the other spouse.

This court first announced this holding in the case of *In re Estate of Enyart,* 100 Neb. 337, to the effect that, if the provision made for an intended wife was grossly disproportionate to the interest in the husband's estate which the intended wife would acquire by operation of law, it placed the burden upon those claiming the validity of the contract to show that a full and fair disclosure was made

of the value of his estate as well as of the value of the estate which she was relinquishing, and this brings us to an examination of the opinion in the case of *In re Estate of Enyart, supra.*

Captain Logan Enyart owned property worth $225,000. His first wife, by whom he had no children, died in March, 1896. When he came from his large farm to Nebraska City he always made his headquarters at the Grand Hotel, conducted by Mr. and Mrs. Kidd, who were very good friends of his, so much so that he often ate at the family table, where he was introduced to Mrs. Richardson by Mrs. Kidd in June, 1897. This woman had a daughter about 15 years of age, and had been deserted by her husband in September, 1895, and procured a divorce from him in March, 1896. Captain Enyart was a very prominent citizen, took great interest in public affairs, and was a neighbor and close friend of Judge O. P. Mason and J. Sterling Morton. Mrs. Richardson had been sewing, cooking and doing chamberwork at the Grand Hotel to pay for the board and room of her daughter and herself, as well as to pay the unpaid bill left by her husband there. She then went to Auburn and kept house for Postmaster Freeman for about six months, during which time Captain Enyart wrote her letters and went down to see her several times. She gave him references to whom he could write and find out about her standing before she came to Nebraska City. He wrote to these references and the answers were entirely satisfactory. Judge Root says in his brief: "She was not an unsophisticated country girl but was a mature and shrewd woman who had tasted both the pleasure and troubles of life." Their marriage took place April 4, 1898, when he was 70 years of age and she was 37. Two days before the marriage Captain Enyart, who employed lawyers rarely, secured a legal form book and dictated an antenuptial contract, which they signed before a notary public. It is very short, and provided that he would pay her $10,000 at the rate of $500 each year on the anniversary of the contract, and then follows these words:

"That the above sum is all that the party of the second part shall ever claim off of the party of the first part or his estate from marriage." The contract further provided that the agreement did not prevent him from giving her presents as he desired. The evidence discloses that they lived together 15 years, until Captain Enyart died, November 9, 1912. It is said that the prospective wife did not know, and had no means of knowing, of the holdings of Captain Enyart, which consisted of stock in banks and ranches and farms scattered in several states.

In the fifth syllabus in this decision, we held: "Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case a marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place."

Another case cited in our former opinion in the case at bar was *In re Estate of Maag*, 119 Neb. 237. John J. Maag, 58 years of age, married Alice M. Smith, 45 years of age, with two children. They met in Omaha. She had never been in Otoe county, or talked with any one about his land. He simply told her that he had 400 acres of land in that county. He told her that he had a paper for her protection if anything should happen to him. She did not read it, nor did he furnish her a copy of it. She had no one to talk to to advise her about it. He took her back to her home that night and the next morning they went to the courthouse in Omaha, where she signed this paper, and acknowledged it without reading it, nor did any one read it to her, and it was at once filed in the office of the register of deeds. The parties then went to Fremont, where they were married that same evening. He

died November 10, 1927, leaving an estate of $65,000 to $84,000, and the marriage agreement provided that she should be paid $5,000 after his death, and it was stated in this opinion that the amount she received was so grossly disproportionate to the interest which the law would have given her as to lead to the conclusion, whether intentional or otherwise, that it constituted a legal fraud upon her. The facts in this Maag case are so entirely different from the case at bar that they cannot be compared.

Let us examine other Nebraska cases. In *Fellers v. Fellers* (1898) 54 Neb. 694, each of the parties had children by a former marriage. Each owned real estate in their own right. Each desired to keep and control their own real estate, the same as if they had remained sole, and the contract provided that neither was to acquire any right or interest in the property of the other. But it further provided that a will should be executed by Mr. Fellers, containing certain provisions for the benefit of Mrs. Fellers. The will was executed July 31, 1890. The parties had been married on February 5, 1890. He died December 5, 1892. It was held that this antenuptial agreement was but an executory contract, completed by the making of the will after their marriage, and therefore unenforceable, and not effective to bar the dower right of Mrs. Fellers.

In *Isaacs v. Isaacs* (1904) 71 Neb. 537, the parties were married in April, 1900. The wife preferred to live in Ohio, then came to Nebraska and lived with her husband for a couple of months on his farm in Wayne county, and then returned to Ohio. It was held that an antenuptial agreement may alter the interest which either the husband or wife takes in the property of the other, but cannot vary the terms of the conjugal relation itself, and therefore an antenuptial agreement by a man about to be married that after marriage he will reside in a particular state cannot be enforced.

In *Rieger v. Schaible,* 81 Neb. 33, we find a very long opinion of some 27 pages, citing more than 100 cases and discussing many of them. It involves an antenuptial con-

tract between two parties who each owned real estate and personal property in their own right, had each been married before, and in this contract each waived all right to the property of the other. No children were born of this union, and the husband died February 7, 1905, leaving personal property of the value of $21,000, out of which the widow asks support and maintenance, and to which the heirs objected on the ground of the antenuptial contract. Both the probate court and the district court held the marriage agreement void. No evidence was introduced by the appellee to show that she was deceived or overreached. The antenuptial contract had been read over to her and all of its provisions fully explained. There was no suggestion of fraud or concealment, and the parties being advanced in years the marriage seems to have been in the nature of a business transaction. This court held that the agreement was based upon a sufficient consideration, and was executed in good faith, and that she understood its terms and should abide by her contract. This is one of the many cases to be found where the purpose of the contract was for each to waive all their interests in the property of the other.

In *Tiernan v. Tiernan* (1922) 107 Neb. 563, an action was brought to construe the provisions of an antenuptial contract before the death of either. The prospective husband was 78 years of age, and was quite wealthy, while she was in moderate circumstances and supporting herself by menial work. They also, as in the case of *Rieger v. Schaible, supra,* entered into an antenuptial agreement, in which each waived any interest or claim in the other's property. They were married in 1915. The agreement provided that certain city property in Lincoln should be hers so long as she lived and remained his widow. It was held that her object was to secure maintenance during her entire life. It was held that the agreement was legal in every way, and was one of great benefit to the appellant, for it provided maintenance for her as long as she lived, and the antenuptial agreement was sustained.

In *Erb v. McMaster,* 88 Neb. 817, the prospective husband entered into an antenuptial contract to release all claims to the estate of his intended wife on the payment to him of $1,000 after her death. She paid him $330 in her lifetime and provided for the payment of the remainder of the $1,000 in her will. This was also in an action in partition, and he prayed for a decree giving him a one-fourth interest in the real estate of which she died seized and also that a homestead might be set apart to him. It was held that he could not accept and retain the benefits of the contract and at the same time maintain an action based upon its invalidity. "It was not until after his wife's death that he doubted the validity of the contract, which he wrote with his own hand. The court is of the opinion that good faith and common honesty require that he should still abide by the contract, now that she is dead. In good conscience he is estopped to do otherwise." It is further held that a tender by him of the money he had received, made at the time of argument in the supreme court, was too late to be effectual.

The case of *Neneman v. Rickley,* 110 Neb. 446, decided in 1923, involves a very short and well-drawn antenuptial agreement, witnessed by J. J. Sullivan. It was insisted that the antenuptial contract, which gave each a one-half interest in the property of the other, and also the right of survivorship, was unconscionable and a fraud upon the wife, who died four years after the contract was written. The court found that the consideration was the mutual transfer of property and the contemplated marriage. The charge of fraud was based upon the ground that their respective properties were of disproportionate value, but there was no evidence that the wife ever complained of the transaction. The contract was found to be good.

The case of *Stahl v. Stahl* (1927) 115 Neb. 882, is governed entirely by the decision in *In re Estate of Enyart,* 100 Neb. 337. Christian Stahl had nine children by a prior marriage, and the prospective wife had four. His property was all accumulated prior to the death of his

first wife. The prospective wife lived in New York City, and ascertained that he was a rich man, that he owned 560 acres of land in Fillmore county, with three sets of improvements on it, had a large home and live stock and farm implements, but she was not informed as to the actual value of his property. He sent her $125 to meet him in Omaha. He had an antenuptial contract provided before the arrival of his wife. They proceeded to the courthouse, where a license was secured and the antenuptial contract was presented to the wife, and while she signed and acknowledged the same, there is much doubt whether she could read English, or whether she was advised of the nature of the instrument which she signed, and whether it was executed knowingly by her. It is clear that she was wholly uninformed as to the value of his real estate and wholly unacquainted with farm values. She was a stranger in a strange land, without friends, and signed the agreement May 1, 1902, without being accorded an opportunity for consultation with any one who could advise her. It was therefore held that there was not a fair disclosure, nor did the wife have such knowledge of the nature and value of the property as to render the contract binding upon her. The provision for his widow was $2,000, and no more, and his property being worth $20,000, it was held to be grossly disproportionate to his wealth, in accordance with *In re Estate of Enyart*, 100 Neb. 337.

In the case of *In re Estate of Waller* (1928) 116 Neb. 352, the antenuptial contract provided that if his wife survived him she should be paid $1,000 in full of all her rights and interest in his estate. A year and a half after their marriage she obtained a decree of divorce on the ground of extreme cruelty, and received as alimony $1,000 and all costs. Six weeks later James Waller died, and she claimed a widow's share in his estate, which was of the approximate value of $22,000.

The court found that the antenuptial agreement of two full pages was, of course, written in English; that the

prospective wife, a recent arrival from Germany, could neither read, write, nor understand the English language, and did not know what her marriage rights were. It was disclosed by an examination of the instrument itself in court that it was clearly intended by Waller for a prior anticipated marriage, as the former intended wife's name appears eight or ten times as the prospective wife, but that the name Mrs. Frida Durkran was inserted above the partially erased name of the former intended; the court remarking that it appears that Waller was no novice in his search for a helpmate. The court found that Waller wickedly availed himself of the ignorance of his intended wife, and of her lack of understanding of the English language, and her lack of information with respect to an antenuptial agreement, and perpetrated a grossly outrageous fraud upon her, and that good faith is the cardinal governing principle in an antenuptial contract.

An examination of these ten leading Nebraska cases discloses that, aside from the first case discussed, viz., *In re Estate of Enyart,* we find in two of them, to wit, *In re Estate of Maag* and *In re Estate of Waller,* that the antenuptial contract was set aside for fraud. The contract was set aside in *Stahl v. Stahl* because the prospective husband failed to make a fair disclosure of his property. In the cases of *Rieger v. Schaible,* where all rights were waived, *Erb v. McMaster,* where only $1,000 was to be paid after death, and *Tiernan v. Tiernan,* where only support after death of husband was provided, the contracts were held to be good; thus supporting the contention that, if one knows the exact amount and value of the property involved, there is no requirement that they know the value of the rights relinquished, as was well said by Carter, J., in his dissent, found *ante,* p. 140: "If she is acquainted with the facts she is presumed to know the law applicable thereto."

It may, therefore, be held to be established that ignorance on the part of the prospective wife of her legal rights in the property of the intended husband, or of her share

in his estate if she survives as his widow, will not, of itself, entitle her to avoid her antenuptial contract.

And, in these Nebraska cases just discussed, we find that the question whether the amount given the wife is small, or even nothing at all, does not affect the determination of the validity of the contract. Decisions from other jurisdictions are in accord therewith. *Birkbeck's Estate,* 215 Pa. St. 323; *Appleby v. Appleby,* 100 Minn. 408, 10 L. R. A. n. s. 590, 117 Am. St. Rep. 709; *Mallow v. Eastes,* 179 Ind. 267; *Kroell v. Kroell,* 219 Ill. 105; *Fisher v. Koontz,* 110 Ia. 498; *Dunlop v. Lamb,* 182 Ill. 319; *McNutt v. McNutt,* 116 Ind. 545; *Robbins v. Robbins,* 225 Ill. 333; *Ditson v. Ditson,* 85 Ia. 276; *Yarde v. Yarde,* 187 Ill. 636; *Hafer v. Hafer,* 33 Kan. 449; *Richard v. Detroit Trust Co.,* 269 Mich. 411; *Comstock v. Comstock,* 146 Ark. 266; 13 R. C. L. 1035, sec. 55.

Our analysis also tends to confirm our doubts as to the validity of our holding in the case of *In re Estate of Enyart, supra;* and we find that our court has already adopted an opinion in which we have departed from that decision, for in *Wulf v. Wulf, ante,* p. 158, which was released May 24, 1935, it was held: "Where each party to an antenuptial contract knows, or is properly chargeable with knowledge of, the extent and value of the other's property, a disproportion between the contractual provision for the wife and the amount allowed by the statute of descent does not shift to the husband the burden of proving a full disclosure in an action where the wife demands the cancelation of the contract on the ground of fraudulent concealment on his part." An antenuptial contract was signed by the parties December 24, 1927. It provided that if she was left his widow she should have the town property, valued at $5,000, and that no part of the property belonging to either of the parties should descend to the other. The district court held the antenuptial contract void, and gave her one-fourth of his property. Henry Wulf died September 21, 1932, without a will. He was 62 years of age and she was 50. He had

four children by his former wife, and she had three by her first husband. She was an aunt of his first wife, and had lived in the community for years, and she owned a farm near his farm. He called at her home three times, and during the first call proposed marriage. She talked the matter over with the attorney at the time the contract was drawn, and it was stated that both of them were waiving a one-fourth interest in the other's estate, and they said they knew each other's property. The contract was read to both parties. She examined the antenuptial contract a year and a half after her third marriage. The value of Wulf's real estate was about $45,000. It was held that, under the facts outlined, the antenuptial contract was not void on the ground that he had not fully disclosed in advance the nature and extent of his property, or on the ground of an unfair disproportion between the contractual provision and the amount allowed by the statute of descent.

In a Pennsylvania case, Dr. McCready, a widower of 74 years, worth perhaps $50,000, married a widow of 63, who was possessed of great wealth. Her attorney presented an antenuptial contract to be signed and started to tell of her large holdings, and was interrupted with, "Probably I know more about her property than you do," and a contract was signed in which each waived all rights in the property of the other. She died in less than ten years, having not only paid all expenses, which included expensive trips here and abroad, but had given him large sums of money for his personal expenses, and left him $1,000 a month in her will. When he discovered that he could not be deprived of this bequest by contesting the antenuptial contract, he brought this action. Dr. McCready knew exactly what he was doing when he signed the contract. He knew she was a woman of large means, though he did not know of exactly what her property consisted. There was no attempt to misrepresent anything. His attempt to break the contract he had signed just before their marriage was entirely unsuccessful in the courts. *McCready's*

Estate, 316 Pa. St. 246. To similar effect is the opinion in *Leonard v. Prentice,* 171 Okla. 522, which was prepared by a committee of three attorneys of the judicial council of Oklahoma, and adopted by its supreme court.

Has not too great stress been given in some of our Nebraska decisions to the division of the property between the spouses? May not a prospective wife, who greatly desires a home and protection, marry a man of independent means, with many grown children by his other marriages, with little regard for the amount of property given her by the marriage settlement she signs? In any event, if she is dissatisfied she ought to refuse to sign the contract, or, if signed, not continue to accept its benefits for more than 17 years during her husband's life without complaint, and then seek to repudiate it after his death. See *Neely's Appeal,* 124 Pa. St. 406, 10 Am. St. Rep. 594.

When each party to an antenuptial contract, legally executed under section 30-106, Comp. St. 1929, is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or his representatives to sustain the contract, and to that extent our holding in the case of *In re Estate of Enyart,* 100 Neb. 337, is hereby overruled.

It is the opinion of the majority of the court that the antenuptial contract set out in our former opinion, *ante,* p. 130, is valid, legal, and binding upon the parties, and should be enforced, and such former opinion is hereby vacated. The judgment of the district court is reversed, and proceedings in accordance herewith directed.

REVERSED.

C. LAWRENCE STULL, APPELLEE, V. DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.

FILED NOVEMBER 8, 1935. No. 29366.

1. Trial: CONDEMNATION PROCEEDINGS: VIEW OF PREMISES.

Where a jury is permitted to view the premises involved in litigation under the provisions of section 20-1108, Comp. St. 1929, the result of its observations is evidence which, in arriving at a verdict, it may consider only in connection with other competent evidence.

2. **Appeal**: OBJECTION TO EVIDENCE: OFFER OF PROOF. When to a question in direct examination of a witness an objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded.
3. **Evidence** examined and *held* that the verdict of the jury is excessive.

APPEAL from the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed on condition.*

William H. Wright, Attorney General, and *Paul P. Chaney,* for appellant.

W. A. Robertson, contra.

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

CARTER, J.

Appellant in this case commenced a condemnation proceeding in the county court of Cass county to take certain land of the appellee for a state highway. An appeal was taken to the district court where a jury returned a verdict of $3,500 against the appellant. From the overruling of its motion for a new trial the appellant brings the case to this court for review.

The record shows that appellee was the owner of 190 acres of land divided into two tracts of approximately 95 acres each by a county highway running north and south. Both tracts were crossed by the Missouri Pacific Railroad Company right of way from a northwesterly to a southeasterly direction. It is also shown that in 1927 federal-state highway 73-75 was located across that part of the land lying north of the Missouri Pacific Railroad right of way and in substantially the same general direction but

not adjoining said right of way. In October, 1933, this proceeding was commenced to take by condemnation an additional 5.76 acres from the lands north of the Missouri Pacific right of way for the purpose of improving the location of highway 73-75 before paving was constructed thereon.

The first contention of the appellant is that the court erred in refusing to give certain offered instructions on the question of an allowance or offset for special benefits that appellee received by virtue of the building of the highway. Appellee contends that there is no evidence to warrant the giving of such instructions. It is agreed by the parties, and the record so shows, that none of the witnesses called to the witness-stand testified to any special benefits received by appellee because of the construction of the new highway. Appellant contends, however, that the jury were permitted to view the premises in question, that it was apparent that special benefits did accrue to appellee, that the viewing of the premises is to be considered as evidence, and that there is therefore evidence to sustain the giving of the instructions. This court is committed to the rule that the viewing of the premises involved in litigation by the jury is evidence, and not merely a means of enabling the jury better to construe and apply the evidence adduced in court. *Chicago, R. I. & P. R. Co. v. Farwell,* 60 Neb. 322; *Drollinger v. Hastings & N. W. R. Co.,* 98 Neb. 520. However, we take the view that such evidence by itself, and in the absence of other evidence tending to sustain the issue, is not sufficient to sustain a finding or an award of damages. Such seems to be the prior holding of this court. In *Drollinger v. Hastings & N. W. R. Co., supra,* we said: "Upon a trial to determine the compensation to be awarded a landowner, where a railroad company exercises the right of eminent domain in crossing his farm, it is proper for the trial court to permit the jury to view the premises, and to take into account the result of their observations, and make it, in connection with the other evidence, the basis of their verdict." It will be noted that

the view of the premises by the jury may be considered by them in arriving at a verdict *in connection with the other evidence.* (Italics ours.) The trial court did not err in refusing the offered instructions.

Appellant contends that the trial court should have permitted evidence tending to show what was to happen to the old highway. The record shows that no offer of proof was made by which this court could determine whether or not the evidence was material. In the absence of an offer of proof, it will be presumed by this court that the trial court ruled correctly on the objection made. The rule in this state is that when to a question in direct examination of a witness an objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded.

Appellant further contends that the judgment was excessive and cannot be sustained by the evidence. This court has held that there are two elements of damage involved in a case of this character: First, the market value of the land actually appropriated; and second, damages suffered by diminution in value of the remainder of the land, less special benefits received. *Regouby v. Dawson County Irrigation Co.*, 126 Neb. 711. The evidence shows that appellee's land that was taken was worth approximately $150 an acre. Witnesses for appellant testified that it was worth $125, while appellee placed it at $200 an acre. The great weight of the evidence is to the effect that its market value in October, 1933, did not exceed $150 an acre. As to the damages to the remaining lands the evidence is very unsatisfactory. Witnesses for both parties were permitted to testify without objection to the difference in value of the whole tract before and after the taking when, as a matter of fact, it should have been limited to the difference in value of the remainder of the land not taken before and after the taking for public use. Appellee's witnesses testify that the remaining 185 acres

were damaged from $50 to $75 an acre "straight through." That this was opinion evidence not supported by any reasonable statement of fact is apparent from the evidence. That appellee suffered damage other than the value of the property actually taken goes without saying. We must, however, bear in mind that appellee's lands had already been crossed by a railroad right of way and the former route of federal-state highway 73-75. Appellee, we can assume, has once been paid for the inconvenience caused by the old highway and the heavy traffic thereon. The fact that appellee's lands had already been cut up by a county road running north and south and a railroad and a highway running approximately from northwest to southeast materially lessens the damages that might otherwise accrue. On the other hand, the evidence shows that two small tracts, one consisting of 1.49 acres and the other of 5.87 acres, have been isolated from the main tracts by the old and new highways. That these two tracts are materially lessened in value cannot be disputed. Conceding for the sake of argument that the 5.76 acres were of the value of $150 an acre, a total of $864, we are convinced that the evidence cannot sustain a verdict of $2,636 for damages to the remainder of the land. After a consideration of all the evidence, we come to the conclusion that the verdict is so grossly disproportionate to the facts proved that a verdict of $3,500 cannot stand. The maximum allowance that can be sustained by the evidence, in our opinion, is $2,100.

We, therefore, hold that this appeal should be affirmed on condition that appellee remit the sum of $1,400 of the judgment obtained in the district court within 30 days, otherwise the judgment to be reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

WALLA WALLA LODGE NO. 56, INDEPENDENT ORDER OF ODD FELLOWS, APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.

FILED NOVEMBER 8, 1935. No. 29417.

Opinion on motions for rehearing of case reported, *ante*, p. 292. *Former opinion modified.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and RYAN, District Judge.

CARTER, J.

This case was previously argued and decided by this court. *Walla Walla Lodge No. 56, I. O. O. F., v. Board of Equalization, ante*, p. 292. The cause is again before the court on motions for a rehearing filed by both parties.

We hold that the building described in the evidence is subject to assessment for taxation purposes in the sum of $3,600, as found by this court in a previous opinion, *ante*, p. 292, the same being 45 per cent. of its assessed value. On the authority of *Masonic Temple Craft v. Board of Equalization*, p. 827, *post*, released herewith, the lot upon which the building stands is also subject to assessment for taxation purposes to the extent of 45 per cent. of $5,675, its assessed value, the same being the sum of $2,553.75. The building and lot therefore ought to be taxed on the basis of an assessed value of $6,153.75.

To the extent set forth herein the former opinion, *ante*, p. 292, is modified and the motions for a rehearing overruled.

FORMER OPINION MODIFIED.

MASONIC TEMPLE CRAFT, TRUSTEE, APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.

FILED NOVEMBER 8, 1935. No. 29418.

Opinion on motions for rehearing of case reported, *ante*, p. 293. *Former opinion modified.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and RYAN, District Judge.

CARTER, J.

This case has been before this court on two previous occasions in connection with other causes. *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841; *Masonic Temple Craft v. Board of Equalization, ante,* p. 293. The latter case is again before the court on motions for rehearing filed by both of the parties.

In the last decision of this court, the assessed value of the Masonic property was fixed at $26,500 on the building, and $8,500 on the lot on which the building was constructed. The court therein held that, under the evidence, 65 per cent. of the assessed value of the building and 50 per cent. of the assessed value of the lot were exempt for taxation purposes under the provisions of section 77-202, Comp. St. 1929.

We are convinced that the finding by this court that 65 per cent. of the building was exempt for taxation purposes is amply sustained by the evidence in the record. After a consideration of the briefs filed in support of the motions for a rehearing, we have come to the conclusion that the lot upon which the building was erected should be exempted in the same proportion as the building, and that 65 per cent. of the assessed value of the lot is exempt for taxation purposes. We hold, therefore, that where a building is constructed on a lot used primarily in connection with the building, a part of the building being exempt for taxation purposes, the lot will also be exempt in the same proportion. In the case at bar the building is subject to assessment for taxation purposes to the extent of 35 per cent. of its assessed value, the same being the sum of $9,275. The lot upon which the building stands is, under the evidence in this case, subject to assessment for taxation purposes to the extent of 35 per cent. of its assessed value, which is the sum of $2,975. The building and lot therefore ought to be taxed on the basis of an assessed value of $12,250.

To the extent herein set forth the former opinion, *ante*, p. 293, is modified and the motions for a rehearing overruled.

FORMER OPINION MODIFIED.

HAROLD D. CURLEY, APPELLANT, V. WINNIE V. WHITE ET AL., APPELLEES: LEXINGTON STATE BANK, APPELLANT: LINDLEY-CAHOW COMPANY, INTERVENER, APPELLEE.

FILED NOVEMBER 8, 1935. No. 29285.

