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REPORTS OF CASES

IN THE

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JANUARY AND SEPTEMBER TERMS, 1931

VOLUME CXXI

HENRY P. STODDART,
OFFICIAL REPORTER

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By Henry P. Stoddart, Reporter of the Supreme Court,

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1931.

JOHN WILKEN, APPELLEE, V. MOORMAN MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED MARCH 26, 1931. No. 27589.

1. **Corporations: PROCESS: SERVICE.** A foreign corporation may be served with process in this state by service of such process on a managing agent of the corporation in the state.
2. ———: ———: ———: MANAGING AGENT. A sales manager of a foreign corporation who exercises judgment and discretion in the conduct of the corporation's affairs within this state is, within the meaning of the statute relating to service of process on such corporations, a managing agent, notwithstanding his acts and doings as such agent may refer only to a part of the business transacted by the corporation.
3. ———: ———: ———: AUDITOR. Evidence examined, and *held* to show that defendant corporation was doing business in the state and could be served with process by service thereof on the auditor of public accounts.

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

Norval Brothers, Tibbets & Hewitt and *Wilson & Schmiedeskamp,* for appellants.

Thomas & Vail, contra.

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

PER CURIAM.

Defendants have appealed from a judgment for damages in an action sounding in tort.

The errors complained of relate solely to the jurisdiction of the court over the persons of the defendants.

Summons was served personally on defendant Rucklos in Seward county. It is claimed that he was enticed into that county for the purpose of obtaining service of process on him in this action. The evidence shows that Rucklos was a resident of Lancaster county; that he was frequently transacting business as a salesman or sales manager in Seward county and was in the county transacting such business on the day summons was served on him. The record does not sustain his contention that he was enticed within the jurisdiction of the court. The trial court properly overruled his special appearance.

Moorman Manufacturing Company is a foreign corporation. Summons was served on it by delivery of a copy to Rucklos as managing agent of the corporation. Later, an alias summons was issued and served on the corporation by delivery of a copy to the auditor of public accounts. The defendant corporation contends that Rucklos was not a managing agent, and that delivery to him of a copy of the summons was insufficient to give the court jurisdiction over it, and also contends that it was not doing business within the state, within the meaning of the statute, so as to authorize service of process upon it by delivery of a copy to the auditor of public accounts.

Section 20-513, Comp. St. 1929, provides: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." If Rucklos was a managing agent, service of summons upon him would give the court jurisdiction.

From the record it appears that the defendant corporation is engaged in the manufacture of stock foods at Quincy, Illinois. It maintains a corps of salesmen and sales managers in this and other states who solicit orders which are sent to the company either at its office in Quincy or at an office which it maintains in Council Bluffs, Iowa, where the orders are filled and shipped direct to the purchaser. It requires of its sales managers that they solicit other persons to become salesmen, and when sales-

men are selected the sales managers are required to accompany them through their territory for a week and instruct them in their duties in making their sales. Rucklos was a sales manager. He had 21 counties in Nebraska under his supervision. He had something like 40 salesmen under him. These men it was his duty to instruct in the performance of their duties, and, when making sales, they reported to him, as well as direct to the company. Rucklos received a commission on all the sales made by the salesmen under him in his territory. It also appears that, for the purpose of advertising its wares, the company maintains an exhibit at the state fair, and that Rucklos was in charge thereof; also that in the contract between Rucklos and the corporation he was required to hold, at stated times, meetings of the salesmen in which he was to instruct them in their duties. It also appears that he was to instruct the purchasers of the stock foods as to the manner of their use. There were other duties which he habitually performed within his territory in the interest of the company.

It is a rule that an agent who exercises judgment and discretion in the conduct or management of a corporation's affairs within this state is a managing agent, within the meaning of the statute, and that the acts and doings of such agent may refer to only a part of the business transacted by the corporation.

In *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14, it was said (p. 15): "An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the meaning of the 75th section of the Code, which authorizes the service of summons on a managing agent of a foreign corporation, and it is immaterial where he resides." This ruling was approved in *Ritchie v. Illinois C. R. Co.*, 87 Neb. 631. In the latter case it was said (p. 635): "A 'managing agent' must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity

and under the direction and control of superior authority."

In *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159, it was held: "A manager of an agency established in this state by a foreign railroad corporation for the purpose of soliciting traffic over its line of road is a managing agent within the meaning of the statute with reference to the service of summons upon such corporations."

In *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, it was shown that the creamery company maintained a cream station at Panama, Nebraska, whose duties were to purchase cream and other products and ship them according to defendant's directions. Prices were fixed by the company and payments made by draft, drawn on the company. The local agent was required to grade the products to fit the price scale fixed. He was held to be a managing agent.

Kron v. Robinson Seed Co., 111 Neb. 147, presented a situation quite similar to that in the *Brophy* case. The agent was held to be a managing agent, within the meaning of the statute.

Under the facts disclosed and the authorities cited, we have no hesitancy in reaching the conclusion that Rucklos was a managing agent, within the meaning of the statute quoted.

We are also of the opinion that the record discloses that the defendant corporation was transacting business in the state of Nebraska, within the meaning of section 24-1201, Comp. St. 1929, which authorizes service of process upon such corporations by delivery to the auditor of public accounts.

We conclude that the service of summons upon the defendant corporation by delivery to the auditor of public accounts was sufficient to give the court jurisdiction. Its objection to the jurisdiction of the court over its person was not well taken.

The errors of which defendants complain are not well founded. The judgment is

AFFIRMED.

CATHERINE HELEN COMBS, ADMINISTRATRIX, APPELLEE, V. OWENS MOTOR COMPANY ET AL., APPELLANTS.

FILED MARCH 26, 1931. No. 27656.

1. **Evidence** in the record examined, and *held* to support the verdict, and to sustain the denial by the trial court of defendant Owens Motor Company's motion for an instructed verdict in its behalf.
2. **Trial**: ERROR: WAIVER. Errors, if any, in receiving incompetent evidence are presumed to have been waived, unless objected to when the evidence is offered.
3. ———: EVIDENCE: MOTION TO STRIKE: DISCRETION. Where a question is asked of a witness, and his answer, which is responsive to the question, is received without objection, and motion is then made by counsel to strike out such evidence on the ground of its incompetency, it is discretionary with the court whether it will sustain the motion or not.
4. **Hearsay evidence** tending to prove a material fact, if admitted without objections, may sustain a finding of the existence of that fact. The probative force of such evidence is for the jury and not for the court to determine.
5. **Appeal**: NONPREJUDICIAL ERROR. To warrant the reversal of a judgment, it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining.

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

Morrow & Morrow, for appellants.

Raymond & Fitzgerald, contra.

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

PER CURIAM.

Action by administratrix to recover damages occasioned by injuries inflicted upon and causing death of her intestate and husband. Trial to jury. Verdict for plaintiff. From judgment thereon defendants appeal.

The accident occasioning the death of Combs occurred in the intersection of two rural highways. Just prior to the collision which caused his death he was driving a Gra-

ham-Dodge truck eastward along the south side of an east and west country road. At that time an Oldsmobile automobile, the property of the defendant Owens Motor Company and in charge of John Darrah, an employee of the motor company and then engaged in its business, coming from the north on a similar intersecting north and south highway, traveling approximately in the center thereof, collided with the truck, and as a result thereof the truck was upset and its driver killed. The point of impact was in the south half of the intersection. As to whether the driver of the Oldsmobile was then carrying out a purpose of continuing southward along the north and south highway, or was attempting to turn to the east and continue his journey on the road the truck was then traveling, the evidence of defendants' witnesses is conflicting. It may be said that it clearly appears from the evidence that in broad daylight, on a clear day, on a smooth, dry, graded highway, due to and because of the speed at which the Oldsmobile was being operated, the failure of the driver thereof to keep a proper lookout, his failure to have his vehicle under proper control, or his failure to keep it in its proper course, in view of the circumstances then existing, the collision occurred and thereby the death of the deceased was caused. At the point of impact the truck was on its proper side of the road, and at a place where approaching an intersection in a highway, "from the right," it was entitled to the right of way over the Oldsmobile then approaching the same point on an intersecting road on its left. Evidence in the record also sustains the inference that the truck entered the intersection first, and there is no evidence which establishes any negligence as chargeable to the truck driver. The court did not therefore err in overruling the defendants' motion for an instructed verdict at the close of plaintiff's case in chief.

The defendant Owens Motor Company insists, however, that evidence as to certain admissions made by John Darrah, the driver of the Oldsmobile, a codefendant and its employee, in a conversation with certain witnesses testifying thereto, which took place at the scene of the acci-

dent, a few moments after its occurrence, is not competent against it nor proper for the consideration of the jury in determining the issues formed by its pleadings.

The statements to which this objection refers were made by the witness, John Darrah, and related to the manner in which the accident occurred, and support, if true and competent, the inference of negligence on the part of the driver of the Oldsmobile. The motor company insists that admissions or declarations of an agent or employee made after the accident or transactions, which are no part of the *res gestæ,* are not admissible to bind the principal.

Conceding, for the purpose of this opinion, the correctness of the principle upon which the motor company relies, as an abstract proposition, the question sought to be raised is not presented by the record presented for review. It appears that at the trial both defendants were represented by the same attorneys. The evidence now objected to was elicited without any objection on the part of any of the defendants. The interrogatories propounded in reference to this subject fairly disclosed its nature and the purport of the evidence sought to be introduced. The counsel for defendant motor company not only failed to object, but cross-examined at length upon the conversation now challenged. No motion was tendered to strike out this evidence until the close of the plaintiff's case. Under such a state of facts, the general rule appears to be: "If a party suffers an improper question to be put to a witness, he must object. He cannot speculate upon a favorable answer, and if the answer is not favorable, move to strike out. The objection must be made at the time. He cannot thereafter complain." 2 Hyatt, Trials, 1278. This court is committed to this doctrine. *Wood v. City of Omaha,* 87 Neb. 213; *Ryne v. Liebers Farm Equipment Co.,* 107 Neb. 454; *Western Home Ins. Co. v. Richardson,* 40 Neb. 1; *Dunn v. State,* 58 Neb. 807; *Fulton v. Ryan,* 60 Neb. 9; *Palmer v. Witcherly,* 15 Neb. 98; *Brown v. Cleveland,* 44 Neb. 239.

Nor did the trial court err in overruling the defendant motor company's motion to strike the evidence of this con-

versation from the record made at the close of the plaintiff's case. "Where a question is asked of a witness, and his answer, which is responsive to the question, is received without objection and motion is then made by counsel to strike out the evidence contained on the ground of its incompetency, it is discretionary with the court whether it will sustain the motion or not." *Gran v. Houston,* 45 Neb. 813. But the record further discloses that, in addition to permitting the evidence as to the Darrah conversation to be introduced without objection, the defendant motor company thereupon cross-examined at length upon that subject. Obviously, in the light of the present record, it is thereby foreclosed from all objections thereto, and its motion to strike came too late. *In re Estate of Holloway,* 89 Neb. 403; *Haverly v. Elliott,* 39 Neb. 201.