1. **Husband and Wife:** CONTRACT OF MARRIED WOMAN. The contract of a married woman, which is not made with reference to her own separate trade, business or profession, and by which she charges her separate estate, can be enforced only against the separate estate which she possessed at the date of the contract.
2. **Mortgages:** MERGER. Where the owner of the fee in real estate acquires a first mortgage lien thereon, no merger occurs if there is an intervening lien and it was the intention of the holder of the title to the real estate, at the time of acquiring the lien, that merger should not occur.
3. **Estoppel.** To be available as a cause of action or a defense, estoppel must be specially pleaded.

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

J. T. Berquist and *Cook & Cook*, for appellants.

Shotwell, Monsky, Grodinsky & Vance, Frank M. Johnson and *T. M. Hewitt, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and RYAN, District Judge.

RYAN, District Judge.

This is an action brought by the plaintiff to foreclose a certain real estate mortgage upon a tract of farm land located in Dawson county, Nebraska. The petition is in the usual form. A cross-petition was filed by the defend-

ant Lexington State Bank, asking foreclosure of a lien in the sum of $1,530.40 upon a partial assignment of the mortgage.

The appellee Lindley-Cahow Company, upon leave of court, filed a petition in intervention, alleging that it had an interest in the matter in litigation; that on December 20, 1932, the claim of intervener against the estate of Lemuel R. White, deceased, was duly allowed by the county court of Dawson county, Nebraska, in the sum of $12,260.45; no appeal has been taken from the order of allowance of said claim; and that said order and judgment in favor of the intervener were final; and alleges further that the notes secured by said real estate mortgage were fully paid on or about February 4, 1932, and the indebtedness represented thereby fully and completely released, satisfied, discharged and extinguished, and that said mortgage and the lien thereof upon said real estate described in plaintiff's petition were fully and completely released, discharged and extinguished; that the purported assignment of the notes and mortgage by the original holder thereof, the Lexington State Bank, was not *bona fide,* but was fictitious and made for the purpose of fraudulently attempting to revive the debt and the lien after payment and for the purpose of defrauding the intervener and other creditors of the estate of Lemuel R. White, deceased; and that said purported assignment was made through collusion between the plaintiff, the cross-petitioner Lexington State Bank, and the defendant Winnie V. White as part of a conspiracy between said parties to defraud the intervener and other creditors of the estate of Lemuel R. White, deceased. Intervener prays the petition of the plaintiff and the cross-petition of the Lexington State Bank be dismissed, that the court adjudge that the indebtedness represented by the notes and mortgage set up and sought to be foreclosed has been fully paid, satisfied and discharged and that the same should be canceled of record.

To this petition of intervention answers were filed by the plaintiff and the cross-petitioner, the Lexington State

Bank. The answer of the plaintiff alleges that the defendant Winnie V. White, at the time of the execution of the notes and mortgage described in the petition, was a married woman and the wife of Lemuel R. White, and as such wife executed the notes and mortgage; that the aforesaid notes and mortgage were not executed in connection with any separate trade or business then carried on by the said Winnie V. White, and the said Winnie V. White was not then carrying on any trade or business of her own account, and that said Winnie V. White executed said notes and mortgage solely as a married woman to charge her interest in the real estate of her husband covered by said mortgage, and at the time of the execution and delivery of said instruments she had no separate property or estate whatever; that upon the death of said Lemuel R. White the defendant Winnie V. White received certain insurance money upon the life of said Lemuel R. White, the same being payable direct to her and not liable for the payment of any of the debts of said deceased, and that the insurance money so received was an amount in excess of $17,000; that said insurance money was received by her on or about February 4, 1932; that at said time the notes and mortgage set forth in the petition were owned and held by the defendant Lexington State Bank, and that on or about said date Winnie V. White purchased the said three notes for the principal sum of $5,000 each and the mortgage securing the same, and paid the bank therefor the sum of $15,123.96 out of the insurance money received by her; that at the time of the purchase of said notes and mortgage it was understood and agreed between Winnie V. White and the bank that said transaction should not constitute a payment or discharge of the mortgage indebtedness, and that the same should not be extinguished but should be kept alive and continued as a mortgage indebtedness against said land, and it was agreed between the parties that the bank should assign and deliver said notes and mortgage to such persons as Winnie V. White should direct; that by error and mistake the notes and mortgage were first assigned of

record by the bank to the defendant Winnie V. White; that thereafter, at the direction of Winnie V. White, the notes and mortgage were assigned and delivered to the plaintiff by the bank on the 11th day of August, 1933, and that the plaintiff is now the legal owner and holder thereof; that it was not the intention of Winnie V. White or of the bank, or either of them, that the sum paid by Winnie V. White should constitute a payment and discharge of the mortgage indebtedness, or any part thereof, but it was the intention of both parties, and that the actual transaction was that Winnie V. White individually purchased said mortgage and the notes secured thereby from the bank with the intention that it should continue in existence as a lien upon the real estate therein described, and that the same should not merge with the title to the mortgaged premises received by Winnie V. White under the will of Lemuel R. White, deceased, and that plaintiff is entitled to the foreclosure of the mortgage as prayed in his petition.

The cross-petitioner Lexington State Bank filed a similar answer to the petition of intervention. Winnie V. White, as executrix of the estate of Lemuel R. White, deceased, filed an answer in the nature of a general denial to the petition of intervention. The intervener filed a reply to her answer, denying every allegation therein contained except that Winnie V. White had paid the sum of $15,123.96 to the Lexington State Bank.

The trial court found in favor of the intervener, found that the mortgage debt was paid and satisfied by Winnie V. White on February 4, 1932, and should be canceled of record; that the assignments were not *bona fide*, but were made as part of a conspiracy to revive the debt after it had been paid and extinguished. The court entered judgment dismissing the petition of the plaintiff and the cross-petition of the Lexington State Bank and canceling of record the mortgage and assignments thereof. The plaintiff and the cross-petitioner, Lexington State Bank, bring the case to this court on appeal.

Lemuel R. White was engaged quite extensively in the

feeding of live stock and at the time of his death on December 28, 1931, was the owner of a large amount of both real and personal property. Most of the real estate was heavily encumbered and he owed a considerable amount of unsecured debts. He had three life insurance policies of $10,000 each, of which Winnie V. White was the beneficiary. The said Winnie V. White received payment on each one of these policies some time in June, 1932, and out of the proceeds paid $7,385.75 at the Lexington State Bank, these policies having been assigned to the bank as collateral security. The balance of the insurance money, totaling a little over $17,000, the amount having been reduced somewhat by reason of the fact that an error was made in the age of the insured at the time the policy was written, was paid on February 4, 1932. At that time the Lexington State Bank was the owner and holder of the three $5,000 notes and the real estate mortgage securing the same which are sought to be foreclosed by the plaintiff in this action.

Winnie V. White testified that she inquired of R. F. Stuckey, president of the Lexington State Bank, if she might purchase the mortgage and invest her insurance money in it so that she might foreclose it and secure the home place as a home for herself and her sons, that, upon being assured that she could do this, she purchased the notes and mortgage from the Lexington State Bank. The notes were indorsed to her without recourse and an assignment of the mortgage executed to her on that date by the bank; that it was not her intention that the mortgage and notes should be paid and discharged, nor that the lien should merge with the title which vested in her by reason of the will of her deceased husband. The defendant Winnie V. White was named as the sole legatee and devisee in the will of Lemuel R. White and also designated as the executrix. The will was admitted to probate on February 15, 1932, in the county court of Dawson county.

R. F. Stuckey, the president of the Lexington State Bank, testified as to the conversations had between him and Winnie V. White on February 4, 1932, and strongly cor-

roborates her testimony. It was also testified by both parties that sometime later Mrs. White borrowed $1,500 from the bank and assigned one $5,000 note to the bank as collateral security for this loan.

The assignments of the notes and mortgage to the plaintiff were made on August 11, 1933, for the purpose of bringing the action of foreclosure. It is admitted that the plaintiff has no financial interest in the subject-matter of the litigation, but brought the action solely for the benefit of Winnie V. White. The assignments to the plaintiff, made on August 11, 1933, were dated March 2, 1933, and were made at the direction of the defendant Winnie V. White.

On behalf of the intervener two letters written by the defendant Winnie V. White to the intervener were produced in evidence. The first of these contains this statement: "I have the money from one policy, paid the note at the bank, am using a part of the remainder to buy corn and hay with. As soon as I get the remainder I want to pay off the mortgage on the home place." This letter was not dated, but was written some time between the 1st of January and the 4th of February, 1932. The second letter is dated February 27, 1932, and contains the statement: "I had some insurance money. I paid off a $15,000 mortgage and int. on this place."

Thomas H. Lindley, president of the intervener company, testified to the indebtedness owing the intervener by Lemuel R. White at the time of his death, and that he talked with Winnie V. White in June of 1932. In answer to the question, "Will you state whether or not she told you anything about the mortgage on the home place in any of those conversations, stating which one?" the witness replied: "I remarked to Mrs. White that it was too bad that she had tied her money up in the eighty at home as she would have been in shape to go on, and I would assist the boys the same as I had in the past with Lem. She said, 'Well, I can see that now;' 'but,' she says, 'Mr. Stuckey was bound that I would clean up this farm, on this eighty, so I have put my money

in there, but I can see that I should have kept my money so that I could do business with it.' "

Vern W. Vance, a member of the firm of attorneys representing the intervener, testified that he talked with Mrs. White on April 25, 1932; that he discussed the indebtedness of the estate and the mortgages upon the real estate. He testified: "She said that this home eighty and the other section and a half had been covered by a fifteen thousand mortgage to the Lexington State Bank, but that she had paid off that mortgage and it was then clear and was the only piece which was clear with the exception of the fact that the estate had an undivided one-third interest in another section of pasture land, joining, as I recall, the 960 acres which were a part of the estate. Q. Did Mrs. White, in that conversation, indicate to you that she had purchased the mortgage on that home place eighty? A. Nothing of the kind was ever mentioned or suggested." Mr. Vance further testified that he examined the records in the office of the register of deeds and found that the $15,000 mortgage had not been released of record.

The defendant Winnie V. White denies making the statements attributed to her and testifies: "Q. Did you make any statement at that time to Mr. Vance with reference to the $15,000 mortgage on the home eighty and the section and a half of pasture land? A. I did. I said that I held the mortgage." She also testified that in her letters she did not mean to convey the idea that the $15,000 mortgage had been discharged; that she was merely explaining to Mr. Lindley what disposition she had made of her insurance money.

The principal assignments of error made are: (1) That the findings and judgment of the court are contrary to law; and (2) that the findings and judgment of the court are not sustained by sufficient evidence.

The law of this state governing the propositions involved is well settled. The general rule applicable is: "Where the owner of premises acquires an outstanding mortgage thereon, his intention is the controlling factor as to whether

there is a merger. If his intention has been expressed, it controls. In the absence of such an expression, the intention will be presumed from what appears to be his best interest as shown by all the circumstances." 46 A. L. R. 322, note 1.

In *Peterborough Savings Bank v. Pierce*, 54 Neb. 712, it is held: "Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected."

In *Citizens State Bank v. Petersen*, 114 Neb. 809, it is held:

"Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter.

"But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself."

These holdings were followed and approved in *Edney v. Jensen*, 116 Neb. 242.

The rule is firmly established in this state that a merger does not occur where a party acquires two unequal estates in realty, if there is an intervening lien and it was the intention of the holder of the estates, at the time of acquiring them, that merger should not occur. Under the facts disclosed by the record in this case, as shown by the testimony of Winnie V. White and R. F. Stuckey, president of the Lexington State Bank, and corroborated by the fact that the mortgage was assigned and not released of record, and by the further fact that the Lexington State Bank afterwards made a loan to Winnie V. White and took a partial assignment of the mortgage as security therefor, it is clear

that there was no merger intended by Winnie V. White at the time she purchased the mortgage and the indebtedness secured thereby from the Lexington State Bank, and it is equally as clear that the cross-petitioner, Lexington State Bank, so understood the transaction.

The burden of proving that the assignments were not *bona fide* and were made as a part of a conspiracy between Winnie V. White and the cross-petitioner, Lexington State Bank, was upon the intervener, and in our judgment the proof falls far short of sustaining that burden.

Winnie V. White, at the time she signed and executed the notes and mortgage which she afterwards purchased, was the wife of Lemuel R. White, who at that time was the owner of the premises involved. While it is true that the notes contain the clause, "Each of us hereby personally charge our own separate estate with the payment of this note," it is undisputed that at the time of the execution of the notes she had no separate estate whatever. She had no separate trade, business or profession. She signed the notes with her husband to charge her interest as wife in the mortgaged lands.

The law is well settled in this state that the contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract. *Kocher v. Cornell,* 59 Neb. 315; *Giltner State Bank v. Talich,* 115 Neb. 236.

The statements made by Winnie V. White in her correspondence with the intervener are strongly relied upon by the intervener in this case. The most that could be made of them is that they might amount to an estoppel, but it is also a well-settled principle of law that, to be available either as a cause of action or a defense, estoppel must be specially pleaded. *Burwell Irrigation Co. v. Lashmett,* 59 Neb. 605; *Boales v. Ferguson,* 55 Neb. 565; *Diehl v. Johnson,* 123 Neb. 699; *Scheschy v. Binkley,* 124 Neb. 87.

It is also argued in the briefs that the insurance money with which the mortgage in question was purchased was not entirely exempt to Winnie V. White, and the briefs in-

clude computations as to how much was actually exempt. This question was not raised by the pleadings. The amount of the premiums paid, however, does appear in the record, and, according to our computation, a $500 annual premium would purchase slightly more insurance than the amount of this mortgage, and therefore the contention is without merit.

The judgment of the district court is therefore reversed and the cause is remanded, with directions to enter a decree of foreclosure as prayed in the petition and cross-petition.

REVERSED.

IN RE ESTATE OF JOHN R. HOUSE.

NELLIE HOUSE MONTGOMERY CRAVEN, APPELLANT AND CROSS-APPELLEE, V. PAUL A. PINION, EXECUTOR, ET AL., APPELLEES: HERBERT V. BIRK ET AL., APPELLEES AND CROSS-APPELLANTS.

FILED NOVEMBER 15, 1935. NO. 29370.

1. Wills: PROBATE: REVOCATION: APPEAL: TRANSCRIPT: JURISDICTION. When, upon a petition to probate a will, the will is admitted to probate and later a petition in equity for revocation of the probate of said will is duly filed and issues thereupon are duly made up and tried in the county court, a transcript of the proceedings will not be deemed insufficient to confer jurisdiction of the subject-matter upon the district court when it fails to

contain the petition for probate of the will, if the petition for revocation recites the fact of the petition for probate and the parties stipulated in the district court that the cause should be tried there upon the pleadings filed and used in the county court. In such a situation the action is considered as begun with the filing of the petition for revocation of probate.

2. Appeal: CROSS-APPEAL: PRAECIPE. Paragraph 2, rule 7 of the rules of this court, requires the præcipe for a cross-appeal to be filed on or before the day originally fixed for the filing of appellant's brief.
3. ———: ———: ———. "Order extending time originally fixed for appellant to file brief does not operate to extend the time for filing præcipe for cross-appeal beyond the day originally fixed for appellant to file brief." *Ellingwood v. Schellberg*, 121 Neb. 207.
4. Wills: PROBATE: REVOCATION: FRAUD. "Where the fraud relied upon, for the vacation of a decree admitting a will to probate, is of such a character that it would have been available to defeat the probate of the will, an allegation that the plaintiff had no actual notice of the proceedings is not sufficient to excuse his failure to contest the will, where it appears that notice of the proceedings was given according to law, and he had notice of facts sufficient to put him upon inquiry." *Miller v. Estate of Miller*, 69 Neb. 441.

APPEAL from the district court for Thurston county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Howard Saxton and *Allen & Requartte*, for appellants.

James H. Hanley and *John C. Mullen, contra.*

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

GOSS, C. J.

This is an appeal from a judgment relating to the probate of the will of John R. House.

The will was made on December 23, 1926, and testator died the next day. The will devised approximately one-half of testator's real estate to his wife and the remainder to his executor in trust, with instructions to pay the net income from this portion to Nellie House Montgomery Craven, his only child. Upon her death, leaving issue, the

real estate devised in trust was to pass to her "lineal heirs at law absolutely in fee simple." If she failed to leave issue, such real estate was to go to testator's heirs at law related to him "by blood." The will bequeathed to testator's wife and daughter, share and share alike, all his personal property except his stock in a certain grain company, which stock was bequeathed to the grain company. The estate consisted of more than 2,000 acres of fine land and of more than $30,000 in personal property.

The will was admitted to probate in the county court on February 28, 1927. October 15, 1929, Nellie House Montgomery Craven filed a petition in the county court, asking revocation of the probate of the will on the grounds that the executor and his attorney intentionally and fraudulently concealed from her the mental and physical incompetency of testator to make the will, alleging that she brings this action immediately upon the discovery of the facts as to the incompetency of testator. Issues were joined by pleadings filed by the parties interested and who had not been defaulted for want of pleadings filed by November 26, 1929. On December 11, 1929, the county court entered a decree revoking the order of February 28, 1927 (admitting the will to probate) and set the hearing for the probate thereof for December 12, 1929, on which date the county court found that the instrument was not the last will and testament of John R. House, ordered its probate refused and appointed William T. Craven, husband of Nellie House Montgomery Craven, as the administrator of the estate of John R. House. Craven gave bond, receipted to Pinion, Executor, for the property described in the executor's final report, and the interested defendants appealed to the district court.

The cause was twice tried in the district court, once by Judge Ryan and once by Judge Spear. In the first trial the court ruled that the case should be tried to a jury on the contest of the will and to the court on the question of setting aside the probate. It was so tried and the jury disagreed. In the second trial the judge followed the same

procedure. His order, made at the beginning of the trial, was: "Thereupon the court decided to hear the issues on the petition for revocation of probate of the will to the court itself without a jury, and decided that the issues on the petition for probate of the will, the objections thereto, and the contents thereof, be tried by the jury."

On September 22, 1933, the jury returned a five-sixths verdict, finding that the instrument offered for probate was the last will and testament of John R. House, deceased. On May 21, 1934, the court found that plaintiff was entitled to present to the court and jury the issues raised by her petition for revocation, ordered the will admitted to probate and that the judgment be certified to the county court and proceedings be there had to carry out the terms of the will. In legal effect this reversed the judgment of the county court and allowed the former probate of the will to stand. Plaintiff appealed and defendants undertook to cross-appeal.

Plaintiff raises at the outset her objection that defendants failed, in the transcript from the county court to the district court, to include or to show any petition for the probate of the will of John R. House. She argues that such a petition was absolutely necessary to be shown in the transcript to give the district court jurisdiction of the subject-matter.

In answer to this contention defendants cite *In re Estate of Francis*, 94 Neb. 742, where, on page 743, this language appears in the opinion: "It was first contended that no petition for the probate of the copy of the alleged will was ever filed in the county court, and therefore that court was without jurisdiction. The transcript, however, recites that such a petition was filed, and, although no copy of it is found in the record, still the recitation of the fact of the filing of such a petition will be taken as true, and therefore the court was not without jurisdiction."

It is to be noted that in the above case the opinion says that the transcript "recites that such a petition (for probate of the copy of an alleged will) was filed." We have ex-

amined the transcript in the case and find it contains what the opinion says it contains. We have also examined the original briefs in that case and find that much of their content was used in discussing the precise point passed upon by the court in the few lines above quoted.

In the instant case the action was begun by plaintiff in the county court by the filing of the "Petition for Revocation of Will." It recited with particularity the presenting by Paul A. Pinion of the will of the deceased and a petition for the appointment of Pinion as executor thereof; that on February 28, 1927, a decree was entered by the county court admitting said instrument to probate as the last will and testament of John R. House, the issuance of letters testamentary to him, and that he is now the duly qualified and acting administrator and the trustee appointed under said will. The petition alleges the incompetency of plaintiff, her recent discovery of them and her freedom from laches, and prayed that the decree admitting the will to probate be set aside, that the letters testamentary be revoked, that the instrument be not adjudged the last will of John R. House, but that William T. Craven, or some other suitable person, be appointed administrator, "and for such other relief as be just and equitable." The issues were made up in the county court on the theory that this petition was the beginning of the action and all parties tried it there upon that theory. In the district court, in open court, all parties to the action stipulated that the case should be tried upon the pleadings filed and used in the county court and an order to that effect was journalized and appears in the transcript brought to this court.

When, upon a petition to probate a will, the will is admitted to probate and later a petition in equity for revocation of the probate of said will is duly filed and issues thereupon are duly made up and tried in the county court, a transcript of the proceedings will not be deemed insufficient to confer jurisdiction of the subject-matter upon the district court when it fails to contain the petition for probate of the will, if the petition for revocation recites the

fact of the petition for probate and the parties stipulated in the district court that the cause should be tried there upon the pleadings filed and used in the county court. In such a situation the action is considered as begun with the filing of the petition for revocation of probate.

Defendants attempted to cross-appeal. Their præcipe giving notice thereof was filed in this court January 9, 1935. Paragraph 2, rule 7 of this court, requires the præcipe for a cross-appeal to be filed on or before the day originally fixed for the filing of appellant's brief. That day was September 17, 1934. Therefore the præcipe for cross-appeal was filed too late. It is true that extensions of time were granted to appellant, but that does not extend the time for taking the cross-appeal because this is ruled by the time "originally fixed" for the filing of appellant's brief. We have so held. *Ellingwood v. Schellberg*, 121 Neb. 207. So the cross-appeal was not perfected and we cannot consider it.

Plaintiff complains and alleges error because all of the cause on appeal in the district court was not tried to the court instead of submitting a part of the issues to the jury; that if any part of the case was to be submitted to a jury the court erred in not submitting all of it to the jury.

As we view the situation, this cause on appeal never reached the stage where it was necessary to submit any feature of it to a jury. After the will had been duly admitted to probate, upon evidence satisfying the county court of the competency of the testator and of the execution of the will in the manner provided by statute, the plaintiff filed her petition in equity to revoke probate of the will. Upon trial in the county court of the issues, the contestant prevailed and the admission of the will to probate was ordered revoked. Defendants appealed. The issue first to be decided in the district court was whether the county court was justified in revoking the probate. That was an issue for the court alone and not for a jury. It should have been disposed of in the district court before any jury was there called to pass upon whether the testator was competent

when he made the will and whether it was executed according to and was in the form provided by law. If plaintiff failed to prove to the district court that she had been defrauded out of her right to contest the probate of the will in the county court, then it was the function of the district court to find for the contestants and to order the county court to restore the status of the probate proceeding to the position occupied when the county court entered the erroneous order, from which defendants had duly appealed. As we understand the orders of the district court, it was there found and ordered by the court that the will should stand as originally probated. There never arose any occasion for the use of a jury in the district court. Its finding was unnecessary, its action nugatory.

The court heard all the evidence. The effect of the judgment was that the probate should not have been revoked and that the county court should restore the parties to their former status. If the court heard unnecessary evidence on the supposed jury question, that was, of course, not prejudicial.

Considering the matter *de novo*, we find there was ample evidence to justify the conclusion of the district court. Plaintiff, who resided in Oregon, came home to attend her father's funeral. The will was read to her two or three days after the funeral. She knew there was a trust provision in the will and wanted to get that cleared up so she would have a fee simple title. She discussed it with Mr. Smith, attorney for the estate, and wanted him to get the probate of the will put off until the trust feature could be adjusted or until she and her husband came from Oregon in the spring of 1927. She returned to Oregon a few days after the funeral and corresponded with Mr. Smith and with her mother. She had a letter from a law firm in Omaha relating to the matter. The notice of the hearing to probate the will February 28, 1927, was published in a Pender paper and she regularly received that paper. She testified Smith advised her by letter that "Mr. Flynn (the county judge) said he would have to probate it and it was

going to be probated over my head." Plaintiff and her husband discussed the situation and Mr. Craven answered the letter from Mr. Smith, saying in part: "We think that things will all work out to the best anyhow within a short time, and Mrs. Craven asks me to tell you to go ahead with the probate of the will, as you suggest, if you will put myself in as executor when I can get back." Plaintiff admitted on cross-examination that the above quotation from her husband's letter to Smith was a part of the conversation between herself and husband concerning Mr. Smith's letter. After Mr. and Mrs. Craven returned from Oregon in the spring of 1927, Mr. Craven looked after her interests in the farms she got in trust under the terms of the will, supervising the work with Mr. Pinion, the executor. They arranged leases, painted buildings and repaired fences. This continued through 1928 and 1929, as long as Mr. Pinion was executor. When he was removed late in 1929 and Mr. Craven was appointed administrator, he took full charge. The Cravens have continued to make their home in Pender since May, 1927. This is a brief sketch of the evidence, justifying the finding that no fraud was perpetrated upon plaintiff as to the probate of the will. She was at all times either in possession of all facts relating to the execution or probate of the will or was charged with notice sufficient, if followed up, to have put her upon full inquiry, as to those matters.

"Where the fraud relied upon, for the vacation of a decree admitting a will to probate, is of such a character that it would have been available to defeat the probate of the will, an allegation that the plaintiff had no actual notice of the proceedings is not sufficient to excuse his failure to contest the will, where it appears that notice of the proceedings was given according to law, and he had notice of facts sufficient to put him upon inquiry." *Miller v. Estate of Miller,* 69 Neb. 441.

We are of the opinion the judgment of the district court was right. It is

AFFIRMED.