The fact that the admission made by codefendant Darrah was admissible against him does not in any manner excuse the failure of the Owens Motor Company to make necessary and suitable objections in its own behalf when testimony of the admission in question was offered against this defendant. The principles of proper practice would indicate the necessity of making objections by the motor company in its own behalf at the time the testimony was offered. The making of the objections in due form would afford the trial judge an opportunity to limit the scope of the tendered evidence at the time of its reception, or his failure so to do would entitle the objecting party to request a proper instruction for the guidance of the jury in weighing the evidence received in connection with the issues submitted to them for determination. *Berggren v. Hannan, O'Dell & Van Brunt,* 116 Neb. 18; *Osborne v. State,* 115 Neb. 65. Indeed, conceding these statements of Darrah as testified to by plaintiff's witnesses to be hearsay as to the Owens Motor Company, still this evidence was received without objection, and was therefore before the trial jury for its consideration.

"The courts seem to differ as to the weight to which hearsay evidence is entitled when it has been admitted without objection, * * * but, on the contrary, other au-

thorities hold that when the hearsay has been admitted without objection the jury may consider it as they would any other properly admitted testimony." 6 Encyclopedia of Evidence, 455.

"So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible. *Damon v. Carrol,* 163 Mass. 404, 408; *Sherwood v. Sissa,* 5 Nev. 349, 355; *United States v. McCoy,* 193 U. S. 593, 598; *Schlemmer v. Buffalo, etc., Ry. Co.,* 205 U. S. 1, 9; *Neal v. Delaware,* 103 U. S. 370, 396; *Foster v. United States,* 178 Fed. 165, 176." *Diaz v. United States,* 223 U. S. 442, 450.

This court, in line with the authorities above referred to, is fairly committed to the doctrine that: "Hearsay evidence tending to prove a material fact, if admitted without objections, may sustain a finding of the existence of that fact. The probative force of such evidence is for the jury and not for the court to determine." *Metz v. Chicago, B. & Q. R. Co.,* 88 Neb. 459. See *Sheibley v. Nelson,* 84 Neb. 393.

It is quite obvious, in view of the authorities cited, that the contentions of the defendant motor company as to the admissibility and effect of evidence as to the admissions of John Darrah, in view of the record here for review, cannot be sustained.

Appellants also urge that prejudicial error was committed by the trial court in permitting the plaintiff as part of her case in chief to introduce evidence that defendant Owens Motor Company "was covered by liability insurance."

The record sustains appellants' contention as to what occurred. The trial court, though admitting the evidence in the manner objected to, instructed the jury as to this evidence as follows: "You are instructed that while evidence was admitted to show that the car in question was covered by liability insurance, you should not bring in a verdict against the defendants unless the evidence would justify a verdict against the defendants if the car had not

been covered by liability insurance. The evidence showing the car to have been covered by insurance was admitted for the sole purpose of showing the real parties in interest and for no other purpose."

The bill of exceptions also discloses that the president of the Owens Motor Company testified as a witness for defendants. In view of the record, it may be said that to him pertinent interrogatories on the subject of liability insurance carried by the company at the time of the accident, proper under the rule announced in *Jessup v. Davis*, 115 Neb. 1, would have without doubt secured identical information to that tendered by the plaintiff.

While the majority of the court are firmly of the opinion that the doctrine of the *Jessup* case should not be extended beyond the rule of practice therein announced, which as there applied and as properly understood is a rule governing cross-examination only, they in no manner approve the action of the trial court in the instant case in failing in its proper observance and application. Defendants' objection to the reception of this line of evidence as part of the plaintiff's case should have been sustained.

Still, in the instant case, the fact of existing public liability insurance is not challenged. To say that direct evidence of an existing fact is prejudicial, and the disclosure of the same fact by cross-examination, opportunity for which the records of this case disclose the course of this trial afforded, is not, would hardly be logical. So, considering the record as an entirety, giving due weight to the instructions of the court, the amount of the verdict returned, the nature and extent of the damages suffered as established by the proof, the members of the court are unanimously of the opinion that, as a fact, the appellants were not in any degree prejudiced by the technical error of procedure of which they complain.

"To warrant a reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of

the party complaining." *Morfeld v. Weidner*, 99 Neb. 49; *Cronin v. Cronin*, 94 Neb. 353.

The further assignments of error made by the defendants have been given careful consideration, but we do not find them to be well taken. However, further discussion would serve no good purpose. Upon consideration of the whole case, we do not feel at liberty to disturb the judgment entered in the court below. It is, therefore,

AFFIRMED.

ALEXANDER REICHERT, APPELLEE, V. REINARD MULDER, APPELLANT.

FILED MARCH 26, 1931. No. 27604.

1. **Corporations**: SALE OF STOCK: AGREEMENT TO REPURCHASE. An agreement to repurchase corporate stock at the buyer's option is valid and enforceable.
2. ———: ———: ———: BREACH OF CONTRACT: MEASURE OF DAMAGES. The measure of damages for breach of contract to repurchase corporate stock is the amount the seller agreed to pay as the repurchase price.
3. ———: ———: ———. An agreement in a contract of sale of corporate stock to an employee to repurchase when the employment is terminated is valid and enforceable.
4. **Contracts**: SEVERABLE CONTRACT. A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable.
5. ———: CONSTRUCTION. Whether a contract is entire or severable is a question of intention as apparent in the instrument. In an unambiguous contract it is to be determined from the language, the subject-matter and the construction placed upon it by the parties in the light of the surrounding circumstances.
6. ———: ABANDONMENT. A contract will be treated as abandoned, where each party performs acts inconsistent with its existence, which in each instance are acquiesced in by the other.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Max V. Beghtol and *G. Porter Putnam, Jr.*, for appellant.