VAN T. WESCOTT, APPELLANT, V. LEE MATHERS ET AL., APPELLEES.

FILED NOVEMBER 15, 1935. No. 29362.

1. **Judgment:** NUNC PRO TUNC ENTRY. The district court may enter a *nunc pro tunc* order to show an order or judgment which was rendered at a previous term of court, but which was not journalized at such term.
2. **Appeal.** The trial court's finding, based on conflicting evidence, in law action tried to court without a jury, will not be disturbed on appeal, unless clearly wrong.
3. **Landlord and Tenant:** LEASE: TITLE TO CROPS. Provision in a lease, reserving to the landlord title and possession in crops, to be grown on demised premises, until the terms of the lease are complied with and the rent paid, is a valid and enforceable reservation of title.

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

George A. Munro and *Minor & Minor*, for appellant.

Hamer & Tye and *T. M. Hewitt, contra.*

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

GOOD, J.

This is an action in replevin tried to the court without a jury. In his petition plaintiff set forth three separate causes of action. This appeal relates solely to the first cause of action wherein plaintiff alleged that he was the owner and entitled to the immediate possession of particularly described live stock, farm implements, also corn and alfalfa, growing or grown on certain described lands. To this first cause of action defendant entered a general denial.

February 7, 1934, after trial of the issues, the court made its findings and entered judgment thereon, in which the replevied property was awarded in part to plaintiff and the other part to defendants. Plaintiff and defendants filed motions for a new trial. Then followed an entry of a judgment on the 5th of April, 1934, which is at variance with

that entered on the 7th of February. To this judgment plaintiff filed a motion for a new trial which was overruled. The second judgment was entered at a term of court subsequent to that at which the first was rendered. On May 7, 1934, a *nunc pro tunc* journal entry was entered as of date March 17, 1934, which was during the term at which the first judgment was entered. The *nunc pro tunc* journal entry is as follows:

"That on the 17th day of March, 1934, that being one of the days of the adjourned October, 1933, term of this court, the above entitled cause came on to be heard, upon the motion of the plaintiff for a new trial and the motion of the defendant for a new trial, and upon consideration of said motions, the court is of the opinion that the findings and judgment of the court heretofore, and on the 7th day of February, 1934, entered, should be set aside, and the court upon its own motion doth set aside said findings and judgment and doth overrule both said motions, and again takes this cause under advisement for further consideration and determination by the court."

Plaintiff contends that the court was without jurisdiction to enter the second judgment, because it had no jurisdiction to set aside the judgment entered at the previous term of court, and argues that the *nunc pro tunc* order entered in May was an attempt by the court to give it jurisdiction of the cause to render the second judgment.

From the record it appears without question that the court did, in fact, on the 17th day of March, 1934, vacate its former judgment and again take the cause under advisement. That was at the same term and was within the jurisdiction of the court, but for some reason the journal entry of the judgment was not spread on the record. There is no question that the court may, at a subsequent term, enter a *nunc pro tunc* order to show what was actually done at a previous term of court. *Hamer v. McKinley-Lanning Loan & Trust Co.*, 51 Neb. 496; *Hyde v. Michelson*, 52 Neb. 680; *Calloway v. Doty*, 108 Neb. 319.

Plaintiff contends that the first judgment was set aside

without any notice to the plaintiff. The record fails to establish this claim; but, even had he been without notice, it does not appear that plaintiff was prejudiced because he did not seek to have the cause retried or additional testimony taken; nor is there any claim that there was other evidence that he could or would have produced. If the court concluded that it had made an error in the first judgment entered, it was warranted in setting it aside on its own motion at the same term. The cause then stood submitted to the court upon pleadings and the evidence. If plaintiff had desired to offer any further testimony, he should have made such a showing; none was made. No error, prejudicial to plaintiff in this respect, is disclosed.

With reference to the ownership of the farming implements and live stock described in the first cause of action, the evidence is in irreconcilable conflict. That on behalf of the plaintiff would indicate the ownership to be in plaintiff, while that on behalf of defendants would strongly indicate the ownership of the property was in defendants. It is a rule that, in the trial of a law action to the court without a jury, findings of facts based on conflicting evidence will not be disturbed on appeal, unless clearly wrong. *Vohland v. Barron,* 126 Neb. 50; *City of Cozad v. Thompson,* 126 Neb. 79; *Chiles v. Custer County,* 127 Neb. 481; *Miller v. Banner County,* 127 Neb. 690; *Elmcreek Ditch Co. v. St. John,* 127 Neb. 253. The finding is supported by sufficient evidence.

Ownership of the alfalfa hay and corn, described in the first cause of action, hinges upon a question of law. Plaintiff was the owner of a farm which he leased to defendants under a written instrument, which was partly printed and partly in typewriting, and which contained this typewritten provision: "The lessor (plaintiff) reserves ownership in all crops grown on said lands, title and possession thereof to be and remain in the lessor until the conditions of this lease are fully complied with, the rent paid, including the division and delivery of the landlord's share." Among other things, the typewritten portion of the lease or con-

tract provided for the payment of "$200 cash as evidenced by a note of even date and like amount." The undisputed evidence shows that this note had not been paid at the time this action was begun. The question arises as to whether, under this provision of the lease or contract, title and right of possession were in the plaintiff, the lessor.

In *Sanford v. Modine*, 51 Neb. 728, this court had under consideration a written instrument, whereby the owner of realty, by contract, had placed the possession thereof in another party for the raising of crops, and, by the terms of the instrument, the title and possession of the crops were to remain in the owner of the land until the compensation for the use of it was fully paid to the owner. In that case it was held that the title and possession were in the owner of the land. Referring to the contract, the court said (p. 732):

"As we read and understand the foregoing, call it a lease or a contract as you may please, or the parties to it landlord and tenants, or the latter croppers, the agreement was that the parties who worked the land, who planted, cultivated, and harvested the crops had no interest or ownership therein until such time as there had been the division of them contemplated by the express terms of the instrument. This was their agreement directly and plainly stated. There is no claim that it was for any reason as to this stipulation void or not enforceable, and as we know of none, we must accept the contract which the parties made for themselves. We cannot, by so-called construction, supplant it by a different one which would be a contract, not of the parties, but the workmanship of the court. The owner of the land was, by the agreement, the owner of the crops until the performance of the conditions required of the other parties by the express terms of the agreement."

The courts of last resort of other states likewise hold that a provision in a lease, reserving to the landlord title in crops to be grown on the demised premises until the terms of the lease are complied with and the rent paid, is a valid and enforceable reservation of title. Among the cases so

holding are *Andrew v. Newcomb,* 32 N. Y. 417; *McCombs v. Becker,* 3 Hun (N. Y.) 342; *Consolidated Land & Irrigation Co. v. Hawley,* 7 S. Dak. 229; *Wentworth v. Miller,* 53 Cal. 9; *Merchants State Bank v. Sawyer Farmers Co-operative Ass'n,* 47 N. Dak. 375, 14 A. L. R. 1353; 17 C. J. 381.

Under the authorities above cited, title to the crops grown on the demised premises remained in the plaintiff until the cash rent had been paid and the landlord's share delivered to him, according to the terms of the instrument. Since the terms of the lease had not been complied with and the cash rent had not been paid, title remained in the landlord.

The conclusion of the trial court, that title to one-half of the alfalfa hay and corn, described in the first cause of action, was in defendants, is erroneous. For that reason the judgment of the district court, so far as it relates to the first cause of action, is reversed and the cause remanded for further proceedings consistent with this opinion. The judgment as to the second and third causes of action is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

EAGLE INDEMNITY COMPANY, APPELLANT, V. VILLAGE OF CRESTON, APPELLEE.

FILED NOVEMBER 15, 1935. NO. 29384.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: EMPLOYEES.** Volunteer firemen in a village are not employees of the village, within the meaning of the workmen's compensation law, until they have been recommended by the chief of the fire department for membership therein to the chairman and board of trustees and have been confirmed as such by the chairman and board of trustees. Comp. St. 1929, sec. 48-115.
2. **Contracts: CONSTRUCTION.** "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Comp. St. 1929, sec. 20-1217.

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

Dressler & Neely and *H. J. Lutz,* for appellant.

Otto F. Walter, contra.

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

GOOD, J.

This is an action to recover balance of premiums alleged to be due on two standard workmen's compensation and employers' liability policies of insurance.

Plaintiff alleged the issuance of the two policies and the payment of a certain amount as premiums; that the actual amount of the premiums depended upon the payroll of employees covered by the policies. As to volunteer firemen, where no salaries are paid, it was to be considered at the rate of $100 per annum for each fireman. It is claimed by plaintiff that the policies covered 22 volunteer firemen of the village of Creston, and that no premiums for these 22 firemen were paid. For this alleged coverage the plaintiff seeks to recover the balance of the premiums. The defendant denied that the policies were intended to or did cover any firemen, and alleged that there were no firemen in the village of Creston subject to the workmen's compensation law, and that, therefore, there was no coverage. A trial of the issues resulted in judgment for defendant. Plaintiff has appealed.

There is no substantial dispute in the evidence. This state of facts is disclosed by the record: The village of Creston desired a policy of insurance to protect it from liability to its employees under the workmen's compensation law. The village clerk was directed to procure such insurance. He applied to the agent of the plaintiff for rates. The agent wrote to the company at its home office and procured a statement of what the rates would be for the several classes of employees, submitted it to the village clerk, and it was thereupon reported to the village board. The board determined that the rate for firemen was too high and directed the clerk to procure a policy of insurance covering employees other than firemen. This information was con-

veyed to the agent of plaintiff. The agent of plaintiff, not being familiar with and not writing the insurance, submitted the application to the company. He testifies that he informed the company that insurance covering firemen was not desired, but only a policy covering other employees. In due time the policy was received; the agent looked it over casually, and concluded that it did not cover firemen; handed the policy to the clerk of the village, who likewise examined it casually and believed it did not cover firemen. A few days thereafter the premium was paid to the agent and by him transmitted to the company.

When this policy was about to expire, an application was made for another policy, of like amount, for another year, and like information was given to the agent, and by him transmitted to the company, that the policy, covering employees except firemen, was desired. Such policy was written and returned to the agent, and by him delivered to the village clerk. Neither of them examined the second policy with care, but believed that it did not cover firemen. Shortly before the expiration date of the second policy, the company directed an audit of the payroll of defendant's employees. The auditor did not make an inspection, but wrote the clerk for information as to the number of employees in listed classes and the salary paid to each. In the form of inquiry sent to defendant by the auditor, firemen were listed. In answering the inquiry, the clerk of defendant wrote after the classification "firemen:" "22 men not insured." Shortly after the expiration of the second policy, an audit was made in like manner, and the clerk, again filling out the requested information, wrote after the designation "firemen" the words "not insured." The auditor determined, however, that, under the terms of the policy, firemen were covered and insisted that there was an additional premium due of something over $60 on each of the policies. It is to recover this amount that the action is brought.

From the record it is clear that the defendant did not desire insurance to cover its volunteer fire department. It is

also clear that this information was given to plaintiff's agent. It is undisputed that this information was given to the company. The policy which the company wrote and sent might well deceive one not skilled in reading such policies. The company, either deliberately or by inadvertence, wrote a policy which, by its terms, would cover the firemen of the village. We prefer to believe that it was a matter of inadvertence and not design. In any event, there was no meeting of the minds of the parties for the coverage of the firemen. Defendant did not desire coverage for its firemen and did not understand that it had such coverage. The mistake was made by the company, and the village, in accepting the policy, believing it not to cover firemen, participated in the mistake. It was, therefore, a mutual mistake. Under such circumstances, had a suit been brought upon the policy, the plaintiff would have been entitled to have had the policy reformed to conform to the intention of the parties. We see no reason why a like rule should not be applied when a suit is brought against the insured to recover the additional premium. In accepting the policy as written, defendant did not desire, or intend to accept, coverage for its firemen.

But there are other reasons why the plaintiff may not recover in this action. The workmen's compensation law, section 48-115, Comp. St. 1929, which was in force at the time the policies were written, defines the words, "employee" and "workman," and, among other things, contains this language: "*Provided,* that for the purposes hereof, volunteer firemen of any fire department of any city or village, which fire department if (is) regularly organized under the laws of the state of Nebraska, shall be deemed employees of such city or village while in the performance of their duties as members of said department. *Provided, further,* members of such volunteer fire department shall before they are entitled to the benefits under this act, be recommended by the chief of the fire department for membership therein to the mayor and city commission, the mayor and council or the chairman and board of trustees,

as the case may be, and upon confirmation shall be deemed employees of the city or village; and *provided further* members of such fire department after confirmation to membership, as aforesaid, may be removed by a majority vote of such commission, council or board, and thereafter shall not be considered employees of such city or village."

The evidence discloses that no list of firemen was ever presented to the village board of defendant by the chief of the fire department; nor was any confirmation of any firemen made by the chairman and village board. Clearly, under this statute, there were no firemen of the village who were employees, within the meaning of the workmen's compensation law, and there was and could be no liability incurred under the policies in question for workmen's compensation to such firemen as employees of the village.

Plaintiff cites and relies upon *City of Fremont v. Lea*, 115 Neb. 565, wherein it was held that volunteer firemen were employees of the city of Fremont. That case was decided in 1927. The statute then in force did not contain the provisos above quoted. Moreover, in that case the fireman who was injured was, and had been for a number of years, on the payroll of the city and receiving a salary of $115 a month, being regularly paid by warrants ordered by the mayor and council. That case, however, has no application to the situation here under the changed statute.

Section 20-1217, Comp. St. 1929, reads: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." In the instant case the agreement or contract of insurance was intended in a different sense by the respective parties thereto. The plaintiff knew, by information from its agent, that the defendant understood it to be a policy not covering its volunteer firemen. Such being the case, the policy should be construed, as between the parties, as not covering the firemen.

For the reasons stated, plaintiff was not entitled to recover.

AFFIRMED.

GEORGE MCGINLEY ET AL., APPELLEES, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 15, 1935. No. 29365.

1. **Appearance.** A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing.
2. **Costs:** ATTORNEY'S FEES: REVIEW. Under the facts in this case, in order to review the question of the taxation of an attorney fee as part of the costs in the district court, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court.
3. **Carriers:** DAMAGES: LIABILITY. The common-law liability of the initial carrier only is dealt with and modified by the Cummins (Carmack) amendment of March 4, 1915. It renders that carrier liable for loss or damage to the property committed to its care throughout the entire route by which it is billed until delivered to the consignee; but it leaves the relation of all connecting carriers, including the terminal carrier, to the shipper or consignee entirely unaffected.
4. **Appeal:** MISJOINDER. "A complaint that there has been a misjoinder of parties defendant should be called to the attention of the district court before trial, and it is too late to raise this objection for the first time in the appellate court." *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58.
5. **Carriers:** INJURY TO LIVE STOCK: LIABILITY. Even though, by virtue of the contract under which the animals are carried, it is the duty of the shipper to attend the animals, provide for their wants, and protect them from injury to themselves, including the execution of a necessary request in writing for extension of confinement time to 36 hours when circumstances render the same desirable, yet if the carrier fails or refuses to furnish the shipper or his caretaker with necessary information and reasonable opportunities and facilities for performing the duties he has undertaken, the carrier will be liable for the injury thereby sustained.
6. **Evidence** in the record examined, and *held* ample to support the verdict and judgment.
7. *McElwain v. Union P. R. Co.*, 101 Neb. 484, adhered to.

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

T. F. Hamer, George C. Holdrege, T. W. Bockes, James T. Keefe and *Crofoot, Fraser, Connolly & Stryker*, for appellants.

Halligan, Beatty, Halligan & Maupin, contra.

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

EBERLY, J.

This is an action by plaintiffs, George McGinley & Sons, copartners, against the Union Pacific Railroad Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for damages occasioned by unnecessary delay, due to the negligence of the defendants, who are connecting carriers, in the transportation of 98 head of fat cattle from Brule, Nebraska, to the Union Stock Yards at Chicago, Illinois. These defendants will hereinafter be referred to as the "Union Pacific" and the "Milwaukee," respectively.

A trial to a jury, after issues were joined, resulted in a verdict for plaintiffs, returned and filed February 9, 1934. Separate motions for new trial were thereupon filed by the defendants on February 10, 1934. On April 2, 1934, proceedings were had upon motion of plaintiffs to tax attorneys' fees. Further evidence limited to this subject was introduced, defendants participating in the hearing. On April 3, 1934, "that still being one of the days of the regular February A. D. 1934 term of this court," the motions for new trial theretofore filed, together with the application for allowance of attorneys' fees on behalf of plaintiffs, were submitted and taken under advisement by the court. On May 19, 1934, "that being one of the days of the regular April A. D. 1934 term of the court, this matter having heretofore been taken under advisement by the court upon the motions for new trial and an application for attorneys' fees on behalf of the plaintiffs filed herein," the motions for new trial were each overruled; judgment was entered on the verdict; and it was further ordered that plaintiffs' attorneys be allowed a fee of $250 to be taxed as part of the costs. From the judgment rendered, the defendants Union Pacific and Milwaukee prosecute this appeal.

The first proposition presented by appellant Milwaukee is a challenge to the jurisdiction of the trial court over its person.

The transcript discloses that plaintiffs' petition was filed in Keith county, Nebraska; that summons was duly issued thereon, and proper service thereof was made on the Union Pacific in Keith county, Nebraska; that there was also a summons issued in said cause to the sheriff of Douglas county, Nebraska; that, without any challenge to the jurisdiction of the court, the Milwaukee thereupon appeared and by motion attacked plaintiffs' petition, which motion was duly sustained on November 23, 1933; that plaintiffs thereupon amended their petition to conform to the ruling of the trial court then made; that on January 31, 1934, the Milwaukee filed its amended answer to plaintiffs' amended petition, which in no manner challenged the jurisdiction of the district court for Keith county. On February 7, 1934, a trial in this action was commenced in the district court for Keith county. The defendant Milwaukee appeared by its attorneys and participated therein. At the close of plaintiffs' evidence the Milwaukee demurred to plaintiffs' evidence, and moved for judgment in its behalf. This motion was denied by the trial court. Evidence was thereupon adduced in its behalf. At the close of all the evidence, the Milwaukee again moved for judgment on the insufficiency of plaintiffs' evidence, to which was coupled as an additional ground, and for the first time during the course of the trial, a challenge to the jurisdiction of the trial court over its person.

Under the facts enumerated, the controlling rule is: "A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant so appearing." *Independent Elevators v. Davis*, 116 Neb. 397. See, also, *Troyer Furniture Co. v. Orchard & Wilhelm Co.*, 121 Neb. 301; *Nebraska State Bank v. Citizens State Bank*, 122 Neb. 522; *Gaines v. Warrick*, 113 Neb. 235; *Adams v. Guthrie & Co.*, 113 Neb. 192; *Bodge v. Skinner Packing Co.*, 115 Neb. 41.

It follows that the Milwaukee's challenge to the jurisdiction of the court, at the time when first made, was properly disposed of by the trial court.

As heretofore outlined herein, the record does not present for our decision the question as to the claimed improper allowances of attorneys' fees by the trial court.

As we have noted, defendants' motions for new trial were both filed prior to the determination and allowance of attorneys' fees by the trial court, "as part of the costs." *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642. So far as disclosed by the transcript, no motion to retax costs was ever filed in the district court nor a ruling of that tribunal had on such a motion. "In order to review the question of taxation of costs, a motion to retax the costs must be made in the trial court, and a ruling obtained thereon by that court." *Real v. Honey*, 39 Neb. 516. See, also, *Yankton, N. & S. W. R. Co. v. State*, 49 Neb. 272; *Cozine v. Hatch*, 17 Neb. 694; *Whitall v. Cressman*, 18 Neb. 508; *Wilkinson v. Carter*, 22 Neb. 186.

It may be said in passing that under section 74-715, Comp. St. 1929, the plaintiffs, under the facts established by the evidence, appear to have been entitled to an allowance of attorneys' fees as an element of the costs of suit recoverable in this case in the district court. *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151, and see same case in 260 U. S. 35; *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58; *Wagner v. Union Stock Yards Co.*, 107 Neb. 769; *Schneider v. Davis*, 109 Neb. 638; *Daily v. Chicago, St. P., M. & O. R. Co.*, 110 Neb. 481. But, as the matter is not properly presented by the record, no determination of that question is announced.

This is not a trial *de novo* in this court. It is an appeal in a law case. Such being the fact, disputed questions of evidence relating to facts must be considered in the light of the verdict returned. The conclusions of the jury as to the weight of the evidence and the facts in controversy, so far as sustained by competent proof, is binding on this court.

The 98 head of cattle were received by the Union Pacific at Brule, Nebraska, consigned to Charles O. Robinson &

Company of Chicago, Illinois, a commission firm engaged in the live stock business at the Union Stock Yards of that city. The cattle, in charge of caretakers, arrived at Valley, Nebraska, where the shipment was unloaded for water, feed and rest. It appears that the plaintiffs, in shipping cattle from Keith county, Nebraska, to Chicago, Illinois, never planned on more than one stop for feed and water. While the shipment was billed from Brule, Nebraska, to Chicago by the Union Pacific, no special route was designated beyond the terminus of that railroad, but the shipment was to stop and feed at Valley, Nebraska. It was contemplated that the route from Valley, Nebraska, to Chicago would be selected at the former place by the shipper after arrival. George McGinley went along with the cattle to make this selection. Eliminating questions of disputed evidence, it appears that there were two practical routes from Valley to Chicago; one over the Chicago & N. W. R. Company, the other over the Milwaukee line. Both were represented by their agents as being able to transport the stock to Chicago in time for the Monday morning market of June 22d. But, to proceed over the Chicago & N. W. R. Company, it was necessary that the cattle be loaded in cars at Valley an hour prior to the time required in the event the shipment proceeded over the Milwaukee line. The Milwaukee's agents were fully advised of the fact that the shipper desired to arrive at Chicago for the Monday morning market, and represented that train No. 82, the one which carried plaintiffs' shipment, had been making that run in 20 to 23 hours from Council Bluffs, Iowa, which would afford ample time for the completion of the movement within the "twenty-eight hour limit." The plaintiffs desired to keep the cattle out of the cars at Valley as long as possible, and, relying on the assurances of the Milwaukee, selected that line for the transportation of the cattle from Council Bluffs to Chicago. The cattle remained in charge of plaintiffs' caretaker, and, in due time, were delivered to the Milwaukee and made a part of its stock train No. 82. When this train arrived at Savanna, Illinois, it was

25 minutes ahead of the scheduled time. Immediately prior to arriving at this place, Ted McGinley, the caretaker in charge of the shipment, had inquired of the conductor in charge of the train as to the time it would take to complete the run to Chicago, and was informed that the average time was 6 or 7 hours. If this information had been correct the run would have been fully completed within the 28 hours, and no extension to 36 hours would have been required. Defendants' evidence is that on arrival of stock trains at Savanna a representative of the Milwaukee conducts the caretakers to a railway eating-house where they are requested to wait until the representative of the Milwaukee again calls for them for their "connections." This program was carried out on the night in question. The evidence of Ted McGinley, the caretaker, is to the effect that he went to the eating-house as requested, remained there as directed, and returned to the newly made-up train accompanied by the railway representative. Further, that at no time was he advised of the necessity of executing a request for an extension of the running time from 28 hours to 36 hours in order that the cattle might arrive in Chicago as planned; and that he knew nothing concerning the removal of the 5 carloads of cattle from train No. 82 at Savanna until after his arrival at the Chicago Stock Yards on the 22d. Notwithstanding the fact that caretaker McGinley was, during the entire stop at Savanna, practically in the personal charge of the representatives of the Milwaukee, the general yardmaster at Savanna, without communicating with said McGinley, removed the 98 head of cattle from the train and caused them to be unloaded at a feed-yard for feed, water and rest. The sole reason of the yardmaster for his action is that no request for an extension of the 28-hour limit to 36 hours had been made, and the Milwaukee has prescribed a rule that, "We have to have ten hours from leaving time at Savanna to make the U. S. Yards." This direction was issued by the general manager's office in Chicago to the general yardmaster at Savanna. It was not issued to the conductors in charge of stock trains, and we may infer from

the evidence that the conductor in charge of train No. 82 knew nothing about it. However, the yardmaster testifies that he endeavored to get in touch with McGinley, the caretaker in charge, but failed. It must be admitted that this failure, so far as disclosed by the evidence, was in no manner due to any fault of McGinley. On behalf of the owners, McGinley, the caretaker, was authorized to execute the usual written request for an extension of shipping time to 36 hours, and admittedly would have done so if given the opportunity. As a result of this action of the Milwaukee and the necessary delay occasioned thereby, the cattle did not arrive for the Monday market, and in fact were not received until Tuesday following. The caretaker in charge was prevented from performing the duties of his office, and the shipment on arrival at the Chicago Stock Yards was in such condition that the cattle could not be sold until on Wednesday's market. It appears that the Tuesday market following, as well as Wednesday's, was concededly lower than the Monday market. It appears the condition of the cattle also was seriously impaired, far beyond that incident to ordinary shipments. That the shipper suffered substantial damages is clearly established, and the questions presented by the record are (1) the liability of the carrier, and (2) the extent of the loss sustained as properly established by the evidence.

As the transportation involved constituted an interstate shipment, federal statutes, so far as applicable, are controlling. Two congressional enactments become important. The first, ordinarily referred to as the "Carmack amendment" (49 U. S. C. A., ch. 1, sec. 20 [11]), so far as here material, is as follows:

"Any common carrier, railroad, * * * receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over

whose line or lines such property may pass within the United States. * * * *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."

In interpreting this statute, the supreme court of the United States has given full force and effect to the quoted proviso, announcing its conclusion, as follows, in substance: "The common-law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, sec. 8563), section 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury 'caused by it' or by any other carrier to which the shipment may be delivered." *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 60 L. Ed. 1022 (241 U. S. 319).

And again, in *Oregon-Washington R. & N. Co. v. McGinn*, 66 L. Ed. 689 (258 U. S. 409) the rule was announced:

"The common-law liability of the initial carrier only is dealt with and modified by the Cummins (Carmack) amendment of March 4, 1915. It renders that carrier liable for loss or damage to the property committed to its care throughout the entire route by which it is billed until delivered to the consignee; but it leaves the relation of all connecting carriers, including the terminal carrier, to the shipper or consignee and to each other, entirely unaffected." See, also, *Hansen-Peterson Co. v. Atchison, T. & S. F. R. Co.*, 165 Minn. 43; *Whitnack Produce Co. v. Chicago & N. W. R. Co.*, 104 Neb. 587; *Starr v. Chicago, B. & Q. R. Co.*, 103 Neb. 645.

It follows that the Carmack amendment did not change any liability of the defendant Milwaukee to the shipper for loss occurring on its own line as connecting carrier. Aside from the liability imposed by the terms of this amendment, the defendant is liable to the owner of freight carried by it, for damages thereto occasioned by its own negligence.

In discussing a similar question, in *Atlantic C. L. R. Co. v. Riverside Mills,* 219 U. S. 186, 206, Mr. Justice Lurton employs the following language:

"The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents. In substance congress has said to such carriers, 'If you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents and not as agents of the shipper.' It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

It may be said *arguendo* that, if the effect of this statute is to impose the liability of principal and agents on carriers involved in interstate transportation, the situation in the present case would invoke the application of this rule: "Where an agent and his principal are both liable for the same act of negligence, or the same tort, they may be joined as parties defendant in an action to recover damages for the injuries caused thereby. They may be sued either jointly or severally like other joint tort-feasors." 2 C. J. 903. See, also, *Atlantic C. L. R. Co. v. Riverside Mills,* 219 U. S. 186; *Burkenroad Goldsmith Co. v. Illinois Central R. Co.,* 138 La. 81; *Dietz v. Southern P. R. Co.,* 225 Mo. App. 39; *Makeever v. Georgia S. & F. R. Co.,* 219 Ky. 699; *Nation v. San Antonio S. R. Co.,* 115 Tex. 431; *Burd v. San Antonio S. R. Co.,* 261 S. W. (Tex.) 1021; *Northern P. R. Co. v. Wall,* 241 U. S. 87.

However, the question not being presented by the briefs of the parties, and not being necessary to the determination of the case, it is reserved. But, in the instant case, no objection to misjoinder of parties defendant having been

called to the attention of the district court before trial, the objection may not now be waged. *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58.

It appearing that there was at least a several liability on the part of the Milwaukee to the shipper, subject to the sufficiency of the evidence on negligence, this action must be sustained.

The defendants claim as a defense that the conduct of the Milwaukee in removing the cattle from the train and detaining the shipment at Savanna, Illinois, without notice to the caretaker in charge, was required by the provisions of the "twenty-eight hour law" and that delay that ensued was wholly justified thereby.

So far as essential to the disposition of this case, the provisions of this federal enactment (28-hour law) are as follows:

"No railroad * * * common carrier * * * whose road forms any part of a line of road over which cattle * * * shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours: * * * *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included." 45 U. S. C. A., ch. 4, sec. 71.

The main purpose of this act is to prevent cruelty to animals in transit, and the duty of seeing to compliance with these requirements is placed on the carrier. *United States v. Oregon R. & N. Co.*, 163 Fed. 640; *United States v. Philadelphia & R. R. Co.*, 223 Fed. 206; *Atchison, T. & S. F. R. Co. v. Hill*, 171 S. W. (Tex. Civ. App.) 1028.

This act was not primarily intended for the benefit of the owners; it is restrictive of their rights. *Baltimore & O. S. W. R. Co. v. United States,* 220 U. S. 94.

It necessarily follows that the right vested in the owner to extend the period of confinement from 28 to 36 hours is a valuable right, and by fair implication the duty of affording a reasonable opportunity for its exercise is imposed on the carrier.

The following rule has long been established in American jurisprudence: "But even though, by virtue of the contract under which the animals are carried, it is the duty of the shipper to attend the animals, provide for their wants and protect them from injury to themselves, yet if the carrier fails or refuses to furnish the shipper reasonable opportunities and facilities for performing the duties which he has undertaken, the carrier will be liable for the injury thereby sustained." 2 Hutchinson, Carriers (3d ed.) 708, sec. 641.

This act is not criminal, nor is it subject to strict rules of construction or of evidence as applied to a criminal prosecution. *Montana C. R. Co. v. United States,* 164 Fed. 400.

In construing the language of this controlling statute, in *Wabash R. Co. v. United States,* 178 Fed. 5, 9-11, Judge Sanborn employs the following language:

"The plain object of this clause of the act (requiring the request for extension to be separate and apart from any printed bill of lading or other railroad form) was to make it certain that the owner or person in custody of the shipment should know, when he made the request, that he was making it, and should exercise his judgment and choice in the matter. Its purpose was to prevent the concealment of the request in any railroad form which treated of other subjects or contained other terms that might withdraw the attention of the signer from the request, and cause him to sign it without knowledge that it was there, or without a conscious exercise of his option. The end sought is as perfectly attained by a separate request upon a railroad form

as by one upon any other piece of paper. The solicitor of the department of agriculture, to which the administration of this law is entrusted, held in 1906 that it was not intended to prevent a railroad company from printing an appropriate request to be used exclusively for the purpose of enabling owners and persons in custody of shipments to make with more clearness and facility the request that the confinement of their animals in transit should be extended to 36 hours. No persuasive reason for a departure from that ruling has been presented, and our conclusion is that a request upon a railroad form, separate and apart from a bill of lading or other railroad form than one which contains the request alone, is a compliance with the statute. * * * While there are statements in the debates upon the bill, as has been stated, that one of the purposes of the permission to extend the time of confinement upon a request was that the person in custody during the transportation might provide for an unanticipated emergency, there are also clear statements in those debates that another of the purposes of the permission was to enable those owners, whose cattle were shipped from points more than 28 and less than 36 hours' run from their destination, or from pens suitably equipped for unloading, watering, feeding, and resting them, to avoid unloading them on the way. It is much more cruel and injurious to cattle and sheep to unload and reload them than it is to continue their confinement 8 hours when the 28-hour limit is reached. This fact was repeatedly called to the attention of the members of congress during their consideration of the bill, and there can be no reasonable doubt that they intended to make the permission granted broad enough to attain this end."

The Milwaukee was advised when this shipment was turned over to them, and that it was for the following Monday's Chicago market. The conductor, when inquired of as train No. 82 was approaching Savanna, as to when such train would arrive at Chicago, had previously had submitted to him the contracts on which the shipment was carried. On these contracts the time since the last unload-

ing of the shipment clearly appeared. His answer to the caretaker's inquiry disclosed that ample time remained to complete the movement before the expiration of the 28 hours.

Thus, the result of a careful analysis of the entire situation, as disclosed by this record, supports the necessary conclusion that the defendant Milwaukee seeks to justify its action by a "ten-hour rule," not approved by the interstate commerce commission, forming no part of any public schedule or any public notice, not included in the shipping contracts, and of which neither the shipper nor caretaker was given information, and as to the existence of which no members of its train crews who participated in the movement appear to have been advised. In fact, the representations made on which the shipment was obtained by the Milwaukee fairly by implication tended to negative its existence, and to create in the minds of shipper and caretaker a belief that no extension of the 28 hours' running time would be required. Obviously the Milwaukee, under the conditions that surrounded this shipment, was grossly negligent in failing to communicate the substance of the "ten-hour rule," as it existed at Savanna, to the caretaker, and affording him an opportunity to execute the written request for the extension of the time of confinement of these cattle to 36 hours. All parties admit that this extension would have permitted the stock to arrive at the Chicago Stock Yards in due time for the Monday market. The facts in the record, therefore, must be deemed ample to support the jury's verdict as to the liability of the Milwaukee for damages established by the proof. This view of the situation also justifies the trial court's refusal of instructions requested by defendant Milwaukee relating to this subject.

Proof as to items of damages actually occasioned by the delay is not seriously questioned, save and except as to "excess shrinkage." The defendant Milwaukee contends that the jury included in its verdict the sum of $449.45 for "excess shrinkage" and interest thereon. It cites the case of *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, in

support of its contention that "shrinkage in weight * * * must be proved by competent evidence, and cannot be established by mere opinion evidence." However, Letton, J. (author of the opinion in the *Underwood* case), in *McElwain v. Union P. R. Co.*, 101 Neb. 484, 488, as to the doctrine announced in the *Underwood* case on the point under consideration, says in part: "This was correct as applied to the facts in that case (*Underwood* case), but is not correct as a general rule." And the doctrine of the *Underwood* case was accordingly distinguished and qualified.

In the instant case, the best evidence which was possible to obtain under the surrounding conditions, the testimony of experts, was adduced. Under the general rule, referred to by Judge Letton, this class of evidence was competent and sufficient, if believed, to support the verdict as to the item of excess shrinkage here questioned. *McElwain v. Union P. R. Co.*, 101 Neb. 484.

It follows that the district court was correct in its disposition of this case, and its judgment is

AFFIRMED.

ROY BOWEN, APPELLANT, V. JOSEF JOHNSON ET AL., APPELLEES: JESSIE R. PRESTON, INTERVENER, APPELLEE.

FILED NOVEMBER 15, 1935. No. 29373.

1. **Fraud**: PROOF. "It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423.
2. **Mortgages**: ASSIGNMENT: CANCELATION. Before a court of equity will cancel an assignment of a mortgage secured by fraud, it will require a return of the consideration so that the assignee will be placed in substantially the same position as when the instrument was executed.

APPEAL from the district court for Burt county: WILLIS G. SEARS, JUDGE. *Affirmed as modified.*

Walter M. Hopewell, for appellant.

C. O. Stauffer, Gale B. Braithwaite and *Mossman, Anderson & Meissner, contra.*

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

DAY, J.

This is a suit in equity to foreclose a second mortgage on real estate. Bowen acquired this mortgage by assignment from Jessie R. Preston, as executrix of the estate of Allen R. Preston, deceased. The petition is a conventional one for foreclosure. The defendants' answer pleads fraud on the part of Bowen and others in procuring the assignment. It is unnecessary to notice this further, since they have not filed briefs here, but have adopted the theory of the intervener, who seeks to have the decree affirmed. The petition of intervention, aside from formal allegations including her appointment as executrix, alleges that she assigned this mortgage to Bowen for $2,500, at a time when the mortgage debt was about $7,000, through fraud consisting of misrepresentation as to the value of this mortgage. The trial court decreed that the plaintiff was entitled to no relief and dismissed his suit upon the merits. As to the intervener, it was decreed that the assignment of the mortgage was canceled, but foreclosure was not granted intervener, though this was without prejudice to a future suit for such relief. From this decree the plaintiff appeals to this court.

The trial court made elaborate and comprehensive findings of fact. It seems unnecessary to extend this opinion by a detailed recital of the evidence. It should be sufficient to state that the record establishes that the plaintiff and one Holindrake made substantial material misrepresentations of fact to Mrs. Preston through Mr. Cherry, her attorney; that, relying upon these statements, Mrs. Preston executed the assignment of this mortgage to Bowen, when the face value was about $7,000.

Holindrake was the secretary-treasurer of the Logan Valley Investment Company, through which the defendant Johnson had secured the first mortgage on his land from the Federal Land Bank. It was represented to Mr. Cherry and Mrs. Preston through a series of interviews and letters, adroit though they were, that this second mortgage was of little or no value. It was represented to them that Johnson was willing to give up the land to any one who would protect him on the indebtedness. In fact, there is testimony that Bowen said to Cherry on the day that he secured the assignment, that he wished to hurry back so that he could get the deed from Johnson that night. Holindrake testified that he had no part in the acquisition of this mortgage. But after he knew that Bowen had secured an assignment of the mortgage, he caused Johnson to make an application for a commissioner's loan from the Federal Land Bank on a second mortgage and secured an approval of such a loan in the sum of $4,500. While we can only infer, or surmise, or speculate as to the extent of Hollindrake's interest in this matter, it is apparent from all the circumstances that he was not a disinterested representative of the Federal Land Bank, or moved by any public-spirited motive to assist Johnson and Preston in their difficulties. He contributed a substantial part to the fraud of Bowen in the transaction.

Bowen represented to the intervener that Johnson intended to abandon the farm, when such was not the case. He represented that Johnson's crops were poor, and his financial condition was becoming increasingly hopeless every day, when the contrary was true. These representations affected the value of this mortgage and were made during the negotiations leading to the execution of the assignment. They were made for the purpose of securing the assignment. The intervener was ignorant of their falsity and believed that they were true. The intervener acted as a result of the false representations. No single conversation and no one letter contained the entire false representation. It requires all the surrounding circumstances over a

considerable period of time to establish fraud. So considered, the facts in this case bring it well within the established rule in such a case as announced in *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423, in the following language: "It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage."

The intervener in her petition alleged that she tendered a return of the $2,500 to Bowen, which he paid for the assignment. In addition, it is conceded that she kept her tender good throughout the trial of the case. The trial court found that the false and fraudulent representations constituted active, deliberate, and flagrant fraud on the part of plaintiff upon the intervener of such a character as to deprive the plaintiff of the right of any relief in equity. We have perused with interest the authorities presented by the appellee, but we are unable to reach the conclusion of the trial court. The facts do not seem to require the application of that drastic rule to the case at bar. The intervener, with full knowledge of the fraud, filed a petition seeking rescission and tendered the money received for the assignment. She kept her tender good throughout the trial. The rule applicable to this case is: Before a court of equity will cancel an assignment of a mortgage secured by fraud, it will require a return of the consideration so that the assignee will be placed in substantially the same position as when the instrument was executed. *Kruger v. Block*, 114 Neb. 839; *Overton v. Sack*, 99 Neb. 64. There is reason in the rule. It is a test of good faith on the part of one who asks rescission. This is not a case where plaintiff seeks to recover expenditures made to improve the security. It is merely a situation where the intervener wishes to trade back.

This court reaches the same conclusion as the trial court except that the decree should be modified so that the assignment is canceled, and the notes returned to intervener upon the return of the consideration of $2,500. The costs in this case to be taxed to the plaintiff.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF HARVEY TILTON.
OPAL DODD, APPELLEE, V. HENRY TILTON ET AL., APPELLANTS.

FILED NOVEMBER 15, 1935. No. 29375.

1. **Judgment: RES JUDICATA: HEIRSHIP.** The right of heirship of a daughter is not *res judicata* by a judgment entered upon a dismissal and disclaimer filed by her mother.
2. **Witnesses: COMPETENCY.** The rule is that a party to an action adverse to the representative of a deceased person who disclaims all interest in the subject-matter of the action and is thereby estopped from asserting any claim thereto, is a competent witness.
3. **Marriage.** Formerly, a man and woman, contractual capables, holding forth to the community by conduct, demeanor, and habits, that they had agreed to be husband and wife constituted a common-law marriage.
4. **Witnesses: COMPETENCY.** The agreement between parties which established a common-law marriage is not a communication between husband and wife concerning which they are prohibited from testifying.
5. **Death.** The unexplained and continuous absence of a person from home for seven years raises the presumption of death.

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

W. C. Heelan, E. D. Crites and *F. A. Crites,* for appellants.

W. B. Quigley and *J. J. Harrington, contra.*

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

DAY, J.

In the probate proceedings relating to the estate of Harvey Tilton, Opal Dodd filed a petition of intervention to establish heirship. After a judgment in the county court, an appeal was taken to the district court. Upon a trial to a jury, a verdict was returned finding that Opal Dodd was the daughter and only heir of deceased. Thereupon, an appeal was perfected to this court.

This proceeding had its inception in the filing of a petition by Sarah L. Tilton and Opal Dodd, alleging that Sarah L. Tilton was the widow of the deceased and that Opal Dodd was their only child. At a former trial of this case in the district court, an objection was made to the competency of Sarah L. Tilton, as the surviving spouse, to testify as a witness. At that time Sarah L. Tilton dismissed her petition as follows: "Now comes the intervener, Sarah L. Tilton, widow of Harvey Tilton, deceased, and does hereby release, relinquish and forever disclaims any and all right, title, interest, claim or share in the estate of the deceased; and now for herself and herself only dismisses and moves the court to dismiss this action as to her with prejudice to a further action and at her cost." Thereafter, on the motion of Opal Dodd, a juror was withdrawn and the case continued.

The appellants urge that this dismissal by Sarah L. Tilton and judgment thereon entered in the case are *res judicata* and conclusive upon her copetitioner, Opal Dodd, in all the issues raised in their joint pleading, and especially of the issue that Sarah L. Tilton was the common-law wife of Harvey Tilton, deceased, and that Opal Dodd was the legitimate daughter of Tilton. As to Sarah L. Tilton, the judgment entered upon the dismissal was *res judicata* as to all the issues pleaded. But the issue of paternity of Opal Dodd was not adjudicated thereby. It would be unthinkable that the legitimacy of a daughter could be determined by her mother disclaiming any interest in an estate. The right of heirship of a daughter is not *res judicata* by a judgment entered upon a dismissal and dis-

claimer filed by her mother, where the allegation of the petition is that the mother is the common-law wife of the deceased. There was no adjudication as to the marriage, or the parentage of Opal Dodd. The judgment operated as an estoppel against Sarah L. Tilton to prosecute her claim as widow of the deceased. Opal Dodd was a stranger to that judgment and was not affected by the judgment of dismissal.

Sarah L. Tilton was then produced as a witness for Opal Dodd. Objection was made to her testimony upon the theory that she claimed to be the wife of the deceased and was incompetent under sections 20-1201, 20-1202, and 20-1204, Comp. St. 1929. This objection represents a change in position from the immediate preceding contention that the matter of the marriage was *res judicata*, and that there was a judgment that Sarah L. Tilton was not the surviving widow of deceased.

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 between the deceased person and the witness." Assuming for the time that this is an action against the representative of a deceased person, this statute does not render Sarah L. Tilton incompetent as a witness. The rule is that a party to an action adverse to the representative of a deceased person, who disclaims all interest in the subject-matter of the action and is thereby estopped from asserting any claim thereto, is a competent witness. *Brooks v. Brooks*, 105 Neb. 235. In a recent opinion, *Oft v. Ohrt*, 128 Neb. 848, this court discussed the effect and limitation of this statute. Its reasoning is applicable here and is controlling on this question.

Section 20-1201, Comp. St. 1929, renders incompetent to testify any "husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward." Section 20-1204, Comp. St. 1929, forbids a

husband and wife to testify against each other except in special cases. But it is generally recognized that the state is an interested party to the marriage relationship, and anything which tends to establish the marriage status is not within the meaning of communications between husband and wife. A common-law marriage is alleged to have existed between Sarah L. Tilton and Harvey Tilton.

A common-law marriage is not now valid in Nebraska. *Collins v. Hoag & Rollins,* 122 Neb. 805. But in 1896, when it is alleged that the marriage of Sarah L. Tilton and Harvey Tilton was consummated, a contract made in good faith by mutual agreement to take each other as husband and wife constituted a valid marriage if consummated. *Sorensen v. Sorensen,* 68 Neb. 483; *Coad v. Coad,* 87 Neb. 290. At the time the Tiltons entered into the marriage contract, it was just as valid as a ceremonial marriage and was followed by exactly the same results. Formerly, a man and woman, contractual capables, holding forth to the community by conduct, demeanor, and habits, that they had agreed to be husband and wife constituted a common-law marriage.

There can, however, be no valid marriage without the consent of the state. *Eaton v. Eaton,* 66 Neb. 676. The state has a direct interest in the marriage status and may control and regulate the same. The agreement between parties which establishes a common-law marriage is not a communication between husband and wife concerning which they are prohibited from testifying. It is not within the purview of section 20-1201, Comp. St. 1929. When the conversation occurred which created a common-law marriage, the parties were not husband and wife. The status of marriage followed and was the result of that conversation. Furthermore, it was a public matter, and because of its very nature and its public interest required its revelation. This was no more a communication between husband and wife than the promise and agreement to take as husband or wife of the ceremonial marriage. It was not error to permit Mrs. Tilton to testify in this case after she had

dismissed her claim against the estate, a judgment was entered thereon, and she was estopped to prosecute any right to the estate.

Opal Dodd testified in this case over the objection of the appellants. The basis of the objection was that she was incompetent under section 20-1201, Comp. St. 1929. An examination of the record reveals that her testimony concerned her present status, the place where she was born; where she later lived; that Harvey Tilton was her father; the manner in which deceased treated her, and incidents in her life related to the deceased. It must be remembered that this is an action to establish heirship. Some authorities are cited to the effect that such a statute as ours does not render a party incompetent to testify in such a case. *In re Estate of Maher,* 210 Ill. 160; *McCoy v. Conrad,* 64 Neb. 150; *Matter of Kindberg,* 207 N. Y. 220. But this case may be determined upon other grounds. The testimony of Opal Dodd was cumulative at the most. Even if she was an incompetent witness, it was error without prejudice because the other testimony was such that no other verdict by the jury would have been proper.

The evidence in this case was sufficient to prove a common-law marriage without the testimony of Opal Dodd. In fact, her testimony scarcely touched this question. It appears that Sarah had been married before the common-law marriage with Harvey Tilton. The former husband left her in 1887, and she never saw him or heard from him thereafter. She made numerous inquiries about him. When he left, he said he would hunt work and either come for her or send for her. He drove a team hitched to a wagon. They had no quarrel prior to his departure. This was nine years before her agreement to be the wife of Harvey Tilton. At the time of the trial, she had not heard from him for 47 years. His continued absence has never been accounted for. The unexplained and continuous absence from home for seven years raises the presumption of death. *Holdrege v. Livingston,* 79 Neb. 238; *McLaughlin v. Sovereign Camp, W. O. W.,* 97 Neb. 71. See, also, *Gilroy v. Brady,* 195 Mo.

205. The circumstance of this former marriage is not such as to make the evidence insufficient to prove a common-law marriage. Sarah L. Tilton and Harvey Tilton lived together notoriously as husband and wife for about ten years, during which time a child, Opal Dodd, was born. The evidence tending to prove a common-law marriage is more than usually satisfactory. Under the law as it existed, such a marriage was valid, and a daughter born thereunder is the heir at law of the father.

An examination of this record discloses no prejudicial error requiring a reversal of the judgment.

AFFIRMED.

GOOD, J., concurs in the result.

THOMAS DAVIDSON, APPELLEE, V. RUSSELL W. SHIELDS ET AL., APPELLANTS.

FILED NOVEMBER 15, 1935. No. 29377.

1. **Mechanics' Liens.** The general contractor must file with the proper officer a verified claim within four months from the date the last material is furnished or the last labor performed under the contract to perfect a mechanic's lien.
2. ———. A contractor cannot extend the time for filing a mechanic's lien by substituting proper material for defective material, previously furnished and charged to the owner.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Reversed and dismissed.*

Stiner & Boslaugh and *Lester R. Stiner*, for appellants.

Tibbets, Canaday & Hewitt, contra.

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

DAY, J.

This is a suit to foreclose a mechanic's lien. The appeal is from a decree of foreclosure. The question presented here is whether or not the plaintiff filed the lien in time.

The plaintiff was the general contractor for the construction of an apartment house. The lien for the balance due on the contract price and extras was filed June 24, 1932. The general contractor must file with the proper officer a verified claim within four months from the date the last material is furnished or the last labor performed under the contract to perfect a mechanic's lien. Comp. St. 1929, sec. 52-103; *Pardue v. Missouri P. R. Co.*, 52 Neb. 201; *Nye & Schneider Co. v. Berger*, 52 Neb. 758.

The plaintiff claims that the last labor and material were furnished for this contract on April 22, 1932. On the other hand, the appellants insist that no labor and material were furnished on this contract after October 1, 1931. It is necessary for us to determine at the outset when the last material was furnished and the last labor was performed under the contract. The record reveals that the apartment building involved herein was turned over to the owner, and thereafter occupied by his tenants, about September 1, 1931. The heating plant was put in operation about October 1, 1931, and operated continuously thereafter. It is claimed by the plaintiff that two Trane air eliminators were installed about April 25, 1932; that these valves were a part of the standard equipment of the heating plant installed; that it was the custom to install other air valves, and put the Trane valves in after all dirt had been cleaned out after a period of operation. The pipes were cleaned in December, 1931, and, it was claimed, though denied by adverse testimony, again in January, 1932. Even the witnesses for plaintiff admit that the valves could have been installed after the January cleaning.