Sanden, Anderson, Laughlin & Gradwohl, contra.

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

DAY, J.

This is an action to recover the amount represented by the book value of certain corporate stock which the defendant sold to the plaintiff under a written contract which required defendant to repurchase it at the book value at any time the plaintiff wished to sell. The trial court, at the close of all the evidence, directed a verdict in favor of the plaintiff. The defendant appeals. The only assignment of error which is presented by the argument or briefs is that the "trial court erred in enforcing the provision of the contract sued upon, for the reason that this contract was against public policy and therefore void and unenforceable."

The repurchase provision of the contract is: "It is hereby agreed by and between R. Mulder and Alexander Reichert, both of Lincoln, Nebraska, that whereas R. Mulder has this day sold and transferred to said Alexander Reichert, seven (7) shares of the capital stock of the Standard Planing Mill Company, a corporation, of the par value of $250 per share for the sum of $2,100.

"Now therefore for and in consideration of R. Mulder so selling and transferring of said seven shares of stock, Alexander Reichert hereby agrees that in case and in the event that he wishes to sell and dispose of the said stock, or any part thereof, that he will first offer it to R. Mulder for purchase at the book value per share and said R. Mulder hereby agrees to purchase said stock or any part thereof from the said Alexander Reichert at the said book value per share at any time he wishes to sell and dispose of same or any part thereof."

This controversy arose when the plaintiff desired to sell his stock to the defendant and tendered it to him on December 31, 1929. An agreement to repurchase corporate stocks at the buyer's option is valid and enforceable. *Stratbucker v. Bankers Realty Investment Co.*, 107 Neb. 194; *Grotte v. Rachman*, 114 Neb. 284; *Griffin v. Bankers*

Realty Investment Co., 105 Neb. 419; *Trenholm v. Kloepper*, 88 Neb. 236; 50 A. L. R. 327, note. These cases discuss this question so exhaustively and cite the authorities so comprehensively that we do not find it necessary or profitable to repeat them here. The measure of damages for breach of contract to repurchase stock is the amount the seller agreed to pay as the repurchase price. *Heller v. Speier*, 119 Neb. 787. An agreement in a contract of sale of corporate stock to an employee to repurchase when the employment is terminated is valid and enforceable. While not directly discussed in the opinion in *Heller v. Speier, supra*, we sustained such recovery. See *Halsey v. Boomer*, 236 Mich. 328, 48 A. L. R. 622, and annotation therein, with cases cited. See, also, *Topken, Loring & Schwartz, Inc., v. Schwartz*, 249 N. Y. 206, 66 A. L. R. 1179, together with annotation and cases cited.

The defendant contends that this contract was against public policy and therefore void and unenforceable, for that as part of the contract, or at least as an inducement to its execution, there was an oral agreement by the defendant to employ the plaintiff at an arbitrary salary. The oral employment agreement is, "that, however, at said time and in consideration of and as part of the said agreement between plaintiff and defendant referred to in paragraph I hereof, defendant orally promised and agreed to keep and retain plaintiff in the employment of said corporation, of which defendant was president, manager and practically the sole owner, upon the same basis and at the same compensation as was then and would thereafter be paid to defendant's two sons, William and George, who were then working for the corporation, and plaintiff agreed to said terms."

In passing, we note that the defendant testified that he did not remember making such an agreement. The plaintiff and another former employee of defendant, who also purchased stock at the same time, testified to it. An examination of the agreements, however, reveals that neither is interdependent upon the other. The defendant agreed to repurchase the stock whenever the plaintiff wished to

sell. The wishes of the plaintiff and not the termination of employment is the controlling factor. It is evident that the agreement to employ was an inducement to the purchase of the stock, but once the sale had been executed, neither was dependent upon the other. A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable. 13 C. J. 561. The defendant contends that where as in this case a director, having sold stock to another, agreed as a part of the consideration for the repurchase agreement to employ the purchaser for the corporation at an arbitrary salary for an indefinite time, said repurchase agreement is against public policy and void. In support of his contention, he cites numerous cases to the effect that the law will not allow one in the fiduciary capacity of a director of a corporation to make a contract which places the possibility of a decision upon him the result of which would either be detrimental to him personally or disadvantageous to the corporation. However, since the termination of employment was not the condition precedent to the obligation of the defendant to repurchase, appellant's argument is not applicable. Whether a contract is entire or severable is a question of intention as apparent in the instrument. It is to be determined from the language and subject-matter. 13 C. J. 562; *Burwell & Ord Irrigation & Power Co. v. Wilson,* 57 Neb. 396; *Hamilton v. Thrall,* 7 Neb. 210. The fact is that the employment agreement, if made, was never carried out. It was abandoned. This stock was purchased February 28, 1920, and in May of the same year the plaintiff's compensation was fixed at 70 cents an hour, while that of defendant's sons was increased to $200 a month. This was clearly not in accordance with the terms of the agreement, which provided that plaintiff's compensation was to be the same as that of the defendant's sons. The plaintiff continued in the employment of the corporation without protest. A contract will be treated as abandoned, where each party performs acts inconsistent with its existence, which in each instance are acquiesced in by the other. *Baker v. School District,* 120