The owner did not know that the heating plant was not properly and completely installed. He did not know that the valves were changed. Only one competent witness, a plumber employed by the subcontractor, testified that the valves were changed. He testified that he made the change in the presence of the janitor. The janitor denied that the change was made in his presence and testified that the same kind of valves were there at all times. It is a difficult

question of fact to determine. We are not impressed that the plaintiff has sustained the burden of proof resting upon him on this question. Of course, if these valves were not installed as claimed, the plaintiff did not perfect his lien in time.

But assuming, for the purposes of this case, that these valves were changed, such fact does not extend the time for filing a mechanic's lien. It is claimed by plaintiff that these Trane air eliminators were required by the contract. The contract relative to the heating plant is rather indefinite and is not capable of such strict construction. The plant operated, and no complaint was made by the owner. He did not know that it was not completely and properly installed. He did not know about these valves. The owner, the contractor, the heating and plumbing subcontractor, and the materialman had a conference wherein payment of the balance due or security was demanded of the owner in March, 1932. Negotiations were had for a settlement of a completed contract. Some trouble arose concerning these negotiations, but the completion of the contract was never questioned by any one. The testimony of plaintiff's witnesses is that these valves might have been properly installed in January. The failure to install them at that time was the equivalent to the installation of defective material.

It is the rule that a contractor cannot extend the time for filing a mechanic's lien by substituting proper material for defective material, previously furnished and charged to the owner. *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561; *Cady Lumber Co. v. Reed*, 90 Neb. 293.

It follows, therefore, that the decree of foreclosure was improper and should have been denied.

REVERSED AND DISMISSED.

CHARLES H. MARLEY, TRUSTEE, APPELLEE, V. M. H. MCCARTHY ET AL., APPELLANTS.

FILED NOVEMBER 15, 1935. No. 29363.

1. **Abstracts of Title.** An abstracter, in simply adding an extension to an old abstract, does not certify to, or verify, the accuracy of entries in such abstract prior to the first date given in his certificate of extension.
2. ———. Abstracters are required to show each link in the chain of title. A failure to note a valid outstanding tax sale renders an abstracter liable to the person injured by said omission.

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

J. J. Harrington, for appellants.

Charles H. Marley and *D. R. Mounts, contra.*

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

PAINE, J.

This is an action to recover damages against an abstracter and his bondsmen jointly for damages which the plaintiff claims he sustained because of the negligence of the abstracter in extending two abstracts covering the title to the land upon which the plaintiff purchased a $5,000 mortgage.

The plaintiff alleges that he was appointed trustee under the will of Rebekah S. Manderson, deceased, which estate is being probated in Douglas county, Nebraska; that one of his duties as the trustee of such estate was to invest certain funds in his hands as trustee, and that in December, 1929, he entered into negotiations with W. M. Rainbolt, who was engaged in the mortgage loan business in Omaha, for the purchase of a mortgage given by Clifford R. Fifer to said Rainbolt in the sum of $5,000, which mortgage was dated September 23, 1929, and filed for record October 25, 1929, in book 146, page 17, of the mortgage records of Holt county, Nebraska, on 320 acres of land in said county. Said mortgage was represented to be a first lien upon said real

estate, with all taxes paid up to and including the year 1928. That the title of said land was shown in two abstracts of title, which had been extended and recertified by the Hammond Abstract Company up to September 28, 1926, at 11:00 a. m., and said two abstracts were sent to the defendant M. H. McCarthy, a bonded abstracter of Holt county, on October 23, 1929, with instructions to bring the same to date, which he did, and for which he was paid his charges therefor.

That in the one of said abstracts which covered the northeast quarter of section 1, township 32, range 15, the following entry was made by the said defendant M. H. McCarthy, as bonded abstracter: "Taxes paid up to and including the year 1928. Taxes for the year 1929 are $29.18. No judgments or suits pending. Reexamined and extended from September 28, 1926, at 11 a. m. to January 4, 1930, at 1 o'clock p. m.," which was duly signed, "M. H. McCarthy, Bonded Abstracter. Bond expires March 14, 1934." That in extending the abstract showing the title of the balance of the land covered by said mortgage, it was shown in a similar way that the taxes were paid up to and including the year 1928, and that the taxes for the year 1929 were $31.08, that there were no judgments or suits pending, and the same was reexamined and extended to the same time and date, and signed in the same way by the bonded abstracter.

Plaintiff relied upon such statements in the two abstracts as entered by the said defendant as a bonded abstracter, and on January 4, 1930, purchased said mortgage, paying therefor the sum of $5,000. That some time thereafter plaintiff discovered that the land covered by these abstracts had been sold on November 17, 1926, for the delinquent taxes for the years 1920 and 1921 to S. Y. Gillan & Company; that said tax sale certificate had been foreclosed, and the real estate sold to Paul H. Gillan on November 30, 1931, for the sum of $687.53, and that said sale had been confirmed by the district court for Holt county on December 8, 1931, and the sheriff had deeded the premises to said Paul H. Gillan, pur-

chaser, by deeds which were recorded in book 118 at pages 9 and 11 of the deed records of Holt county.

Plaintiff had no notice or knowledge thereof, and relied on the statements in said abstract as certified by the defendant McCarthy, and all information about said property having been sold for taxes was omitted from the abstracts because of the negligence and lack of due diligence in examining into and investigating the situation of said title, and all reference to the fact that the land had been sold for taxes on November 17, 1926, for the delinquent taxes for the years 1920 and 1921 was omitted in the extension of said abstract. That the plaintiff was compelled to and did pay to Paul H. Gillan on September 26, 1933, the sum of $526.65 for a quitclaim deed to said real estate; wherefore the plaintiff, because of such wrongful acts and neglect of due diligence on the part of the defendant McCarthy, asks judgment in the sum of $526.65, with interest at 6 per cent.

The defendants, for answer to the allegations of the petition, allege that said abstracts had been previously examined and extended by the Hammond Abstract Company to September 28, 1926, and that the defendant McCarthy was employed only for the purpose of extending said abstract from said date to January 4, 1930, for which he charged only the sum of $7.50, and that, if he had made a full and complete examination of all records from the time the original patent received from the government was recorded, such full and complete abstract would have cost the sum of $27.50, and that the said defendant McCarthy did not guarantee the correctness of the abstract prior to September 28, 1926, and said McCarthy alleges that it was no part of his duty as a bonded abstracter to go back prior to the time that his examinations cover to ascertain whether there had been any unpaid taxes or other liens thereon, and asked that the action be dismissed. The reply thereto was a general denial.

On May 19, 1934, said cause was tried to the district court without a jury. The evidence was taken and the case

argued and submitted to the court. The court found the allegations of the petition to be true, and found that, while the plaintiff did not have the right to redeem from the tax sale issued for delinquent taxes for the years 1920 and 1921, yet he had a legal right to pay Paul H. Gillan for such quitclaim deed the sum of $846, which included the taxes, interest, costs and attorney's fees, and that the plaintiff is entitled to recover from the defendants the sum of $846 less the 1929 taxes, of which he had notice in the extension of the abstract, together with the proportionate share of interest, costs and attorney's fees on the taxes for said year, and therefore entered a judgment for the balance of $733.-66, with interest at 6 per cent. and costs.

Eight errors are set up in the brief and relied upon for reversal. Appellant charges that an abstract of title is used by the one who purchases the same and also by subsequent purchasers and mortgagees, and, therefore, an abstracter is held to a higher degree of care than was required of him at common law. 5 Neb. Law Bulletin, 466.

Nebraska requires that an abstracter give a bond of $10,000, to be furnished by a surety company or three sureties, all as set out in sections 76-601 to 76-603, inclusive, Comp. St. 1929, and this requirement has greatly increased the confidence that persons interested reposed in an abstract. "The right to use an abstract as evidence is not even limited to the person to whom it is issued. Any one may use it, and any one against whom it is employed may be injured in consequence of the certificate being false." *Gate City Abstract Co. v. Post*, 55 Neb. 742.

It may be admitted that an abstracter, in extending an abstract from September 28, 1926, at 11:00 a. m., to January 4, 1930, at 1:00 p. m., does not certify to or verify the accuracy of earlier entries in said abstract prior to the first date given. "Damages cannot be recovered against an abstracter which are not the result of his negligence or breach of duty." 1 C. J. 371.

In the case at bar, the land was sold for taxes on November 17, 1926, for the delinquent taxes for the years 1920

and 1921. This tax sale was made some six weeks after September 28, 1926, and clearly within the period covered in the extension certificate of the abstracter.

A tax certificate may ripen into a title superior to that of the owner, provided the land is not redeemed from the tax sale.

Abstracters are required to show each link in the chain of title, and one link adversely affecting the title is an outstanding valid tax sale, and a failure to note this on an abstract makes the maker of the abstract liable in damages to the person injured. *Marcell v. Midland Title Guarantee & Abstract Co.*, 112 Neb. 420; *Bridgeport Airport, Inc., v. Title Guaranty & Trust Co.*, 111 Conn. 537, 71 A. L. R. 345.

The amount of the recovery was based upon the amount paid by the plaintiff for a quitclaim deed to the purchaser under the tax foreclosure sale less the amount of the 1929 taxes, which were duly shown as unpaid by the abstracter upon his extension, together with the interest and proportionate share of the costs. The net amount remaining was entered as a judgment in the sum of $733.66. We have examined all errors set out and argued in the brief of appellant. Finding no error in the record, the judgment is hereby duly

AFFIRMED.

CHARLES LEFFELMAN, APPELLEE, V. F. H. MATSCHULLAT, APPELLANT.

FILED NOVEMBER 15, 1935. No. 29380.

1. **Agriculture.** A cropper is a hired hand who is paid for his labor with a share of the crop he works to make and harvest.
2. ———. A cropper has no exclusive right to possession of the land and no estate in the crop until he is assigned his share thereof.
3. **Landlord and Tenant: CROPPERS.** A cropper takes his estate in the crop, and performs his work thereon, subject to the terms of the lease of the tenant under whom he holds.

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

Joseph G. Rogers, Matschullat, Matschullat & White and *Robert A. Nelson,* for appellant.

C. W. Peasinger, contra.

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

PAINE, J.

Charles Leffelman, the plaintiff and appellee, brought an action in replevin to recover 130 bushels of potatoes. The judgment appealed from found that the plaintiff was the owner of the potatoes and entitled to recover possession thereof, with all costs, including damages for the wrongful withholding of possession thereof in the sum of one cent.

The record shows that the defendant, F. H. Matschullat, lives in Lincoln, Nebraska, and that he owns a small ten-acre tract of land adjoining Randolph, Nebraska, and that he made a lease of this to a tenant, W. H. Burgel, with a stipulation in this written lease against subletting, and Burgel, the tenant, was to pay $25 a month cash rent. He paid rent for one month, and took possession on March 1, 1933. There was a house and barn on the place. The record shows that Matschullat was not out at Randolph until in July. Burgel made an oral agreement with the plaintiff, Leffelman, that if he would come on the premises and raise potatoes he could have half of the potatoes that he raised on the premises. Leffelman thereupon came upon the premises, and with the help of his family they raised the potatoes. In the meantime Matschullat went to Randolph and, without talking to any of the parties at all, started a forcible entry and detainer suit, and the defendant Burgel was evicted from the premises by order of the county court, the eviction taking place late in July, 1933. Thereupon, the landlord and the plaintiff, who was the cropper, each claimed the potatoes, whereupon the landlord offered to give the plaintiff one-half of the potatoes if

he would finish taking care of them, which offer the plaintiff flatly rejected, claiming all of the potatoes. Between August and September 12 the defendant, Matschullat, hired men and spent $44 in caring for the potatoes, the checks being introduced in evidence, and on September 12, 1933, plaintiff started this replevin action to get possession of all of the potatoes, having secured an assignment from Burgel, the tenant, of his alleged interest therein.

There appears to be no controversy on any material point in the evidence. There was no contention that the defendant, Matschullat, ever waived the stipulation in the lease against subletting the premises; therefore, the case presents several legal problems. A landlord owns certain premises; the tenant breaches the conditions of the lease and the landlord puts him off. Now, the question at once arises, has the plaintiff any rights after the landlord has taken the possession of the property away from the tenant? It is necessary to ascertain the exact nature of the relationship between these parties. The landlord claims that Leffelman is a mere cropper on the premises. Did the plaintiff, who was a mere cropper, have any greater rights in the premises than the tenant, Burgel, had?

In the case of *Blachford v. Frenzer*, 44 Neb. 829, it was held: "A subtenant is charged with notice of the existence of the tenant's lease and bound by its terms and conditions." And in the case at bar the landlord had not consented to the tenant subletting the place, and, in fact, was not notified thereof, and, therefore, the plaintiff had no legal rights in the premises except as a mere cropper, and was to receive one-half of the potatoes for his labor in planting and tending the crop.

It was held in *Halsell v. First Nat. Bank*, 109 Okla. 220, "The difference between a cropper and a tenant is that the cropper is a hired hand paid for his labor with a share of the crop he works to make and harvest. He has no exclusive right to possession and no estate in the land nor in the crop till the landowner assigns him a share."

To the same effect is *Maltbie v. Olds*, 92 Atl. 403 (88

Conn. 633) which says: "A 'cropper' being one who cultivates the land of another in consideration of a portion of the crop, having no interest in the land, and hence none in the crop until divided, his possession being that of the landowner." See *Wilcox & Co. v. Deines,* 119 Neb. 692; *Hansen v. Hansen,* 88 Neb. 517.

A cropper takes his estate and performs his work subject to the terms of the lease of the tenant under whom he holds.

It has been held that, until a division of the crop has been made, the owner may maintain replevin to recover the possession thereof. *Angell v. Egger,* 6 N. Dak. 391. However, in the case at bar the cropper had refused to continue to care for the crop after the tenant had been evicted, and the landlord was compelled to hire men and expend the sum of $44 to bring the crop to maturity.

It was held in *Salley v. Cox,* 46 L. R. A. n. s. 53 (94 S. Car. 216): "A cropper forfeits all interest in the crop by voluntarily abandoning it without reasonable cause or excuse."

The plaintiff, Leffelman, is unfortunate in having contracted with a defaulting tenant, but certainly he has no right to replevin against the owner of the land, who took possession of the premises in a legal manner, as the rent had only been paid for the month of March and possession was taken late in July by the action in forcible entry and detainer.

In the petition of the plaintiff he alleges that he is the owner of the entire crop of potatoes grown upon the premises, but if the tenant had not been evicted, and the original plans had gone through, the plaintiff as a cropper would only have been entitled in any event to a portion of the 130 bushels of potatoes; therefore, the allegation in his petition of ownership has failed.

In our recent case of *Taylor v. Luedke,* 126 Neb. 602, similar questions were raised, and it was said: "Section 52-601, Comp. St. 1929, construed, and *held* not to provide for a lien upon the crops in favor of a farm hand, for labor in plowing the land, planting and tending the crops, as for

labor performed on personal property." See *Sanford v. Modine*, 51 Neb. 728; *Robinson v. Stricklin*, 73 Neb. 242.

If the tenant himself had planted the potatoes and tended them for the first months, and was then ousted because he failed to pay his rent before the crop was matured, could that tenant later on replevin the crop? We think not; and if the tenant did not have that right he could not give to his cropper a greater right than he had in the potatoes himself.

It appears to the court that Leffelman's claim for his loss is not against the owner of the property, but his claim, if any, is against the tenant for the services that he rendered and could not recover on because the tenant defaulted in the payment of his rent, as the tenant had promised to furnish him the land.

This case has been tried in the county court and in the district court, and in our opinion the plaintiff as cropper did not have the title to, and ownership of, the potatoes at the time he filed his petition in replevin. The judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ETHEL PATTERSON MILTON, APPELLANT, V. CITY OF GORDON ET AL., APPELLEES.

FILED NOVEMBER 15, 1935. No. 29181.

1. **Master and Servant: WORKMEN'S COMPENSATION: BURDEN OF PROOF.** In a suit under the workmen's compensation act, the burden is upon the claimant to show that he suffered an injury and that the injury resulted from an accident arising out of and in the course of his employment.
2. ———: ———. An award for compensation cannot be based upon possibility, probability, speculation or conjecture. Unless it is established by sufficient evidence that claimant has incurred a disability arising out of and in the course of his employment, he cannot recover.
3. **Evidence: RES GESTAE.** The declaration of a person which is merely a narrative of a past transaction, made after the transaction to which it relates has been fully completed and shown

not to have been spontaneously or involuntarily made, is not admissible in evidence as a part of the *res gestæ*.

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

Montgomery, Hall & Young, Laurens Williams and *John J. Olsson*, for appellant.

E. D. Crites, F. A. Crites and *Lloyd H. Jordan, contra.*

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

CARTER, J.

This is a suit brought by appellant under the workmen's compensation law to recover for the death of her husband. From an adverse judgment appellant brings the case to this court on appeal.

The evidence in this case shows that Earl L. Milton, the deceased, was the city marshal and street commissioner of the city of Gordon, Nebraska. It further appears that on April 19, 1932, Milton and one Roy Denny pursued and attempted to arrest the occupants of a truck they suspected of carrying intoxicating liquor contrary to law; that during the pursuit of the truck, and while driving north at a speed of 35 to 40 miles an hour, on one of the streets of Gordon, Milton's car struck a hard surface street crossing which was some 20 inches higher than the level of the street to the south; that Milton's car went over the crossing bouncing and swinging and thereby jarring and jolting the occupants thereof. The evidence shows that Milton's car slipped into the ditch shortly after crossing the street crossing, which permitted the truck and its occupants to escape. Milton then drove his car down-town where he discussed the affair with a number of citizens, pointed out to them some bullet holes in the radiator of his car and called the sheriff at Rushville to come to Gordon and aid in the pursuit.

It is further shown by the evidence that Milton was a man about 5 feet 5 inches in height, weighed about 200

pounds and was about 43 years of age. He was described as very fleshy, with an exceptionally large abdomen and short legs. The evidence discloses that his abdomen was so large that it rested against the steering wheel when he was driving his car. Prior to the date in question, the deceased had been troubled with constipation and gas on the stomach. The record also establishes the fact that Milton had previously been bothered with appendicitis and undoubtedly was subject to appendicitis attacks. He worked the nights of April 19, 20 and 21 following the affair out of which the accident is alleged to have arisen. On April 20 he appeared to be suffering some pain and complained of his stomach bothering him. He came home in the middle of the night of April 21 and went to bed. A doctor was called at noon the next day. He was taken to the hospital on April 23, was operated on and a ruptured gangrenous appendix removed early in the morning of April 25, and died on April 28. At the time of his death he was suffering with peritonitis, obstruction of the bowels and appendicitis. It is the contention of appellant that the deceased suffered an injury on April 19, 1932, when he crossed the street crossing, while pursuing the truck heretofore referred to, by being thrown against the steering wheel of his Ford car, causing injuries to his abdomen. Appellant contends that the deceased was previously afflicted with "chronic appendicitis" that was lighted up by the injury sustained, thereby causing his death.

Appellee contends that there is no proof that the deceased was injured as alleged. It is clearly the law of this state that, in a suit under the workmen's compensation act, the burden of proof is upon the employee to establish that his disability was caused by an accident arising out of and in the course of his employment. *Amos v. Village of Bradshaw*, 128 Neb. 514; *Huffman v. Great Western Sugar Co.*, 125 Neb. 302; *Saxton v. Sinclair Refining Co.*, 125 Neb. 468.

A more detailed examination of the evidence as to the happening of the accident out of which the injury is claimed to have arisen shows that the deceased made no claim of

injury to his companion Denny at or immediately after the hitting of the crossing. There is testimony to the effect that the deceased was nervous and his eyes bloodshot when he came down-town a few minutes after the accident, although this is disputed by other witnesses who were there. The evidence shows that shots were exchanged at close range during the pursuit which appellee claims were the cause of the nervousness of the deceased. Denny testifies that he did not see the deceased strike the steering wheel of the car nor did the deceased say that he had done so. There is no evidence in the record that any one saw any evidences of injury on the abdomen of the deceased. The only evidence in the record tending to connect the accident with the injury is a statement made by the deceased to the sheriff, as follows: "Man, I sure hurt myself in the guts as I went over that crossing there." The record shows that this statement was made after the pursuit of which the claimed accident arose was over, after the discussion on the street by the deceased and various citizens of the town and while the deceased and the sheriff had again taken up the pursuit some 25 or 30 minutes later. Appellant claims this to be a part of the *res gestæ*. To this we cannot agree. The statement in question was clearly a narrative of a past transaction or event. It was not a spontaneous or involuntary statement made during the happening of the event in proof of which it is offered as evidence. Neither is it contemporaneous with the event of which it is alleged to be a part. The statement is not a part of the *res gestæ*. It is merely a self-serving statement and as such is not competent evidence. It should have been excluded by the trial court.

There is evidence in the record that the striking of deceased's abdomen by the steering wheel of the car might and probably would light up the preexisting abdominal condition of the deceased. The evidence shows that, in the opinion of the expert witnesses produced by the appellant, the preexisting abdominal condition was lighted up by a physical injury to deceased's abdomen. The evidence of the

appellee was to the contrary. Even so, appellant must show that any such injury arose out of and in the course of the employment. The evidence of the medical experts of both parties concedes that there are many other ways that the preexisting condition could have been lighted up besides the one contended for by appellant. After a consideration of the whole evidence, we come to the conclusion that a decree for appellant, if one could be granted, would have to be based on speculation and probability. The evidence shows that appellant's contention that the deceased was injured by striking the steering wheel of his car is based upon the possibility that it could have happened at that time and place or the probability that it did occur as alleged. This court has held many times that awards of compensation cannot be based on possibility, probability, speculation or conjecture. Cases particularly in point, and which sustain our holding in this case, are *Amos v. Village of Bradshaw, supra,* and *Huffman v. Great Western Sugar Co., supra.* We therefore conclude that the evidence will not sustain a finding that the deceased sustained an injury arising out of and in the course of his employment within the meaning of the compensation law. The evidence being insufficient to sustain an award, it will not be necessary to consider other errors relied upon for a reversal. The trial court arrived at a proper conclusion and was right in dismissing appellant's petition. The judgment is

AFFIRMED.

RUDOLF KOUMA ET AL., APPELLANTS, V. EDWARD J. MURPHY, APPELLEE.

FILED NOVEMBER 15, 1935. No. 29383.

1. **Landlord and Tenant: LESSEE IN POSSESSION: CLAIM OF TITLE.** Where one who is already in possession of real estate accepts a lease from a third party, the presumption is that he is yielding the possession which he held under claim of right and is thereafter holding possession under the lease.

2. ———: ESTOPPEL. A lessee of real estate is not entitled to occupy the inconsistent position of being the owner of the land and at the same time the tenant of another owner. Under such circumstances, he is estopped to deny his landlord's title.
3. ———: ———. "Estoppel of the tenant to deny the title of his landlord extends to every one in privity with him, and it inures to the benefit of any person to whom the landlord's title may pass, and continues until possession is actually surrendered." *Hackney v. McInnch*, 79 Neb. 128.
4. **Forcible Entry and Detainer**: PARTIES. When a landlord leases lands to a new tenant and the old tenant holds over unlawfully, the landlord is a proper party to maintain a forcible detainer action to recover the possession of the premises.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

H. A. Bryant and *Charles H. Hood*, for appellants.

J. H. Barry, contra.

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

CARTER, J.

This is an appeal from a judgment of the district court for Saunders county affirming a judgment entered in a forcible detainer action in the county court of that county for the restitution of certain lands. From the adverse judgment thus entered appellants bring the case to this court for review.

The record shows that on March 6, 1934, Edward J. Murphy, the appellee, filed a complaint in forcible detainer against the appellants, Rudolf and Milada Kouma, alleging that they were unlawfully holding possession of the lands described therein. Appellants entered a plea of not guilty and, as a further defense, affirmatively pleaded the following facts: That on and prior to August 23, 1932, Rudolf Kouma was the owner of the lands in question and occupied the same as his homestead; that the Midwest Life Insurance Company was at the time the owner by assignment of a mortgage of $22,000 on these lands upon which the sum

of $18,000 remained unpaid. The record further shows that interest and taxes had not been paid as required by the mortgage and that, in order to adjust the matter without foreclosure, appellants Rudolf Kouma and Milada Kouma, his wife, executed and delivered a warranty deed to W. W. Putney, the president of the Midwest Life Insurance Company, who in turn leased the premises back to appellants by a written lease to March 1, 1934. It is further shown by the allegations of appellants' answer that on December 22, 1932, appellants again conveyed the premises to Putney by quitclaim deed and at the same time surrendered for cancelation a certain option to repurchase, which had been previously executed and delivered to them by Putney. The record further shows that on January 11, 1933, appellee became the owner in fee of the premises by warranty deed from the Midwest Life Insurance Company, as well as the owner of the lease by assignment from the Midwest Life Insurance Company of its interest, Putney having previously deeded his interest in the lands and assigned his interest in the lease to the Midwest Life Insurance Company. Appellants further admit in their answer the payment of rent to appellee as provided by the lease. Numerous allegations of fraud on the part of the Midwest Life Insurance Company and the appellee in procuring the deeds were also alleged. The county court found against appellants who sued out a petition in error to the district court. The district court also held against the appellants who then appealed to this court.

Appellee contends that the answer contains allegations of fact that entitle him to a judgment on the pleadings.

Appellants contend that the answer filed draws in question the title to the real estate. There can be no question that, if such be the case, the county court was without jurisdiction to try the case. This was so held in the case of *Stone v. Blanchard,* 87 Neb. 1, the court saying: "Justice courts cannot try actions which involve title to real estate, or in which such title may be drawn in question. This court has frequently been called upon to construe this

statute. No mere claim of title or claim or assertion that title is drawn in question will deprive the justice of power to try and determine the cause. He must ascertain from the evidence whether the action involves or draws in question the title to real estate. Forcible entry and detainer is an action to determine the right of possession, and any competent evidence, whether it be title deeds or other written or oral testimony, tending to show which one of the contending parties is entitled to possession of the disputed property must be considered by the justice. If he can find and determine the right of possession without at the same time determining the rights of the parties, legal or equitable, in the property itself, it cannot be said that the title is drawn in question." The answer of appellants shows that they not only gave two deeds to Putney and the Midwest Life Insurance Company, appellee's predecessors in title, but that they recognized their title by entering into a written lease with them and paying at least a part of the landlord's share of the rent over to them. This court has held that a tenant cannot occupy the inconsistent position of being the owner of the land and at the same time the tenant of another owner. In the case of *Polenske v. Polenske,* 107 Neb. 496, this court said:

"If one who is already in possession accepts a lease from a third party, the presumption is that he is yielding the possession which he held under claim of right, and taking possession and holding it thereafter under and by virtue of the lease.

"The courts are divided upon the question whether, if the possession is not obtained by virtue of the lease, a tenant may question his landlord's title, but the majority hold that even in such cases the general rule applies. A collection of the cases may be found in a note to *Stevenson v. Rogers* (103 Tex. 169) Ann. Cas. 1912D, 101. See, also, 16 R. C. L. 659, sec. 146.

"Where it is clear that the lessee executed the lease, a justice of the peace may determine all questions as to whether the lessee is wrongfully holding over his term,

either by expiration of the term by nonpayment of rent, or by any other breach of the contract which may render his possession unlawful. If the lessee asserts a *bona fide* claim of title, he may still litigate it in the proper forum after he has yielded possession to the lessor. He is not entitled to occupy the inconsistent position of being the owner of the land and at the same time the tenant of another owner."

The appellants, being estopped to deny the title of Putney and the Midwest Life Insurance Company, are also estopped to deny the title of appellee for the reason that appellee is in privity with his predecessors in title. This court so held in the case of *Hackney v. McIninch*, 79 Neb. 128, in the following language: "Estoppel of the tenant to deny the title of his landlord extends to every one in privity with him, and it inures to the benefit of any person to whom the landlord's title may pass, and continues until possession is actually surrendered. Gear, Landlord and Tenant, sec. 165." We therefore conclude that appellants were estopped to deny appellee's title and that appellee was entitled to successfully maintain his suit in forcible detainer as a matter of law.

Appellants also contend that, as appellee had made a new lease of the lands in question commencing on March 1, 1934, he was not the real party in interest and that the new tenant was the proper person to maintain the action. Our court has held to the contrary in the case of *Herpolsheimer v. Christopher*, 76 Neb. 355, on rehearing, wherein the court said: "Ordinarily there is an implied covenant in a lease that the demised premises shall be open to entry by the lessee at the time fixed in the lease as the beginning of the term."

We find no error in the record. The trial court was right in dismissing the petition in error and affirming the judgment of the county court awarding restitution of the premises.

AFFIRMED.

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11. Where the decree of the trial court requires execution of a conveyance, appellant, in lieu of a bond, may execute the required conveyance and deposit it with the clerk to abide the judgment of the appellate court; and the power of the trial court is suspended until disposition of the appeal. *Walter v. Gillan* 514
12. Agreement between parties to an appeal *held* to operate as release of surety on appeal bond. *New Idea Spreader Co. v. Brown* 551
13. The supreme court on appeal may consider pleadings amended to conform to facts proved. *Luthy v. Farmers Mutual Hail Ins. Ass'n* 579
14. Erroneous instruction directing jury to consider certain claims for damages as part of first cause of action instead of second cause of action, wherein they were properly set out, *held* not prejudicial. *Wilfong v. Omaha & C. B. Street R. Co.* 600
15. Defendant, moving to dismiss at close of plaintiff's evidence, admits plaintiff's testimony to be true, together with every conclusion which may reasonably be drawn therefrom. *Schroeder v. Bartlett* 645

16. A properly certified transcript of the record of the trial court imports verity. *Miller v. Central Coal & Coke Co.* 739
17. The supreme court, in reviewing a judgment without bill of exceptions, will only determine whether judgment is supported by pleadings. *Miller v. Central Coal & Coke Co.* 739
18. Refusal of instruction covered by court's instruction is not error. *McConnon & Co. v. Bellamy* 743
19. Findings by court will not be disturbed on appeal unless clearly wrong. *Fidelity & Deposit Co. v. B. Grunwald, Inc.* 749
20. In absence of a bill of exceptions, the supreme court will determine only whether the pleadings sustain the judgment. *Wheeler v. Boiler* 792
21. In action for injury, admission of testimony of a physician reciting a history of injury given him by plaintiff *held* not prejudicial error, in view of the record. *Roberts v. Kubik* 795
22. Alleged error in excluding answer to question on direct examination *held* not error, in absence of offer of proof. *Stull v. Department of Roads and Irrigation* 822
23. Præcipe for a cross-appeal must be filed on or before the day originally fixed for filing appellant's brief. *In re Estate of House* 838
24. Order extending time originally fixed for appellant to file brief does not operate to extend time for filing præcipe for cross-appeal. *In re Estate of House* 838
25. Court's finding based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Wescott v. Mathers* 846
26. Complaint of misjoinder of parties cannot be first raised in the supreme court. *McGinley v. Union P. R. Co* 855

Appearance.

A general appearance vests the court with jurisdiction of the person. *McGinley v. Union P. R. Co* 855

Assignments.

1. In absence of a contrary provision, assignment of a chose in action vests in the assignee equitable title to collateral. *Luikart v. Massachusetts Bonding and Ins. Co.* 771
2. Assignment of a chose in action vests in the assignee equitable title to securities and rights to the subject-matter of the assignment, and he may enforce them although at time of assignment he was ignorant of their existence. *Luikart v. Massachusetts Bonding and Ins. Co.* 771

Attachment.

Plaintiff *held* to have ratified attachment proceedings, thereby precluding action for malicious attachment. *Mosher v. Beselin* 541

Automobiles.

1. Gross negligence within statute relating to motorist's liability to guests means negligence in a very high degree, or absence of even slight care in performance of duty. *Rogers v. Brown* 9
2. Remedy of motorist's guest for injuries, as protected by the Constitution, *held* not taken away by the guest law, since it merely changed the degree of proof. *Rogers v. Brown* 9
3. Duty of motorist at congested intersection in public streets is commensurate with danger to himself and others. *Rogers v. Brown* 9
4. Motorist in congested area in public streets must look for traffic signals and comply with traffic regulations adopted by statute and ordinance. *Rogers v. Brown* 9
5. Whether act of motorist constituted gross negligence *held* question for jury. *Rogers v. Brown* 9
6. Generally, an automobile guest may assume that the driver is a reasonably careful driver; and the duty to warn the driver does not arise until an unusual situation arises. *Rogers v. Brown* 9
7. A motorist has a right to assume that motorists on an arterial highway will obey traffic regulations. *Moncrief v. Interstate Transit Lines* 168
8. Order of state railway commission requiring insurer writing liability policies covering taxicabs to have a surplus of $300,000 as a condition of approval of policy *held* a valid exercise of commission's power. *State v. Mann* 195
9. Injunction will lie to restrain owners from operating taxicabs for failure to comply with order of state railway commission as to indemnity insurance. *State v. Mann* 195
10. Violation of statute regulating use of motor vehicles on highway is evidence of negligence. *Mann v. Standard Oil Co.* 226
11. Custom of automobile drivers to signal intention to turn to left by holding left front door open does not excuse failure to give arm signal required by statute. *Mann v. Standard Oil Co* 226
12. Uniform motor vehicle act *held* not to require a red rear light on a parked automobile. *McGaffey v. Blosser* 371

13. Evidence, in an action for damages from collision with parked automobile, *held* to sustain judgment for defendant. *McGaffey v. Blosser* 371
14. Direction of verdict approved. *Anderson v. Interstate Transit Lines* 612
15. Evidence *held* sufficient to sustain conviction for driving a truck while intoxicated. *Haffke v. State* 713

Bailment.

1. A contract of bailment contemplates return of property bailed, either in the same or in altered form, or its delivery to some third person with consent of the bailor. *Luikart v. Massachusetts Bonding and Ins. Co* 771
2. Contracts of bailment, whether gratuitous or for hire, are supported by a legal consideration, which consists in detriment to the bailor by his yielding possession or custody of the article bailed on the faith of the bailee's engagement to redeliver. *Luikart v Massachusetts Bonding and Ins. Co* 771

Banks and Banking.

1. In an action against a national bank and president of a state bank for conspiracy to defraud the state bank, evidence *held* to sustain judgment for defendant. *Luikart v. Beatrice Nat. Bank* 2
2. Bank receiving draft drawn on a bank in another city, and indorsed by payee in blank for deposit to payee's account, accepts it for collection and becomes payee's agent until draft is paid and proceeds reach collecting bank. *State, ex rel. Sorensen, v. South Omaha State Bank* 43
3. Where payee indorses draft in blank and delivers it to bank for credit to payee's account, relation of debtor and creditor is created after such draft has been paid and proceeds reach bank of deposit, notwithstanding bank knows that draft is owned by payee as guardian. *State, ex rel. Sorensen, v. South Omaha State Bank* 43
4. A claimant seeking to recover money in an insolvent bank on the trust fund theory must establish facts proving that it was not simply a general deposit. *State, ex rel. Sorensen, v. South Omaha State Bank* 43
5. The drawee bank is the place of final settlement of a check, where all prior mistakes, alterations, and forgeries must be corrected. *United States Fidelity & Guaranty Co. v. First Nat. Bank* 102
6. When a check is paid and canceled by the drawee bank, it is considered paid for all purposes. *United States Fidelity & Guaranty Co. v. First Nat. Bank* 102

7. A drawee bank paying a forged check to a *bona fide* holder and charging it to the depositor's account cannot recover payment from the holder. *United States Fidelity & Guaranty Co. v. First Nat. Bank* 102
8. An innocent indorser repaying drawee bank the amount of a forged check, believing payment had been refused, may recover amount repaid on learning that the drawee bank had paid and canceled the check. *United States Fidelity & Guaranty Co. v. First Nat. Bank* 102
9. Without special authorization, a bank cashier has no authority to release, otherwise than in due course of business and on payment, the maker of a note payable to the bank. *Bachman v. Junkin* 165
10. Bank cashier *held* without authority to execute a contract by which the bank assumed liability for a mortgage. *Lincoln Joint Stock Land Bank v. Bexten* 422
11. A personal liability existing against depositors of an insolvent bank cannot be enforced by action against the receiver of the bank. *State, ex rel. Spillman, v. Western State Bank* 486
12. Where payments of money were made through mistake of law by the officer in charge of the depositors' final settlement fund to individual depositors of an insolvent state bank, the officer could not maintain an action against the receiver of the bank to recover such money. *State, ex rel. Spillman, v. Western State Bank* 486
13. Payment of interest on a deposit by a bank is a strong, though not conclusive, indication that title to the deposit has passed to the bank and that the relation between the bank and the depositor is that of debtor and creditor. *In re State Bank of Elkhorn* 506
14. A depositor claiming a trust fund in assets of an insolvent bank must establish title to the deposit, and, if title to the deposit has passed to the bank, he cannot claim the deposit as a trust fund. *In re State Bank of Elkhorn* 506
15. Where a trustee makes a general deposit of trust moneys in an apparently solvent bank, neither he nor his *cestui que trust*, upon failure of the bank, is entitled to preference over other general depositors merely because the deposit was a trust fund to the knowledge of the bank. *In re State Bank of Elkhorn* 506
16. To create a special or specific deposit, the depositor and the bank at time deposit is made must agree that the deposit shall not be commingled with the general funds of the bank, or be subject to its control in the

usual course of its business. *In re State Bank of Elkhorn* 506
17. Deposit by trustee *held* to be a general deposit, and not a trust fund entitled to preference on bank's insolvency. *In re State Bank of Elkhorn* 506

Bills and Notes.
1. A material alteration in a note may be ratified. *State Bank of Edgar v. Jordan* 19
2. Ratification of material alteration of a note must be pleaded. *State Bank of Edgar v. Jordan* 19
3. "Accommodation party" defined. *Bachman v. Junkin* 165
4. The burden is on defendant to prove that a note made by him is an accommodation note. *Neslund v. Kinnan* 279
5. Although a note otherwise negotiable is not rendered nonnegotiable merely by reference to collateral security, a note and mortgage executed at same time as part of one transaction are to be construed as one instrument, and terms in the mortgage may render the note nonnegotiable as to parties with notice. *Von Nordheim v. Cornelius* 719

Bonds.

Where a bond and another instrument form one transaction, the two should be construed as a whole. *Luikart v. Massachusetts Bonding and Ins. Co* 771

Bridges.

One county cannot compel another county to contribute to a state aid bridge over a boundary-line stream between counties unless notice is given to the other county affording it opportunity to participate in location, adoption of plans, letting of contract, and construction of the bridge, and the notice must be sufficient to apprise the other county that it will be expected to contribute to cost of the bridge. *Buffalo County v. Phelps County* 268

Carriers.
1. Establishing of a rate by the railway commission in making award for overcharge is a legislative function, and has the force of a statute. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co* 726
2. Findings of railway commission in making an award for overcharge of shipping rate are judicial in their nature and, in an action to enforce award, are *prima facie* evidence only of facts therein stated. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co* 726

3. The state railway commission has power to make award of damages against a railroad company for exacting overcharge from a shipper. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.* 726
4. Nebraska statutes prohibiting discrimination in rates are declaratory of the common-law rule. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.* 726
5. The shipper's common-law right of action for overcharge in rates is not taken away by Nebraska rate-regulating statutes. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.* 726
6. The reparations act grants to the railway commission additional power to award reparations where lawful existing rate is retroactively set aside, but in absence of legislative intent therein expressed, it cannot change the effect of prior statutes governing other classes of claims. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.* 726
7. The carrier must furnish a caretaker with necessary information and reasonable facilities for performing his duties. *McGinley v. Union P. R. Co.* 855
8. The initial carrier under the Carmack amendment is liable for loss or damage to property shipped until delivered to the consignee; but the relation of connecting carriers remains unaffected by the amendment. *McGinley v. Union P. R. Co.* 855

Charities.

1. Will devising real estate to a nonresident religious corporation to be used for educational purposes and foreign missionary work *held* to create a valid charitable trust. *Stork v. Evangelical Lutheran Synod* 311
2. Equity will not permit a religious or charitable testamentary trust to fail because the trustee named is incompetent to take title to realty because a nonresident corporation, but will appoint a competent trustee to administer the trust. *Stork v. Evangelical Lutheran Synod* 311

Constitutional Law. SEE AUTOMOBILES, 2. STATUTES.

1. Grain inspection act *held* not violative of constitutional provisions for withdrawal of funds from state treasury. *Bollen v. Price* 342
2. Where liquidation of an insurance company is conducted in a court of equity, the proceeding is judicial and not executive. *State, ex rel. Good, v. National Old Line Life Ins. Co.* 473
3. The legislature cannot remove a bar or limitation which

has already become complete. *Dorland v. City of Humboldt* 477
4. Legislative power is vested in the legislature subject only to initiative and referendum provisions reserved to the people. *Smithberger v. Banning* 651
5. Legislative power cannot be delegated to an administrative board. *Smithberger v. Banning* 651
6. The state legislature cannot delegate legislative power to congress. *Smithberger v. Banning* 651
7. The motor fuel tax statute making appropriation for emergency relief, to be expended by an administrative board, and leaving distribution of the fund to the arbitrary discretion of the board, *held* an unconstitutional delegation of legislative authority. *Smithberger v. Banning* 651
8. A statute appropriating money for emergency relief, to be expended pursuant to a future act of congress, is an unconstitutional delegation of legislative authority. *Smithberger v. Banning* 651
9. The salary of any public officer cannot be increased or diminished during his term of office. *State, ex rel. Taylor, v. Hall* 669
10. The legislature cannot pass an act granting an individual special privileges or immunity. *State, ex rel. Taylor, v. Hall* 669
11. Statute prescribing salaries for certain state officers *held* unconstitutional. *State, ex rel. Day, v. Hall* 699

Contempt.

1. Punishment for contempt not committed in presence of the court cannot be imposed without an accusation, notice, and opportunity for defense. *Muffly v. State* 334
2. Order punishing for contempt not committed in presence of the court, made without accusation, notice, or opportunity for defense, is void and may be reviewed without motion for new trial. *Muffly v. State* 334

Contracts.

1. One cannot affirm beneficial part of contract and disaffirm detrimental part. *Kingsley v. Noble* 130
2. Where a word has been omitted from a written contract, the omission may be supplied by construction, if the context shows the omission. *Lincoln Joint Stock Land Bank v. Bexten* 422
3. One may not avoid a contract on the ground that he did not read it. *Lincoln Joint Stock Land Bank v. Bexten* 422
4. An offer must be so definite in its terms, or require such

definite terms in its acceptance, that promises and performances to be rendered by each party are reasonably certain. *Kennedy v. Central Power Co* 637
5. Mutuality of obligation *held* not essential to validity of contract where there was other consideration for the contract. *Luikart v. Massachusetts Bonding and Ins. Co.* 771
6. To recover on a conditional promise to pay, the burden is on plaintiff to show that every condition precedent has been complied with. *Bingaman v. Securities Investment Corporation* 788
7. When terms of an agreement have been intended in a different sense by parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. *Eagle Indemnity Co. v. Village of Creston* 850

Corporations.

1. Officers of a corporation are responsible for fraudulent acts of the corporation in which they participate. *First Trust Co. v. Carlsen* 118
2. In suit against a corporation for fraud, officers who acted in the matter are proper parties defendant. *First Trust Co. v. Carlsen* 118
3. Corporations not incorporated under Nebraska law cannot take or hold realty in Nebraska in trust. *Stork v. Evangelical Lutheran Synod* 311
4. Relation between stockholder and corporation is a contractual relation arising out of stock subscription, receipt for money paid, the stock certificate, together with articles of incorporation and by-laws, and statutes. *Kennedy v. Central Power Co* 637

Costs.

To review taxation of attorney's fee as costs, a motion to retax must be made and a ruling had thereon. *McGinley v. Union P. R. Co* 855

Courts.

1. A defendant contesting a suit on one ground in municipal court cannot set up a different defense in district court. *McDowell v. Metropolitan Life Ins. Co* 23
2. Expressions in opinions must be interpreted with reference to the facts and issues determined therein. *Carlsen v. State* 84
3. The county court is a court of record, and the county judge, in whatever official capacity he may act, is judge of a court of record. *Martin v. Sanford* 212

4. A case appealed from the county court to the district court is to be tried on the issues presented in the county court. *In re Estate of Shierman* 230
5. The county court and not the district court has original jurisdiction in probate matters. *In re Estate of Shierman* 230
6. County courts have equity jurisdiction in matters of probate. *In re Estate of Shierman* 230
7. Where two or more courts have jurisdiction of a cause of action, the one first acquiring jurisdiction will retain it. *State, ex rel. Sorensen, v. Mitchell Irrigation District* 586

Creditors' Suit.

In a creditors' suit, all parties interested in the controversy or who may be affected by the judgment should be made parties. *Waterbury State Bank v. O'Neill* 150

Criminal Law. SEE DIVORCE, 2, 3.

1. Where it is apparent from bill of exceptions that material evidence has been omitted, it will not be considered in error proceedings. *Preston v. State* 1
2. Generally, in a criminal action, the only method to secure a new trial is by motion filed at the same term and within three days after verdict. *Newcomb v. State* 69
3. The writ of error *coram nobis* is available in a proper case. *Newcomb v. State* 69
4. Proceedings to obtain a writ of error *coram nobis* are essentially civil in character, and are governed as to time of commencement by the Code of Civil Procedure. *Newcomb v. State* 69
5. One seeking by writ of error *coram nobis* to vacate a judgment obtained against him when insane must begin proceedings for the writ within two years after the disability is removed. *Newcomb v. State* 69
6. The writ *coram nobis* does not lie to bring into the record facts known to the petitioner before judgment. *Carlsen v. State* 84
7. The common-law writ of error *coram nobis* is preserved in Nebraska by section 49-101, Comp. St. 1929. *Carlsen v. State* 84
8. The common-law writ of error *coram nobis held* not abolished. *Carlsen v. State* 84
9. The only method provided by statute for securing a new trial in a criminal case is by motion filed at the term and within three days after verdict. *Carlsen v. State* 84
10. Corrective judicial process to remedy a wrong when

newly discovered evidence casts doubt on the correctness of a verdict or establishes defendant's innocence *held* not provided by statute. *Carlsen v. State* 84
11. The statute authorizing a new trial in civil actions at a subsequent term on the ground of newly discovered evidence is not available in a criminal case. *Carlsen v. State* 84
12. A court of equity will not interfere for the purpose of granting a new trial in a criminal case for newly discovered evidence. *Carlsen v. State* 84
13. The district court possesses no inherent or common-law power to grant new trials in criminal cases for newly discovered evidence at a term subsequent to that at which the verdict was found. *Carlsen v. State* 84
14. The writ of habeas corpus is not available as a remedy to correct an error of fact resulting in a wrongful conviction. *Carlsen v. State* 84
15. The right to apply for a pardon to an administrative board does not meet requirements of the Constitution guaranteeing a remedy for an injury by due process of law. *Carlsen v. State* 84
16. The verdict of a jury must represent the concurring intelligence, reason and judgment of the entire jury, free from outside influence. *Bramlett v. State* 180
17. Where a bailiff in charge of a jury enters the jury room and by his attitude and statements influences a juror to change his vote, the verdict and sentence will be vacated. *Bramlett v. State* 180
18. The county court, on defendant's plea of guilty to a complaint charging a misdemeanor, may render judgment. *Martin v. Sanford* 212
19. Issuance of a warrant or arrest of accused is not necessary where accused pleads guilty to a complaint charging a misdemeanor. *Martin v. Sanford* 212
20. Omission on the docket of the date of a judgment in the county court imposing sentence in a misdemeanor case is a mere irregularity; the date may be fixed by reference to the proceedings or extrinsic evidence. *Martin v. Sanford* 212
21. In a prosecution for rape of a female 11 years of age, where it is not charged that offense was accomplished against her will or by force, failure to instruct as to simple assault *held* not error, in absence of a request therefor. *Beer v. State* 366
22. Instruction as to reasonable doubt containing statement that jurors were not at liberty to disbelieve as jurors

if they believed as men, while not commended, *held* not to authorize reversal. *Beer v. State* 366
23. In a prosecution for operating a motor vehicle while intoxicated, a witness who had known defendant for years, had observed him at night driving an unlighted truck into street curbs, and had heard him trying to argue, when immediately arrested, that he was sober, *held* competent to testify to opinion that he was intoxicated. *Haffke v. State* 713
24. A defect in foundation for introduction of an exhibit admitted in evidence may be cured by subsequent testimony; the order of introducing proofs not being prejudicial. *Haffke v. State* 713
25. In a prosecution for operating a motor vehicle while intoxicated, a partially filled bottle containing a liquid labeled "Whisky," from which defendant admitted having drunk, *held* properly admitted in evidence. *Haffke v. State* 713
26. Permitting indorsement of names of additional witnesses on the information after trial has begun *held* not error, in absence of showing of prejudice or request for continuance. *McCartney v. State* 716
27. The mere fact that witnesses in a criminal prosecution are police officers *held* not to entitle accused to an instruction that the jury in weighing their testimony should exercise greater care than in weighing testimony of other witnesses. *McCartney v. State* 716
28. In absence of request, failure to give instruction relative to weighing circumstantial evidence is not error. *Doerffler v. State* 720
29. Except as to crimes involving motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses by accused is not admissible. *Doerffler v. State* 720
30. Where punishment prescribed by statute exceeds jurisdiction of the county court, a judgment of conviction and sentence thereunder are void. *Allen v. State* 722
31. Judgment of a court without jurisdiction of the subject-matter is not a bar to a second prosecution for the same offense. *Allen v. State* 722
32. Permitting witness to testify over defendant's objection that name of witness, although indorsed on the information before trial, had been omitted from copy served on defendant, *held* not error, in absence of showing of prejudice or request for continuance. *Allen v. State* 722
33. Necessity for continuance must be determined from facts and circumstances presented, and denial is not reversible

error, unless the record shows that defendant was prejudiced thereby. *Allen v. State* 722
34. Burglary may be proved by circumstantial evidence. *Liesenfeld v. State* 802
35. Circumstantial evidence outlined *held* sufficient to sustain conviction for burglary. *Liesenfeld v. State* 802
36. Instruction directing the jury to consider direct and circumstantial evidence, and stating that by direct evidence was meant evidence of eyewitnesses, *held* not ground for reversal, though there was no direct evidence of the principal fact, where eyewitnesses testified to circumstances connecting defendant with the felony. *Liesenfeld v. State* 802

Damages.