Neb. 513, citing *Herpolsheimer v. Christopher*, 76 Neb. 352. It is the general rule that a contract must be construed with reference to the provisions contained in it; however, in some cases the court will look to the subsequent actions of the parties under it as an aid to the determination of the intention of the parties. *Cady v. Travelers Ins. Co.*, 93 Neb. 634; *Schultz v. Hastings Lodge No. 50, I. O. O. F.*, 90 Neb. 454. In this case both parties by their actions have given the contract the same construction. The parties, by the abandonment of the alleged agreement for employment, have placed a construction upon the agreements involved in this case. With a knowledge of the terms, they have placed a construction that the ownership of the corporate stock was not affected by the termination of the employment agreement. The plaintiff in this case continued to hold the corporate stock for a period of years, while the agreement relating to employment was disregarded by both parties. The plaintiff continued to work for the corporation for years during which time his compensation was not according to the agreement. The parties themselves treated the contract as divisible and severable and clearly indicate their intention to be that the performance of one was not interdependent upon the other.

We have considered the entire record in this case and find no reversible error. The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF ANNA NEVILLE.

F. J. CLEARY, RECEIVER: MILES N. LEE, ASSIGNEE, APPELLANT, V. JOHN NEVILLE, ADMINISTRATOR, APPELLEE.

FILED MARCH 26, 1931. No. 27587.

1. **Courts: PROBATE COURT: APPEAL.** The district court, upon overruling objections to a claim appealed from the probate court, and having arrived at the amount due after a trial *de novo*, can terminate the lawsuit by entering a judgment upon said claim, although the district court may have to remand the case for further proceedings in accordance therewith to the court below.

2. **Executors and Administrators: CLAIMS: NOTICE TO CREDITORS: PUBLICATION.** The publication of the notice to creditors, provided in section 30-601, Comp. St. 1929, is invalid and fatally defective if not founded upon an antecedent order, duly made in writing, signed by the judge and filed in his office.

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

Sullivan & Wilson, for appellant.

N. M. York and *W. A. Stewart, contra.*

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

PAINE, J.

This was a suit to collect two promissory notes against the estate of Anna Neville, deceased, in the probate court of Dawson county. The claim for the balance due on said notes was disallowed by the county court, and upon an appeal to the district court it was tried there and the claim was denied and the action dismissed, and claimant has appealed the case to this court.

The testimony disclosed that Anna Neville died intestate May 25, 1925, and letters of administration were issued to her son, John Neville, on July 20, 1925. An inventory of her estate, filed the same day, disclosed 420 acres of real estate, valued at $28,000, and chattel property listed to the value of $2,320.

At the time of her death the deceased was indebted to the Security State Bank of Eddyville for money borrowed and invested in the land she owned at death. One note was dated July 7, 1923, for $4,294, bearing 10 per cent. interest, and one note for $418.76, dated September 28, 1922, bearing 10 per cent. interest, upon which claim payments had been made by the administrator of the estate after the same was filed. The said bank failed in 1923 and F. J. Cleary was appointed receiver, but the actual work of collecting the assets of the bank was in charge of George C. Gage, agent of the guaranty fund commission. A claim was filed by the receiver against the estate

on December 7, 1925, for a total sum of $4,457.20, due on the two notes. Objections were filed by W. A. Stewart, attorney for the administrator, on the ground that the claim was not filed within the time allowed by the court for filing claims, and that it was not a valid claim against the estate. However, on May 12, 1926, a letter was written by Attorney Stewart for the estate to Receiver Cleary, saying that there had been paid by the administrator on these notes from the sale of personal property a sufficient sum to leave a net balance on the notes, without interest, of $2,208.54, which might be paid out of the sale of the incumbered land. A letter was written by the receiver, F. J. Cleary, to Attorney Stewart, asking if his claim had been allowed, and the reply was written in ink on this letter and signed by W. A. Stewart, saying that the agreed compromise can be entered in the county court at any time, but they would have to sell the land to pay the claims. F. J. Cleary, as receiver, filed application in the district court for Dawson county, Nebraska, to compromise the claim against the Anna Neville estate, setting out in the third paragraph "that your receiver has an offer from the attorney for the Anna Neville estate to pay the sum of $2,307.54, your receiver being required to waive the accrued interest on said claim," which application was filed in the district court for Dawson county on June 10, 1926, and on the same day Honorable Isaac J. Nisley, district judge, entered an order authorizing settlement of the claim in the sum of $2,307.54. However, payment was never made in accordance with the offer of compromise made by the attorney for the estate and authorized by the order of the district judge.

On January 1, 1929, Miles N. Lee, of Arcadia, Nebraska, purchased the remaining assets from the receiver of the Security State Bank at Eddyville and became the owner and holder of the notes in controversy. Proceedings in the county court, which led to the rejection of said claim, were based upon the claim itself, which was filed December 7, 1925, the objections to said claim, filed by the attorney for the administrator, the final report of the administra-

tor, petition for discharge, the answer to the petition filed by Miles N. Lee, the assignee of the receiver, and the reply thereto, and after an adverse ruling in the county court the same was tried *de novo* upon the same pleadings in the district court. *In re Estate of Gamble,* 91 Neb. 199; *Fitch v. Martin,* 83 Neb. 124. On April 25, 1930, a judgment was entered in the district court, rejecting the claim of the assignee. Motion for new trial was overruled on May 15, 1930, and the same was appealed to this court.

The issues in the district court appear to have been contested upon three propositions: First, that fraud was practiced by the administrator and his attorney, which kept the claimant from filing his claim in time; second, that there was no valid order of the county court fixing the time for filing the claims and properly designating the newspaper in which to give the notice; third, that the failure to file said claim in proper time was waived by the administrator.

The district court found on the first proposition that there was no evidence of any inducements which delayed the filing of the claim in the time required by law, but did find that the attorney for the administrator had made offers of compromise, which offers had been accepted and approved by the district court, but that no effort was made, directly or indirectly, to interfere with the claimant filing his claim in time. On the third proposition the district court found that the administrator had no authority to waive the bar of the statute as to the time for filing claims.

The argument before this court and the discussion in the briefs submitted have to do principally with the second proposition, i. e., that no valid order of the county court had ever been entered fixing the time for filing claims or properly designating the newspaper in which the notice should be published. The section of the statute was section 1336, Comp. St. 1922, which was amended in 1929 (Laws 1929, ch. 67, sec. 5) by changing the time of publication from four weeks to three weeks, and with the change of this one word the same is section 30-601, Comp.

St. 1929, and the last part of said section as published in the 1922 Statutes, in force at the time of the trial of this case, and referred to in the briefs, reads as follows: *"Provided,* said judge shall, within forty days after the issuance of letters testamentary or of administration, give notice of the date of the hearing of claims against the deceased and the limit of time for the presentation of claims by creditors, which notice shall be given by posting in four public places in said county, or by publication in a legal newspaper of said county at least four consecutive weeks, or in any manner which the court may direct."

The vital question at issue can be stated as follows: Does this section requiring the judge to give notice of the date of the hearing, either by posting or by publication in a legal newspaper, require that the county judge first make an order to that effect, which shall be the basis for the notice which is published?

The appellee contends that the steps taken in the county court were regular and in strict compliance with the plain, mandatory provisions of the law. Such notice, drawn by the county judge, together with the affidavit of the publisher that the same was published for four weeks in the Dawson County Pioneer, the first publication being on the 24th day of July, 1925, and the last publication on August 21, 1925, is set out in the bill of exceptions as exhibit 11, and reads as follows:

"Notice to Creditors of Estate. State of Nebraska, Dawson County, ss. In the County Court. Notice is hereby given to creditors and all concerned that the time limited for creditors to present their claims against the estate of Anna Neville, deceased, late of said county, is three months from the 24th day of August, 1925; that all claims against said estate must be presented to the county judge of Dawson county, Nebraska, at his office in Lexington, Nebraska, on or before the 24th day of November, 1925, or an order will be made barring the same; and that claims or demands presented or filed against said estate will be heard, by said judge, for the purpose of examination, adjustment and allowance at his said office, on the 24th day of August,

1925, and on the 24th day of November, 1925, at ten o'clock a. m., each day. (Seal) M. O. Bates, County Judge. W. A. Stewart, Atty. (Stamp on back of exhibit 11) Office of the county judge, filed Dec. 12, 1925. M. O. Bates, County Judge, Verna Houser, Clerk."

Examination by Mr. Wilson of M. O. Bates, county judge: "Q. I will ask you if there was any order made and entered by your court or yourself, as the county judge, preceding the notice to creditors? A. There was not."

The probate judge was also asked by counsel for appellant whether any order barring claims had been made and filed, and the witness stated that an order had been made barring one claim only, but not as to claims generally, said order being entered August 24, 1929, with respect to the F. J. Cleary receivership claim of the Security State Bank at Eddyville, and on redirect examination the following testimony appears of the probate judge: "Q. Now, you don't find in your record any formal adjudication of any of these claims, do you? A. No, sir. Q. The only thing that can be considered as, at all, as adjudicating the claims, was an order made by your court directing the administrator to make application to certain debts of the proceeds of the sale of the personal property? A. Yes, sir. Q. Among the debts that he was directed to pay, was this debt that is now in controversy before the court? That is, he was directed to apply on this note the proceeds from the personal property, which property had been pledged to secure the note? A. The order to which you refer directed the administrator to pay to the receiver of the Security State Bank, at Eddyville, a certain sum to apply on indebtedness due from said estate."

Appellee contends that if it was contemplated that the county judge should base the notice to creditors upon a preliminary order, the statute would have said so and cites section 1311, Comp. St. 1922, in the following language: "The court shall forthwith make an order." In section 1309 the following language is used: "The time and place of the hearing thereof, to be given by publication, under an order of such court." In section 1357 is found this

language: "When the time for paying the debts * * * shall be finally limited by order of the court, * * * the court may, * * * by an order for that purpose, cause notice to be given." Appellee contends that these and many other sections each specifically requires an order of the court in each instance, but that said section 1336 does not require an antecedent order.

On the other hand, the appellant insists that notice to creditors must be preceded by an order of the county judge which fixes the time for filing and allowance of claims, and said order must also designate the manner of service, and if by publishing in a newspaper it must name the newspaper, and cites the case of *Schaberg v. McDonald,* 60 Neb. 493, which case held that the claim against the estate of a deceased person must be presented for examination and allowance within the time allowed by statute as fixed by the order of the probate court, and cites also the case of *Dredla v. Baache,* 60 Neb. 655, together with other decisions. Appellant insists that the very next section of the statute, section 1337, requires that the probate court shall by order designate the paper in which the probate notice shall be published, and in the notice published in this case there was no order, as required, designating the paper in which the notice should be published.

Appellee admits that the plain terms of the statute require that the probate court should make an order designating such paper, but says that the same section provides a way of escape, in that the majority of the heirs may at their election designate the legal newspaper in which notices shall be published, and that such heirs may designate the paper orally, without a formal order, and suggests the presumption is that, as no formal order was made in this case, the heirs must have designated the paper in which it was published, as provided in section 1337.