1. Amount of damages is question for jury. *Sprague v. Allied Mills* 394
2. Generally, one injured by breach of contract may recover all his damages, including profits prevented and losses sustained. *Parsons Construction Co. v. Gifford* 617

Death.

Unexplained and continuous absence of a person from home for seven years raises presumption of death. *In re Estate of Tilton* 872

Dismissal and Nonsuit.

Dismissal of action without prejudice before final submission of a case is a statutory right. *Duffy v. Cody* 737

Divorce.

1. Equity will not grant a divorce to a guilty petitioner, though the other party has been more culpable. *Studley v. Studley* 784
2. A sentence to the reformatory for women is a sentence to imprisonment in a "prison, jail or house of correction," constituting ground for divorce. *Studley v. Studley* 784
3. A sentence of not less than one year nor more than ten years under the indeterminate sentence law *held* a sentence for the maximum term. *Studley v. Studley* 784

Easements.

1. An easement by prescription can be acquired only by open, notorious, exclusive and adverse user for ten years. *Onstott v. Airdale Ranch and Cattle Co* 54
2. To establish an easement by prescription, the evidence must establish extent of adverse use for ten years. *Onstott v. Airdale Ranch and Cattle Co* 54

3. An easement acquired by prescription is limited in extent to adverse use during the ten-year period during which the easement was acquired. *Onstott v. Airdale Ranch and Cattle Co* 54
4. Temporary washouts of a dam through use of which defendant acquired prescriptive right to flood plaintiff's land did not affect the prescriptive easement. *Onstott v. Airdale Ranch and Cattle Co* 54
5. Where a prescriptive easement exists, the evidence must establish extent of use made within the period during which easement was acquired to justify issuance of an injunction. *Onstott v. Airdale Ranch and Cattle Co* 54

Elections.

1. The duties of an election canvassing board are purely ministerial, to tabulate the votes as returned to it. *State, ex rel. Campbell, v. Campbell* 177
2. An election canvassing board has no judicial power. *State, ex rel. Campbell, v. Campbell* 177
3. An election canvassing board has no power to inquire into the qualification of judges and clerk of election. *State, ex rel. Campbell, v. Campbell* 177
4. An election canvassing board has no authority to pass on the legality of votes. *State, ex rel. Campbell, v. Campbell* 177

Electricity.

1. In a hearing on a controverted question of fact before the state railway commission, it should refrain from determination of such fact until hearing has been had on the merits. *Miller v. Iowa-Nebraska Light & Power Co.* 757
2. Power of railway commission over electric rates *held* not limited to fixing rural electric rates where a physical connection has been ordered by the commission. *Miller v. Iowa-Nebraska Light & Power Co* 757
3. The state railway commission has jurisdiction, on application of consumers, to determine what are reasonable rates for furnishing electric energy to rural users along transmission lines of companies engaged in generating and transmitting electric current for sale. *Miller v. Iowa-Nebraska Light & Power Co* 757

Eminent Domain. SEE TRIAL, 13.

1. A mortgagee is an "owner" within the eminent domain statute. *Northwestern Mutual Life Ins. Co. v. Nordhues* 379

2. A mortgagee is a necessary party in an action to condemn realty for public use under the right of eminent domain. *Northwestern Mutual Life Ins. Co. v. Nordhues* 379

Equity.

1. A court of equity obtaining jurisdiction for any purpose will retain it for purpose of administering complete relief. *Parsons Construction Co. v. Gifford* 617
2. A court of equity obtaining jurisdiction will retain it where the issues presented are in the nature of an accounting. *Parsons Construction Co. v. Gifford* 617
3. A court of equity will entertain jurisdiction to prevent a multiplicity of suits. *Parsons Construction Co. v. Gifford* 617

Estoppel.

1. Where a party gives a reason for his conduct and decision in a controversy, he cannot, after litigation has begun, change his ground. *McDowell v. Metropolitan Life Ins. Co.* 764
2. Estoppel, to be available, must be pleaded. *Curley v. White* 829

Evidence.

1. Judicial record of sentence in a criminal prosecution, or a duly certified copy thereof, is the best evidence of the penalty imposed. *Hoagland v. State* 6
2. A nonexpert may give his opinion concerning the mental condition of a person with whom he has had an extended and intimate acquaintance. *Davidson v. First American Ins. Co.* 184
3. Letter containing self-serving statements *held* properly excluded. *Waits v. Columbia Fire Underwriters Agency* 207
4. Unauthorized statements by agent made after close of transaction cannot be received in evidence against principal. *Waits v. Columbia Fire Underwriters Agency* 207
5. In an action for false imprisonment based on arrest without a warrant, parol evidence as to issuance of the warrant and plaintiff's arrest *held* competent. *Martin v. Sanford* 212
6. Declarations of a party to the record, or of one identified in interest with him, against his interest are admissible in evidence. *Martin v. Sanford* 212
7. Oral statements of county judge as to issuance of warrant in false imprisonment case *held* properly excluded. *Martin v. Sanford* 212
8. An owner of household goods used for family purposes

is competent to testify to the value thereof. *Sprague v. Allied Mills* 394
9. Admissions of party with reference to acquisition and disposition of property made before a referee in bankruptcy *held* admissible against him in an action in the state court wherein the good faith of such acquisition and disposition was an issue. *Gentry v. Burge* 493
10. Admissions of party are admissible in evidence against him, but will not affect others unless a joint interest or privity of design among them exists. *Gentry v. Burge* .. 493
11. In an action to set aside bankrupt's transfers of property, the bankrupt's admissions made before a referee in bankruptcy are admissible as against transferees, where there was joint interest and privity of design in disposition and acquisition of property to place it beyond reach of creditors. *Gentry v. Burge* 493
12. A medical witness having testified on direct examination to statements of a party concerning her physical condition may testify on cross-examination as to other statements made at the time. *Sweeney v. Midwest Life Ins. Co.* 521
13. A testator is presumed to know that his widow may exercise her right under the statute to take against the will, and that such right is paramount to his will. *In re Estate of Hunter* 529
14. Parol evidence is admissible to show consideration for a contract, and of what it consisted. *Luikart v. Massachusetts Bonding and Ins. Co* 771
15. A declaration which is merely a narrative of a past transaction is not *res gestæ*. *Milton v. City of Gordon* 888

Executors and Administrators.
1. Rule that, on appeal to district court from order of county court allowing or rejecting a claim against an estate, pleadings need not be filed unless directed by the court, *held* abrogated by statute. *Weideman v. Estate of Peterson* 74
2. Administrator *held* not chargeable with loss of interest occasioned by conversion of shares of stock into money. *In re Estate of Hunter* 529
3. Evidence *held* to support finding disapproving administrator's final report. *In re Estate of Swanson* 751

False Imprisonment.
1. A known officer in making an arrest under a valid warrant should, on demand, show his warrant or notify the party arrested of its substance; but, if the party

has actual knowledge of the charge, reading the warrant or its actual production is unnecessary. *Martin v. Sanford* 212
2. Proceedings in false imprisonment case *held* valid. *Martin v. Sanford* 212

Forcible Entry and Detainer.

When a landlord leases lands to a new tenant and the old tenant holds over unlawfully, the landlord is a proper party to maintain a forcible detainer action. *Kouma v. Murphy* 892

Fraud.

Facts necessary to recovery for deceit stated. *Bowen v. Johnson* 868

Fraudulent Conveyances.

1. A deed by judgment debtor to wife's sister is presumptively fraudulent as to existing creditors; the burden being on parties to the conveyance to establish good faith of the transaction. *Lincoln Savings & Loan Ass'n v. Mann* 26
2. In a creditor's suit attacking a voluntary conveyance by a judgment debtor to his wife's sister, a petition pleading facts showing intent to hinder and delay creditors is a sufficient plea of intent. *Lincoln Savings & Loan Ass'n v. Mann* 26
3. In a creditor's suit, evidence that when conveyance was executed the judgment debtor owed plaintiff a debt partially secured by mortgage, *held* sufficient to show that plaintiff was then a creditor. *Lincoln Savings & Loan Ass'n v. Mann* 26
4. Conveyance of land from a judgment debtor to his wife's sister *held* fraudulent as to existing creditors. *Lincoln Savings & Loan Ass'n v. Mann* 26
5. The court will carefully scrutinize a conveyance from husband to wife by which other creditors are prevented from collecting their claims. *Waterbury State Bank v. O'Neill* 150
6. Where a creditor's suit is brought in the same county as the judgment upon which it was founded was obtained, it is sufficient to allege and prove the judgment; proof that judgment was indexed and docketed being unnecessary. *Waterbury State Bank v. O'Neill* 150
7. In creditor's suit to set aside conveyance by debtor to wife for alleged preexisting debt, the wife must show that debt was genuine, and that she acted in good faith in obtaining the title. *Waterbury State Bank v. O'Neill* 150

8. In determining interests of parties to alleged fraudulent conveyance, equity looks through form and regards substance of transaction. *McGuire v. Stimbert* 383
9. When a conveyance of realty from parent to child places the property beyond the reach of grantor's creditors, the transaction will be closely scrutinized, and the grantee must establish *bona fides* of the conveyance. *Farmers State Bank of Smithfield v. Renken* 416
10. Transfer of realty from father to son *held* not fraudulent as to father's creditors; fraudulent intent on part of son not being shown. *Farmers State Bank of Smithfield v. Renken* 416
11. In an action to set aside transfers of property made to members of family for the alleged purpose of defrauding creditors, the burden is on transferees to show that transfers were not fraudulent. *Gentry v. Burge* 493
12. The intent with which a husband deeds realty to his wife, while he is indebted to others, is a question of fact. *Logie v. Snyder* 583
13. To make a conveyance fraudulent, fraudulent intent participated in by both parties to the transfer must exist. *Logie v. Snyder* 583
14. The presumption that a deed from a husband to his wife is fraudulent as to creditors may be overcome by clear and convincing evidence. *Logie v. Snyder* 583

Garnishment.

Premium due by state to surety on state treasurer's bond is not garnishable by creditors of surety, since garnishment does not lie against the state except as authorized by law. *State, ex rel. National Surety Corporation, v. Price* 433

Guaranty.

In action on contract of guaranty, evidence *held* to sustain judgment for plaintiff. *McConnon & Co. v. Bellamy* 743

Habeas Corpus.

1. A prisoner confined under a commitment conforming to the sentence imposed is not entitled to discharge on habeas corpus before serving his term, unless the sentence or commitment is void. *Hoagland v. State* 6
2. In habeas corpus, the burden is on petitioner to prove his detention is unlawful. *Hoagland v. State* 6
3. Errors not invalidating the sentence or commitment in a criminal prosecution are unavailing for discharge of prisoner on habeas corpus. *Hoagland v. State* 6
4. Two sentences *held* to run consecutively and prisoner

held not entitled to discharge on habeas corpus before completing both sentences. *Hoagland v. State* 6

Homestead.

1. Where testator gave his wife fee simple title to realty occupied by both during his lifetime as a homestead and which was at his death occupied by his surviving spouse as a homestead, at her death her heir takes a homestead interest in such realty exempt from debts of either husband or wife. *Lewis v. McAdams* 490
2. In suit to partition homestead, evidence *held* to sustain decree. *Meck v. Wiig* 746

Husband and Wife.

1. Wife's estate *held* chargeable with repayment of proceeds of sale of property conveyed to her under antenuptial contract which is held to be invalid. *Kingsley v. Noble* 130
2. Antenuptial agreements are enforceable, provided they meet the requirements of equity. *Kingsley v. Noble* 130
3. Antenuptial agreement *held* not fairly procured as required by equity. *Kingsley v. Noble* 130
4. A court of equity should construe an antenuptial contract in the light of circumstances surrounding the particular case, and enforce or annul the agreement according to the facts. *Kingsley v. Noble* 130
   Wulf v. Wulf 158
5. Where each party to an antenuptial contract knows the extent and value of the other's property, disproportion between contractual provision for wife and amount allowed by statute does not require those claiming under the husband to prove full disclosure of husband's property in an action wherein the wife seeks cancelation of the contract. *Wulf v. Wulf* 158
6. Antenuptial contract *held* not void on ground that husband had not fully disclosed the nature and extent of his property. *Wulf v. Wulf* 158
7. Mutual release by each party of all interest in farm lands of the other is a sufficient consideration for an antenuptial contract. *Wulf v. Wulf* 158
8. A prospective wife's ignorance of her legal rights in the intended husband's property, or of her share in his estate if she survives as his widow, will not entitle her to avoid an antenuptial contract. *Kingsley v. Noble* 808
9. When each party to an antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the

prospective wife does not shift the burden of proof to the husband's representatives to sustain the contract. *Kingsley v. Noble* 808
10. A married woman's contract, not made with reference to her own separate trade, business or profession, can be enforced only against the estate she possessed at date of contract. *Curley v. White* 829

Indictment and Information.
1. A general demurrer admits facts well pleaded, but not conclusions of pleader. *Carlsen v. State* 84
2. Riot and unlawful assembly are kindred offenses in contemplation of law and may be charged in the same complaint. *Bloor v. State* 407
3. In a prosecution for unlawful assembly, a complaint charging more than the elements essential to such an offense *held* not vulnerable to a motion to quash. *Bloor v. State* 407

Insurance.
1. Payment of forged check by drawee bank *held* to constitute a loss for which bonding company is liable under banker's blanket forgery and alteration policy. *United States Fidelity & Guaranty Co. v. First Nat. Bank* 102
2. Under a policy requiring weekly attendance of a physician on assured, evidence that the physician gave weekly attendance for three months but attended assured only occasionally for remainder of the disability period, and that weekly attendance would have been of no value during latter period, *held* sufficient to meet terms of the policy. *Davidson v. First American Ins. Co.* 184
3. Insurer failing to set up a condition precedent contained in policy sued on and failing to allege its breach by insured waived such defense. *Davidson v. First American Ins. Co* 184
4. Provision of policy indemnifying insured for loss of time from bodily sickness, contracted after policy had been in continuous force for not less than fourteen days, covers sickness first manifesting itself after such period, although cause of sickness antedated the policy. *Davidson v. First American Ins. Co* 184
5. Operators of taxicabs for hire must furnish indemnity to the state railway commission for its approval. *State v. Mann* 195
6. The state railway commission has power to prescribe the amount, terms, and provisions of liability insurance for taxicabs. *State v. Mann* 195

7. Whether tornado policy was issued *held* question for jury. *Waits v. Columbia Fire Underwriters Agency* 207
8. Statute relating to insurance agents does not define the scope of agency except when the agent is performing act of soliciting insurance, collecting premiums, or making a contract for insurance. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
9. Insurer issuing policy as result of agent's act is bound by knowledge agent had affecting issuance of policy, but knowledge thereafter acquired is not imputed to insurer. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
10. After a policy is issued and delivered, the agent's authority with relation thereto is determined by his contract with insurer. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
11. Soliciting agent *held* agent of insured in procuring transfer of policy. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
12. Insured who has parted with title to insured premises cannot assign the policy after a fire, without insurer's knowledge and consent, so as to make insurer liable for loss to holder of title. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
13. Termination of lease, whereby title to buildings and fixtures belonging to lessee becomes lessor's property, and transfer of title to insured personalty, without notice to the insurer, constitute change of title voiding policy. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
14. Insurer may be estopped from denying liability where, by its course of dealing and acts of its agent, it has induced insured to pursue a course to his detriment. *Everett v. Metropolitan Life Ins. Co* 386
15. Where state department of insurance is appointed receiver of insurance company for purpose of liquidation, it becomes an arm of the court, and is subject to the court's orders rather than the governor's orders. *State, ex rel. Good, v. National Old Line Life Ins. Co* 473
16. Assets of an insurance company in process of liquidation are trust funds for payment of debts. *State, ex rel. Good, v. National Old Line Life Ins. Co* 473
17. The attorney for the department of insurance in its capacity as receiver of an insurance company is an officer of the court, and cannot be removed by the head of the department or by the governor. *State, ex rel. Good, v. National Old Line Life Ins. Co* 473

18. In suit to recover on accident policy, question whether death resulted from a fall or from disease *held* properly submitted to jury. *Sweeney v. Midwest Life Ins. Co.*..... 521
19. Automobile fire insurer *held* to have waived proofs of loss. *Luthy v. Farmers Mutual Hail Ins. Ass'n*..... 579
20. The term "due proof of such disability," as used in an insurance policy, *held* not to require any particular form of proof. *Wray v. Equitable Life Assurance Society* 703
21. Bonds guaranteeing contracts of third persons are essentially contracts of insurance, and rules of liberal construction and of construction against insurer, if an ambiguity exists, apply. *Luikart v. Massachusetts Bonding and Ins. Co.*..... 771
22. The holder of the bond given to guarantee performance of a contract, who has been injured by breach of the contract, may sue on the bond without first exhausting his remedies against parties liable on the contract. *Luikart v. Massachusetts Bonding and Ins. Co*..... 771

Intoxicating Liquors.

1. Evidence *held* sufficient to sustain conviction for unlawful possession of intoxicating liquors. *Fast v. State*..... 263
2. Evidence *held* sufficient to sustain conviction for unlawful sale of intoxicating liquor. *Nunnenkamp v. State*.... 264

Judgment.

1. Judgment for defendant in action on account stated, to which defense was that no account had been stated between the parties, will not support plea of *res judicata* in a subsequent action by plaintiff on open account to recover reasonable value of items comprising original account. *Neslund v. Kinnan*..... 339
2. A district court can vacate or modify its judgments after the term only for reasons stated and within time limited by statute. *Hoeppner v. Bruckman*..... 390
3. Where application for modification of a decree for fraud fails to set forth that facts constituting alleged fraud were not discovered within two years after trial, and fails to show any reason for extending the two years allowed by statute for modifying judgments procured by fraud, relief cannot be granted. *Hoeppner v. Bruckman* 390
4. Where it appears from evidence at hearing on application to modify a decree for fraud after the term that the defense alleged in the application cannot be sustained, the application should be denied. *Hoeppner v. Bruckman* 390

5. A judgment on a question directly involved in one suit is conclusive as to that question in another suit between the same parties, but the judgment will not so operate, unless it appears on the face of the record or is shown by extrinsic evidence that the precise question was raised and determined in the former suit. *Lincoln Nat. Bank & Trust Co. v. Grainger* 451
6. The district court may enter a *nunc pro tunc* order to show an order or judgment which was rendered at a previous term of court, but which was not journalized at such term. *Wescott v. Mathers* 846
7. The right of heirship of a daughter is not *res judicata* by a judgment entered on dismissal and disclaimer filed by her mother. *In re Estate of Tilton* 872

Jury.

Verdict based in part on facts within juror's personal knowledge set aside. *Cook v. Patterson* 16

Landlord and Tenant.

1. Lessee's delivery of possession of personalty to lessor as security for rent does not transfer title, but is in the nature of a pledge, and delivery of possession of leased realty as pledge does not terminate the lease, unless surrender of lease is intended. *Krug Park Amusement Co. v. New York Underwriters Ins. Co* 239
2. In absence of express contract to the contrary, a tenant takes demised premises as he finds them, there being no warranty by the landlord that they are safe or fit for occupancy. *Roberts v. Rogers* 298
3. "Latent defect" defined. *Roberts v. Rogers* 298
4. A landlord is under no duty to change the visible form and mode of simple construction of leased premises to make them safe for his tenant, and is not bound to remove obvious sources of danger, since as to these the tenant assumes the risk. *Roberts v. Rogers* 298
5. Defendant *held* not liable to tenant for injuries caused by defective trapdoor where defect was obvious to any observer. *Roberts v. Rogers* 298
6. A severable half of a leasehold estate may be assigned in absence of fraud, or statutory or contractual restriction, where the assignment will not encumber or impair the reversion. *Frankfurt v. Neon Radiant Sign Co.* 405
7. Judgment restoring 99-year lease to lessor *held* erroneous for failure to give assignee credit for amount which he contributed to improving the leasehold estate. *Frankfurt v. Neon Radiant Sign Co* 405

8. The court in construing a 99-year lease must give effect to the intent of the parties gathered from the whole instrument, if consistent with law. *Towle v. Morrell*..... 398
9. The lessee and his successors in interest cannot by contract independently of lessor destroy or encumber the reversion. *Towle v. Morrell*..... 398
10. Lessee has right to assign lease in absence of fraud or contractual restrictions in lease. *Towle v. Morrell*..... 398
11. First assignee of lease, which authorized assignment with release of lessee's liability for future rent, could sublet a portion of the leasehold estate without liability for future rent of assigned portion. *Towle v. Morrell*.... 398
12. Whether acts of landlord constitute constructive eviction or are intended as an eviction must be determined from facts of each particular case. *Kimball v. Lincoln Theatre Corporation*..... 446
13. Premature commencement of a suit on a lease for rent, without a demand for rent, *held* not to constitute constructive eviction, and an instruction that would not aid defendant if he would not have paid the rent *held* not erroneous. *Kimball v. Lincoln Theatre Corporation*..... 446
14. Acts of landlord *held* not such interference with tenant's possession as to indicate landlord's intention that tenant should no longer hold premises, and did not amount to a reentry. *Johnston v. Jackson*..... 545
15. Provision in a lease reserving to the landlord title and possession in crops to be grown on leased premises until lease is complied with and rent paid is valid. *Wescott v. Mathers* 846
16. A cropper takes his estate in the crop, and performs his work thereon, subject to the terms of the lease of the tenant under whom he holds. *Leffelman v. Matschullat* 884
17. Where one in possession of realty accepts a lease from a third party, the presumption exists that he yields possession which he held under claim of right and is thereafter holding possession under the lease. *Kouma v. Murphy* 892
18. A lessee is estopped to deny his landlord's title. *Kouma v. Murphy*..... 892
19. Estoppel of tenant to deny title of landlord extends to every one in privity with him, and it inures to the benefit of any person to whom the landlord's title may pass. *Kouma v. Murphy*..... 892

Limitation of Actions.

1. An oral promise to compensate one for past services by giving him a legacy is an independent contract to

which the statute requiring a new promise to be in writing does not apply. *Weideman v. Estate of Peterson* 74

2. The statute of limitations as to action to recover special assessments voluntarily paid begins to run from time of payment of assessments. *Dorland v. City of Humboldt* 477
3. Action to recover illegal taxes voluntarily paid must be brought within four years after payment. *Dorland v. City of Humboldt* 477
4. As between holder of tax sale certificate and county from which a refund of taxes paid is sought, limitations begin to run from time of payment of taxes and does not await judicial determination that the taxes are illegal. *Gibson v. Dawes County* 706
5. A claim against a county by holder of tax sale certificate for refund of taxes assessed against realty sold is barred by limitations where not presented to county for allowance within five years from date of sale. *Gibson v. Dawes County* 706
6. Where an action for refund of taxes involved in a county treasurer's tax sale certificate is barred by limitations, holder of certificate is not entitled to recover back from the county taxes paid subsequent to the treasurer's sale. *Gibson v. Dawes County* 706
7. A claim by holder of tax sale certificate against the county for refund of illegal taxes paid *held* barred by limitations where not presented to the county until more than five years after date of certificate; the bar being complete before the taxes were adjudged illegal in a suit to which the county was not a party. *Wetzel v. Dawes County* 711
8. An action to enforce an award of the railway commission for an overcharge of shipping rate may be commenced any time within five years after exaction of the overcharge. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co* 726
9. Where a statute grants a new remedy and places a limitation of time within which complainant must act, the limitation is a limitation of the right as well as of the remedy, and in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitation. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co* 726

Malicious Prosecution.

Recovery of damages for malicious prosecution *held* precluded by plea of guilty. *Martin v. Sanford* 212

Mandamus.

1. Mandamus will not lie to compel an irrigation district to supply water to land in the district, where the entire appropriation of water for the district has been previously allocated to other lands in the district entitled thereto. *State, ex rel. Lackey, v. Gering & Ft. Laramie Irrigation District* 48
2. Finding of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless it is clearly wrong. *State, ex rel. Lackey, v. Gering & Ft. Laramie Irrigation District* 48
3. Mandamus lies to compel an election canvassing board, which refuses to canvass votes, to reassemble and perform its duty. *State, ex rel. Campbell, v. Campbell* 177
4. Mandamus is the proper remedy against state officers to enforce execution and delivery of a warrant where appropriation therefor has been duly made by the legislature. *State, ex rel. National Surety Corporation, v. Price* 433

Marriage.

A common-law marriage was formerly recognized in Nebraska. *In re Estate of Tilton* 872

Master and Servant.