1. From a careful examination of the records and briefs, we cannot find that this exact question has been before this court since the present statute was adopted. We will first consider one of the early cases which was before this court twice, *Ribble v. Furmin,* 69 Neb. 38, 71 Neb. 108,

and which was referred to by both counsel in their arguments. It appears that section 215, ch. 23, Comp. St. 1901, entitled "Decedents," provided for the publication of notice to creditors in these words: "The judge of probate, in the commission issued to the commissioners, shall designate the paper in which such notice shall be published." The county court refused to file a claim against an estate because it was presented after the expiration of the time allowed for filing claims. Upon appeal to the district court it appeared from the pleadings that the notice of the expiration of the time for presenting claims was published prior to making the order fixing such time. The district court was reversed for remanding the cause to the county court for hearing upon the claim, and it was held that the claimant was entitled to an order allowing her claim to be filed, and directing a hearing on it in the district court in the same manner as though the appeal had been from an order disallowing the claim upon the hearing before the county court. In the text of the opinion, *Ribble v. Furmin,* 71 Neb. 108, it was said: "It will be noticed that in the petition it is alleged that the notice of the expiration of the time for filing claims was published before the order fixing such time was made. * * * Such notice is a nullity, and the time for filing claims was not limited by the order of the court without publication after the order was made. The defendant in error had a right to file her claim, and have the same examined at the time it was presented, and the judgment of the district court granting such right is clearly justified." Commissioner Pound, in the first appearance of the same case in this court, *Ribble v. Furmin,* 69 Neb. 38, discussed the question of how the appeal should have been handled in the district court, and held that the district court had jurisdiction of the entire matter and could dispose of the question at issue, even though the cause must be remanded for further proceedings in the court below.

2. We will now discuss the troublesome question as to whether section 1336, Comp. St. 1922, being section 30-601, Comp. St. 1929, requires the court to enter an order prior

to preparing and handing the notice to the newspaper for publication.

In *In re Estate of Hoferer*, 116 Neb. 254, this court, speaking through Judge Good, in deciding that letters testamentary were not affected by the failure of the sureties to file affidavits of justification on the official bond of an executor, referred to the very point in question, in these words: "Since the letters testamentary were in full force, it was the duty of the county judge to make an order limiting the time for the presentation of claims, pursuant to section 1336, Comp. St. 1922." See *Votypka v. Valentine*, 41 Cal. App. 74.

In *Nebraska Wesleyan University v. Bowen*, 73 Neb. 598, we find this statement: "A county court ought not to permit a claim to be filed against the estate of a deceased person which is not presented until more than eight months have elapsed since the expiration of the time fixed by an order of the court for that purpose."

In *Union Savings Association v. Somers*, 40 S. Dak. 177, it was held that a similar order was ineffective until entered, and hence, as the first publication was made before it was entered, it did not start the running of the four-month period against the filing of claims.

In the Wisconsin case of *Brill v. Estate of Ide*, 75 Wis. 113, the original order made giving notice to creditors failed to fix any time or place when and where claims would be received and examined, as required by statute, and the court held that its failure to do so was a fatal defect which was not cured by the subsequent publication of a notice made in pursuance of the order, which notice designated correctly the times and places.

"Mere verbal orders, or *ex parte* proceedings not of record, are not valid, and therefore afford no protection to an administrator in a subsequent proceeding." Woerner, American Law of Administration (3d ed.) sec. 149.

In Dame, Probate and Administration (3d ed.) sec. 387, in discussing section 1336, it is said: "Service of the notice cannot be had until after the order for its issue is made and entered," and also, "The statute directing such

notice is mandatory and not directory. The notice must comply with the order, and be served by publication, or as the court therein directs. If it fails to comply with any of these requirements, it is invalid, and not a bar to the *bona fide* claims of creditors." So that this Nebraska text-writer assumes that the notice is published after an order upon which it is founded is duly entered.

It is most important that the probate court should make a formal order and place the same of record, for the notice founded thereon is notice to all persons and confers jurisdiction upon the court over all matters set out therein.

While section 1336, Comp. St. 1922, requires a notice to be given, yet in section 1337, which provides for the publication of this notice, "the judge of probate shall by order designate the paper in which any probate notice shall be published," and the next following section, 1338, which sets out the time allowed to creditors to present claims, closes with these words, "and the time allowed shall be stated in the order." In the opinion of this court these three sections are to be construed together, as they each relate to the notice or its contents, and two of the sections definitely provide that an order of the probate court must be entered, which must be done prior to the preparation and publication of the legal notice. These sections in the 1929 Statutes are sections 30-601, 30-602, and 30-603. The notice in this case is invalid and fatally defective.

In *Estate of Anson,* 177 Wis. 441, it is stated: "The county court is a court of limited jurisdiction. It is a creature of the statute. It must appear upon the face of its proceedings that it acts within the powers granted. * * * We may suggest here that the statute of limitations and the doctrine of laches, estoppel, and collateral attack will prevent any serious disturbance in the settlement of former estates."

There being no dispute as to the balance due upon the promissory notes upon which this claim is founded, the district court is hereby directed to enter judgment for the amount due, $2,307.54, with interest at 7 per cent. from

September 20, 1926, and costs, and remand the cause to the probate court for further proceedings in accordance herewith. The district court was in error in disallowing the claim, and, in accordance with findings herein, the judgment is

REVERSED.