1. Employee housekeeper *held* to have assumed the risks of pranks of employer's dog. *Corley v. Hubbard* 38
2. An employee assumes risks not generally incident to his employment, provided he appreciates the danger, or the risks are so plainly observable that he must be presumed to know them. *Corley v. Hubbard* 38
3. In determining amount of compensation award, injured employee's wages must generally be computed according to terms of contract of hiring in force at time of accident. *Drum v. Omaha Steel Works* 273
   Gorham v. Kiewit Sons Co 277
4. Bridge building in Nebraska *held* not seasonal employment or employment dependent on weather, within statute providing method of computing wages of injured employee. *Gorham v. Kiewit Sons Co* 277
5. Injury to employee must arise out of and in course of employment, to be compensable. *De Porte v. State Furniture Co* 282
6. Injury to employee while on way to lunch *held* not to arise out of and in course of employment. *De Porte v. State Furniture Co* 282
7. "Independent contractor" defined. *Reeder v. Kimball Laundry* 306

8. Whether one is an "employee" or "independent contractor" must be determined from the facts in each particular case. *Reeder v. Kimball Laundry* 306
9. A truck owner who contracted to haul coal from railroad cars to the employer's coal bins *held* to be an "independent contractor" and not an "employee." *Reeder v. Kimball Laundry* 306
10. An employer, against whom award of compensation is allowed by the compensation commissioner, need not on appeal to district court reverse title of case, but may file petition therein as defendant. *McNeil v. Omaha Flour Mills Co* 329
11. Heat prostration is a compensable accident, if the workman is subjected to a greater hazard from heat than that to which the public generally is subject. *McNeil v. Omaha Flour Mills Co* 329
12. An employee, to recover for personal injuries under the federal statute, must allege and prove negligence of employer proximately causing injury. *Hick v. Chicago & N. W. R. Co* 336
13. Nebraska compensation act *held* not applicable where contract of employment was made in another state where the employee was injured. *Rigg v. Atlantic, Pacific & Gulf Oil Co* 412
14. Ascertainment of the amounts payable under the employers' liability law is a prerequisite to commutation. *Miller v. Central Coal & Coke Co* 739
15. The public has an interest in commutation of an employee's compensation. *Miller v. Central Coal & Coke Co.* 739
16. Commutation of compensation is only granted on statutory terms. *Miller v. Central Coal & Coke Co* 739
17. In hearing on application for lump sum settlement of compensation, the trial court should inquire into nature and extent of injury, disability, and whether settlement is for best interests of the workman or his dependents. *Miller v. Central Coal & Coke Co* 739
18. Injuries, to be compensable, must be caused by an accident arising out of and in the course of employment. *Seversike v. Omaha Flour Mills Co* 754
19. Compensation cannot be recovered for injury to employee while performing service for himself. *Seversike v. Omaha Flour Mills Co* 754
20. Volunteer village firemen are not village employees within the workmen's compensation law until they have been recommended by chief of fire department for

membership therein to, and confirmed by, the chairman and board of trustees. *Eagle Indemnity Co. v. Village of Creston* ... 850
21. A compensation claimant must establish that disability was caused by an accident arising out of and in course of employment. *Milton v. City of Gordon* ... 888
22. Evidence *held* not to show disability arising out of and in course of employment. *Milton v. City of Gordon* ... 888

Mechanics' Liens.
1. To secure a lien, a subcontractor must file statement of amount due within sixty days from last date of furnishing labor or material. *Parsons Construction Co. v. Gifford* ... 617
2. Generally, there is no debt existing between owner of premises and a subcontractor independent of the statutory lien. *Parsons Construction Co. v. Gifford* ... 617
3. A subcontractor is not entitled to a mechanic's lien on a building where the construction is defective. *Parsons Construction Co. v. Gifford* ... 617
4. A trifling failure to perform a contract is not sufficient to defeat a mechanic's lien where there is substantial compliance. *Parsons Construction Co. v. Gifford* ... 617
5. A subcontractor *held* not entitled to mechanic's lien because of failure to substantially comply with contract. *Parsons Construction Co. v. Gifford* ... 617
6. To perfect a mechanic's lien, a general contractor must file with the proper officer a verified claim within four months from date last material was furnished or last labor performed under the contract. *Davidson v. Shields* 877
7. A contractor cannot extend the time for filing a mechanic's lien by substituting proper material for defective material. *Davidson v. Shields* ... 877

Mortgages.
1. Defect of parties defendant is not ground for refusing confirmation of mortgage foreclosure sale. *Prudential Ins. Co. v. Diefenbaugh* ... 59
2. Denying application for moratory stay of foreclosure proceedings *held* not an abuse of discretion, where amount of mortgage lien exceeds value of mortgaged lands. *Clark v. Hass* ... 112
3. Bondholders of real estate mortgage *held* to have ratified trustee's agreement for extension of maturity date of mortgage. *First Trust Co. v. Carlsen* ... 118
4. Failure, in petition to foreclose mortgage, to allege that there had been no action at law to collect the debt and

that the debt had not been paid *held* not ground for reversal on appeal, where omitted allegations were read into record of trial with court's permission, were put in issue by answer, and the issues tried. *Hitchens v. Alderson* 573

5. Delivery of note and mortgage may be proved by circumstantial evidence. *Hitchens v. Alderson* 573
6. One test to determine whether a warranty deed, absolute on its face, should be held to be a mortgage is whether the parties treat each other as debtor and creditor. *Schroeder v. Bartlett* 645
7. Mere inadequacy of price will not preclude confirmation of a foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Erickson v. Hansen* 806
8. In a mortgage foreclosure, one having no interest in the premises and no personal liability for lien thereon is not entitled to aid of the moratory statute. *Erickson v. Hansen* 806
9. Defendant in a foreclosure suit is not entitled to benefit of the moratory statute where the mortgage lien equals or exceeds actual value of the mortgaged premises, and where the premises sold for full amount of the mortgage lien, interest and costs. *Erickson v. Hansen* 806
10. Where the owner in fee of realty acquires a first mortgage lien thereon, no merger occurs if there is an intervening lien and it was the owner's intention at time of acquiring the lien that merger should not occur. *Curley v. White* 829
11. Before a court of equity will cancel an assignment of a mortgage secured by fraud, the consideration must be returned. *Bowen v. Johnson* 868

Municipal Corporations.

1. After passage of an appropriation bill by a city of the second class, its power to lawfully contract is determined by amounts carried in such bill, added to amount on hand of previous levies and appropriations at the date of making such engagement, and such power to contract is not diminished by failure of corporate authorities to assess to the extent authorized. *LeBarron v. City of Harvard* 460
2. A property owner who neglects to pursue statutory remedy for review of special assessment cannot, in a collateral proceeding, attack validity of the assessment, except for fraud, a fundamental defect, or want of jurisdiction. *Penn Mutual Life Ins. Co. v. City of Omaha* 733

Negligence.

1. Where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for resulting damages, though one of them alone might not have caused the injury. *Rogers v. Brown* 9
2. Negligence and contributory negligence are questions for jury. *Moncrief v. Interstate Transit Lines* 168
3. The proprietor of a store is not an insurer against accidents to customers, but must exercise reasonable care to keep premises safe for use of customers. *Glenn v. Grant Co* 173
4. Negligence may be proved by circumstantial evidence. *De Porte v. State Furniture Co* 282
5. Negligence is question for jury. *Wilfong v. Omaha & C. B. Street R. Co* 600
6. A party negligently exposing himself to injury may nevertheless recover if defendant, after discovering his exposed situation, negligently injures him, or is negligent in not discovering his dangerous position. *Wilfong v. Omaha & C. B. Street R. Co* 600
7. In an action for negligently starting a fire, hearsay testimony as to origin of the fire *held* not admissible over proper objection. *Triplett v. Western Public Service Co* 799

New Trial.

1. Whether a new trial should be granted for newly discovered evidence depends on the facts in each particular case. *Erwin v. Watson Bros. Transfer Co* 64
2. Showing requisite to new trial for newly discovered evidence, stated. *Erwin v. Watson Bros. Transfer Co* 64
3. Refusing new trial for newly discovered evidence *held* error. *Erwin v. Watson Bros. Transfer Co* 64
   Weideman v. Estate of Peterson 74
4. Affidavits of jurors may not be received to contradict anything essentially inhering in the verdict. *De Porte v. State Furniture Co* 282
5. Affidavits or oral testimony of jurors may be received to avoid a verdict, to show misconduct of juror during the trial, or in the jury room, if the matter does not essentially inhere in the verdict. *De Porte v. State Furniture Co* 282

Pardon.

The pardoning power is not a corrective judicial process to remedy a wrong. *Carlsen v. State* 84

Pleading.

1. A motion to strike a petition may properly be overruled which cannot be allowed in substantially the same terms as requested. *Weideman v. Estate of Peterson* 74
2. Plaintiff suing on accident policy need not negative conditions and exceptions indorsed thereon. *Sweeney v. Midwest Life Ins. Co* 521
3. A judicial decree pleaded in a petition as part of a cause of action prevails over allegations in the petition. *Gibson v. Dawes County* 706

Principal and Agent.

1. A principal who accepts fruits of a contract made by an agent in excess of his authority is liable on the contract, if he had full knowledge or was put on inquiry from which he could have obtained full knowledge. *Lincoln Joint Stock Land Bank v. Bexten* 422
2. Principal's ratification of agent's unauthorized act has the same effect as prior express authority, and generally relates back to time when the unauthorized act was done. *Lincoln Joint Stock Land Bank v. Bexten* 422
3. Question whether contract made by agent in excess of his authority has been ratified by his principal is ordinarily a question for the jury. *Lincoln Joint Stock Land Bank v. Bexten* 422
4. A disclosed or partially disclosed principal is liable upon authorized contract in writing, if not negotiable or sealed, notwithstanding it purports to be contract of agent, unless principal is excluded as a party by terms of instrument or by agreement of the parties. *Lincoln Joint Stock Land Bank v. Bexten* 422
5. Insurance company *held* not liable for personal injuries caused by negligence of solicitor. *Neece v. Lee* 561

Process.

Regular use of process, though with a bad intention, is not a malicious abuse of process. *Martin v. Sanford* 212

Public Lands.

Evidence *held* to sustain decree that school land lease was obtained by fraud. *Walter v. Gillan* 514

Rape.

1. In a prosecution for rape, prosecutrix need not be corroborated as to the particular act constituting the offense; it being sufficient if she be corroborated as to

material circumstances from which, together with her testimony, the inference of guilt may be drawn. *Beer v. State* 366
2. In prosecution for rape, whether accused was sexually impotent *held* a question for the jury. *Beer v. State* 366
3. Instruction on assault with intent to commit rape *held* not erroneous for failure to define "intent." *Beer v. State* 366

Receivers.

1. Appointment of a receiver is purely an ancillary remedy. *Cressman v. Bonham* 201
2. Application for appointment of a receiver is addressed to the discretion of the court. *Cressman v. Bonham* 201

Sales.

Acknowledgment of conditional sales contract *held* sufficient. *Securities Investment Corporation v. Indiana Truck Corporation* 31

States.

1. Funds produced by operation of a regulatory statute providing for grain inspection, when covered into the state treasury, become a part of the state's funds, for withdrawal of which specific appropriation is necessary and to which constitutional and statutory provisions regarding drawing of warrants apply. *Bollen v. Price* 342
2. Within constitutional limitations, authority of the legislature over state funds is paramount, and it may prescribe by law the disposition thereof. *Bollen v. Price* 342
3. The legislature may determine fees collected under grain inspection act as in excess of the amount reasonably necessary to administer the measure, and provide for return of such excess to persons who paid it, through the state agency for the use of which the fund was created. *Bollen v. Price* 342
4. The state cannot be sued in its own courts without its consent. *Northwestern Mutual Life Ins. Co. v. Nordhues* 379
5. A suit to foreclose a mortgage involving realty to which the state has legal title is one against the state which cannot be maintained without its consent. *Northwestern Mutual Life Ins. Co. v. Nordhues* 379
6. The state has jurisdiction to determine liability of property within its territorial limits to seizure and sale under process of its courts. *State, ex rel. National Surety Corporation, v. Price* 433

Statutes.

1. Remedial statutes will be liberally construed. *Securities Investment Corporation v. Indiana Truck Corporation*.... 31
2. A statute is remedial whether it remedies a defect of the common law or of a preexisting statute. *Securities Investment Corporation v. Indiana Truck Corporation*.... 31
3. Special provisions of statute prevail over general provisions. *State v. Mann*..... 195
4. Statute providing for payment of delinquent taxes without interest or penalty *held* unconstitutional. *Tukey v. Douglas County*..... 353
5. A proviso attached to an appropriation, subject of which proviso is not referred to in title of act, is contrary to the Constitution. *State, ex rel. National Surety Corporation, v. Price*..... 433
6. Where a separable, unconstitutional portion of a statute was not an inducement to passage of a valid portion, the latter should be upheld. *State, ex rel. National Surety Corporation, v. Price*..... 433
7. Emergency relief act *held* unconstitutional. *Smithberger v. Banning*..... 651
8. The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding members of the class, relative to the subject of the legislation, which render appropriate its enactment. *State, ex rel. Taylor, v. Hall*..... 669
9. Judges of the supreme court, judges of the district court, members of board of control and state railway commission constitute separate classes for purposes of legislation. *State, ex rel. Taylor, v. Hall*..... 669
10. If portions of an act are unconstitutional, and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, or putting into effect a law which the legislature would not have passed had its attention been called to the invalid parts, the entire act must fall. *State, ex rel. Taylor, v. Hall*..... 669
11. Where invalid portions of an act constitute a material part of the inducement for the enactment, the entire act must fall. *State, ex rel. Taylor, v. Hall*..... 669
12. One cannot assert the unconstitutionality of an act on grounds which do not injure him in his personal or property rights; but where an act deals with a single subject and the party complaining is treated the same as all others with relation to that subject, the provisions

may be so interdependent that each must be considered as the inducement for the other. *State, ex rel. Taylor, v. Hall* 669
13. Statute, carrying emergency clause, prescribing new schedule of salaries for certain state officers *held* unconstitutional. *State, ex rel. Taylor, v. Hall* 669
14. In construing a statute, the court will consider the history of its passage, amendments offered, action taken thereon by senate and house, and all matters of common knowledge respecting the subject of legislation, for the purpose of arriving at the legislative intent. *State, ex rel. Taylor, v. Hall* 669
15. A provision germane to the subject-matter, which might have been made part of the original act, may be added by amendatory legislation. *Allen v. State* 722
16. In determining whether an act amending a previous act of the legislature is broader than its title, the court will consider the titles to both acts. *Miller v. Iowa-Nebraska Light & Power Co* 757
17. Where the title to an amendatory act sufficiently indicates the nature of legislation in it contained, it is immaterial whether provisions of the act are covered by the title to the act amended. *Miller v. Iowa-Nebraska Light & Power Co* 757
18. Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by use of intrinsic aids alone. *Miller v. Iowa-Nebraska Light & Power Co* 757

Stipulations.

1. Where a trial is had on a formal, judicial stipulation of facts, not limited by its terms, made in open court, and on appeal the judgment rendered is reversed and the cause remanded, such stipulation is admissible on a subsequent trial. *LeBarron v. City of Harvard* 460
2. An agreed statement of facts made in open court need not be signed by the parties or their attorneys. *LeBarron v. City of Harvard* 460
3. Parties will not be relieved from judicial stipulations unless application is seasonably made, on due notice, and good cause is shown. *LeBarron v. City of Harvard* 460
4. A judicial stipulation of facts cannot be contradicted by evidence tending to show the facts otherwise. *LeBarron v. City of Harvard* 460

Subrogation.

Subrogation cannot be enforced in proceedings to which

those whose equities are affected are not parties. *State, ex rel. Spillman, v. Western State Bank* 486

Taxation.

1. Part of building owned by religious, charitable, and educational institution, but leased and used for business purposes, is not exempt from taxation. *Walla Walla Lodge No. 56, I. O. O. F., v. Board of Equalization* 292
   Masonic Temple Craft v. Board of Equalization 293
2. Ownership and exclusive use of property determine whether or not it is entitled to exemption from taxation. *Masonic Temple Craft v. Board of Equalization* 293
3. In suit to foreclose tax lien, decree ordering sale of life estate and thereafter the estate in remainder, if necessary, *held* proper. *Moffitt v. Reed* 351
4. The word "voluntary" is used in a technical sense, within the rule that taxes voluntarily paid cannot be recovered. *Dorland v. City of Humboldt* 477
5. Liability of a county for refund of money paid by purchaser of realty at county treasurer's sale for delinquent taxes, where the title fails, is statutory and does not exist at common law. *Gibson v. Dawes County* 706
6. Petition for refund of taxes paid by purchaser of realty at county treasurer's sale for delinquent taxes is demurrable, if it does not state facts sufficient to show the statutory conditions which make the county liable. *Gibson v. Dawes County* 706
7. Where a building is constructed on a lot used primarily in connection with the building, the lot is exempt from taxation in the same proportion as the building. *Masonic Temple Craft v. Board of Equalization* 827

Torts.

All who instigate, promote, encourage, advise, countenance, aid, or abet commission of an actionable wrong by another are liable as principals. *First Trust Co. v. Carlsen* 118

Trial. SEE APPEAL. CRIMINAL LAW.

1. The court may properly direct verdict for plaintiff where evidence sustains his cause of action and is insufficient to sustain verdict for defendant. *Bachman v. Junkin* 165
2. On motion for a directed verdict, the adversary has the benefit of all material evidence and inferences reasonably deducible from facts in evidence. *Moncrief v. Interstate Transit Lines* 168
3. A motion for a directed verdict admits the truth of

evidence submitted by an adversary and entitles adversary to have the benefit of inferences reasonably deducible therefrom. *Martin v. Sanford* 212
4. Where the evidence is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, the court, on request, should direct a verdict in accordance with such conclusion. *Neslund v. Kinnan* 279
5. Instructions should be construed as a whole. *Sprague v. Allied Mills* 394
6. Request for separate statement of conclusions of fact and of law must be made not later than at final submission of cause to render compliance therewith compulsory. *State, ex rel. Sorensen, v. Mitchell Irrigation District* 586
7. On motion to dismiss at close of plaintiff's case, the court must determine as question of law whether plaintiff's evidence is sufficient to support judgment for plaintiff. *Schroeder v. Bartlett* 645
8. Where plaintiff failed to make a *prima facie* case the action was properly dismissed. *Schroeder v. Bartlett* 645
9. Reopening without notice a case which was dismissed when plaintiff rested, and granting without evidence the relief asked for in answer, *held* improper. *Schroeder v. Bartlett* 645
10. Where both parties at close of evidence move for a directed verdict, each invites the court to discharge the jury, determine the facts, and apply the law thereto. *Fidelity & Deposit Co. v. B. Grunwald, Inc* 749
11. Failure to instruct on plaintiff's theory of the case is not error, in absence of tender of instructions. *Roberts v. Kubik* 795
12. If objection to evidence is once made and overruled, objection to further testimony of same nature by same witness is not necessary. *Triplett v. Western Public Service Co* 799
13. The result of a jury's view of premises in condemnation proceedings may be considered only in connection with other competent evidence. *Stull v. Department of Roads and Irrigation* 822

Trover.

1. One who aids in conversion of property is responsible to the owner for its value. *Sprague v. Allied Mills* 394
2. Storage company and creditor of husband *held* liable for conversion of household goods stored in wife's name. *Sprague v. Allied Mills* 394

Trusts.

1. Every violation of duty by a trustee is a breach of trust. *First Trust Co. v. Carlsen* 118
2. It is trustee's duty to inform *cestui que trust* of all material facts relating to the subject of the trust. *First Trust Co. v. Carlsen* 118
3. Where a trustee has practiced concealment, evasion, or misrepresentation depriving the *cestui que trust* of material information relative to the subject of the trust to his injury, the trustee and others participating in the wrong are liable in damages. *First Trust Co. v. Carlsen* 118

Unlawful Assembly.

If three or more persons assemble together with intent to do any unlawful act, with force and violence, against the person or property of another, or to do any unlawful act against the peace, the offense is "unlawful assembly." *Bloor v. State* 407

Vendor and Purchaser.

Vendor cannot obtain cancelation of conveyance for fraud inducing the sale, without returning purchase price received. *Gnuse v. Garrett* 265

Venue.

In an action *in personam*, a summons cannot be sent to a county other than one where action is pending unless there is a joint demand against the nonresident defendant and the defendant summoned in the county where action was commenced. *Neece v. Lee* 561

Waters.

1. A landowner may not by mandamus compel an irrigation district to supply his land with water when there is no appropriation therefor. *State, ex rel. Lackey, v. Gering & Ft. Laramie Irrigation District* 48
2. The fact that an irrigation district contracted with the federal government for an additional supply of water from storage reservoirs to supplement its supply *held* not to work forfeiture or abandonment of district's appropriation from natural flow of the stream, nor surrender of portion of its appropriation. *State, ex rel. Sorensen, v. Mitchell Irrigation District* 586
3. The state may maintain a suit in equity to compel an irrigation district to refrain from using water without complying with regulatory statute, although purpose of suit is to protect rights of all users of water for

irrigation purposes. *State, ex rel. Sorensen, v. Mitchell Irrigation District* 586
4. An irrigation district organized under laws of Nebraska and irrigating lands wholly within Nebraska *held* subject to Nebraska irrigation laws, notwithstanding district's headgates and diversion works were in an adjoining state. *State, ex rel. Sorensen, v. Mitchell Irrigation District* 586
5. It is the duty of the state to see that waters of its streams used for irrigation purposes are not wasted, and that prior appropriators of water are protected as against subsequent appropriators. *State, ex rel. Sorensen, v. Mitchell Irrigation District* 586

Wills.

1. A near relative or other person may institute proceedings in minor's interest as next friend to contest a will, negotiate a compromise, and execute a contract of settlement for minor's benefit. *In re Estate of Shierman* 230
2. Parol evidence is inadmissible to determine intent of testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain. *Lincoln Nat. Bank & Trust Co. v. Grainger* 451
3. Where provision of will is couched in correct grammatical language, it will be given the ordinary and natural meaning which the language imports, unless it clearly appears from the whole instrument that a different meaning was intended. *Lincoln Nat. Bank & Trust Co. v. Grainger* 451
4. Will construed and *held* that children of testator's son, who was deceased at date will was executed, are included as beneficiaries of residue of estate. *Lincoln Nat. Bank & Trust Co. v. Grainger* 451
5. A condition in a will that the life estate in devised property shall not be mortgaged or encumbered by the beneficiary is valid and enforceable. *Drury v. Hickinbotham* 499
6. A future interest in realty, whenever possible, will be construed as vested, and hence alienable and devisable by the remainderman. *Drury v. Hickinbotham* 499
7. Where there is a person in being capable of taking the remainder at termination of a life estate, the remainder is vested in interest. *Drury v. Hickinbotham* 499
8. It is the present capacity of taking effect in possession which distinguishes a vested from a contingent remainder. *Drury v. Hickinbotham* 499

9. Devise of life estate and remainder *held* to vest fee in remainderman, and the fee, less the life estate, could be aliened by remainderman, subject to being defeated by his death prior to that of the life tenant. *Drury v. Hickinbotham* 499
10. Election by widow to take under the statute does not render the will inoperative as to other persons. *In re Estate of Hunter*..... 529
11. A will will be declared inoperative only when the subject-matter has been changed and the purpose of testator has been destroyed by election of surviving spouse to take under the statute. *In re Estate of Hunter*..... 529
12. Where a will bequeathed shares of stock and provided that, if testator should dispose of said shares during his lifetime, beneficiaries should receive in lieu thereof certain sums of money, and testator did not dispose of said shares during his lifetime, the legatees *held* not entitled to receive money in lieu of shares because the number of shares bequeathed was reduced one-third by reason of election by widow to take under the statute. *In re Estate of Hunter*..... 529
13. Widow's election to take under the statute *held* not to render the will inoperative as among other legatees to each of whom shares of stock were bequeathed, but that each was entitled to receive the shares bequeathed, as diminished by the widow's election; and the rule obtains as to a devise. *In re Estate of Hunter*..... 529
14. In a suit to vacate a decree admitting a will to probate, an allegation in the petition that plaintiff had no actual notice of the proceedings is not sufficient to excuse his failure to contest the will, where it appears that legal notice of the proceedings was given, and he had notice of facts sufficient to put him on inquiry. *In re Estate of House*..... 838
15. On appeal from a decree revoking probate of a will, a transcript of the proceedings will be deemed sufficient to confer jurisdiction on the district court though it failed to contain the petition for probate, if the petition for revocation alleged the petition for probate, and the parties stipulated that the cause should be tried in the district court on the pleadings filed in the county court. *In re Estate of House*..... 838

Witnesses.

1. In foreclosure suit against mortgagors by mortgagee's heirs, mortgagors *held* not competent to testify to con-

versations with deceased mortgagee. *Hitchens v. Alderson* 573
2. In a foreclosure suit by mortgagee's heirs, neither of mortgagors was competent to testify as to conversations overheard between the other mortgagor and the mortgagee, for purpose of proving mortgage was sham. *Hitchens v. Alderson* 573
3. A party adverse to the representative of a deceased person who disclaims all interest in the subject-matter of the action is a competent witness. *In re Estate of Tilton* 872
4. The agreement between parties which established a common-law marriage is not a communication between husband and wife concerning which they are prohibited from testifying. *In re Estate of Tilton* 872