L. PEARL LINDBERG, APPELLEE, V. CHARLES A. TOLLE: LIBERTY STATE BANK, APPELLANT.

FILED MARCH 26, 1931. No. 27651.

Mortgages: FORECLOSURE SALE: SETTING ASIDE: INADEQUACY OF PRICE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Affirmed, with leave to redeem.*

Radcliffe & Wehmiller and *W. M. Elmen*, for appellant.

T. F. Neighbors, contra.

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

PAINE, J.

This was an action in foreclosure brought by the plaintiff and appellee, L. Pearl Lindberg, to foreclose a first mortgage lien against certain real estate.

A decree of foreclosure was duly entered May 27, 1929, the plaintiff being declared the owner of a first lien in the amount of $2,780 with interest at 8 per cent. and costs. Twenty days in which to redeem were allowed; and the Liberty State Bank, of Sidney, Nebraska, appellant, filed its request for a stay of execution for the statutory period of nine months, and the same was allowed.

At the expiration of the stay, February 28, 1930, an order of sale was issued by the clerk of the district court, and pursuant thereto, on the 8th day of April, 1930, after full and legal publication, the real estate was sold at pub-

lic auction to the plaintiff herein, for the sum of $1,500, and on the same day the defendant and appellant, the Liberty State Bank, of Sidney, Nebraska, then the owner of the real estate involved, filed objections to the confirmation. On May 26, 1930, the district judge, after hearing the evidence, overruled the objections to confirmation, and an order was entered confirming the sale and ordering the sheriff to make a deed to the purchaser, and fixing the supersedeas bond at $300.

On June 9, 1930, the said Liberty State Bank filed a notice of its appeal and gave bond, which was duly approved by the clerk.

The assignments of error were based upon inadequacy of price. Under our statute the trial court passes on the regularity of foreclosure sales and the proceedings leading thereto. There are no restrictions upon the means by which that court may be satisfied that the land brought its fair value. No fraud is alleged in this case.

We have examined the record in this case and believe that the land sold for its fair and reasonable value under the conditions existing at the time. *Vought v. Foxworthy*, 38 Neb. 790; *Frederick v. Gehling*, 92 Neb. 204; *First Nat. Bank v. Hunt*, 101 Neb. 743.

The judgment of the district court is therefore affirmed, with leave to redeem before mandate is issued.

AFFIRMED, WITH LEAVE TO REDEEM.

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

FILED APRIL 10, 1931. No. 27557.

Appeal. A final judgment is not disclosed by a journal entry which merely recites the submission of the cause to the court and concludes in the following language: "The court * * * finds for the receiver and against the said David W. Osborn, guardian."

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

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

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

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

PER CURIAM.

Petitioner, David W. Osborn, guardian of Frank M. Tannyhill, an incompetent, brought this action in the district court for Pawnee county against the receiver of the First State Bank of Pawnee City, asking that certain deposits of United States compensation and insurance funds, made by him as such guardian in such bank while the same was operated as a going concern, be decreed to be the funds of the United States and entitled to the priority provided by section 3466 of the Revised Statutes of the United States. Petitioner has appealed from what he asserts is a final judgment adverse to him, and which, according to the transcript filed herein, is in the following language: "Thereafter, to wit, on the 27th day of February, 1930, the court, after having said cause under advisement, finds for the receiver and against the said David W. Osborn, guardian."

To obtain a review in this court of a judgment of the district court, there must be a final order or judgment rendered, and it cannot be reviewed prior to its formal entry upon the journal of the trial court. *Hall County v. Smith,* 49 Neb. 274. All here presented for review is a "finding."

"The * * * findings of a court * * * do not constitute a judgment, but merely form the basis upon which the judgment is subsequently to be rendered. * * * A finding is not a judgment any more than is the verdict of a jury. Such findings or decision amount only to an order for judgment, and are subject to modification or change until embodied in a definitive written order of the court." 33 C. J. 1052.

This rule has been expressly approved in part in this jurisdiction. *Fauber v. Keim,* 84 Neb. 167.

Under the record as here presented, there being no final judgment of the district court which can be reviewed, the appeal is, therefore, dismissed.

APPEAL DISMISSED.

STATE BANK OF BEAVER CROSSING, APPELLANT, V. WILLIAM H. MACKLEY ET AL., APPELLEES.

FILED APRIL 10, 1931. No. 27567.

1. **Infants.** Prior to the act of April 20, 1921, becoming effective and raising the age to twenty-one, females ceased to be minors on attaining the age of eighteen years.
2. **Fraudulent Conveyances: INTENT: QUESTION OF FACT.** The question of fraudulent intent is a question of fact and not of law, when considered in the matter of a conveyance charged to be made to hinder and delay creditors.
3. **Parol Evidence: WRITTEN INSTRUMENTS.** "The rule excluding parol evidence to vary or contradict a written instrument applies only between the parties to such instrument and those claiming under them. It has no application to controversies between a party to the instrument on the one hand and a stranger to it on the other." *American Surety Co. v. School District*, 117 Neb. 6.
4. **Fraudulent Conveyances: HOMESTEAD.** "The homestead of a debtor and his family is not subject to the claims of his creditors, and fraud cannot be predicated upon the transfer of the homestead interest by the debtor to his wife." *McCormick v. Brown*, 97 Neb. 545.
5. ———. "In the absence of a mutual fraudulent intent, the law does not interfere with the right of a person, be he solvent or insolvent, to make such disposition of his property, based upon a valid consideration, as his judgment dictates." *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130.
6. **Chattel Mortgages.** After five years from the filing of a chattel mortgage, it ceases to be valid as against creditors of the maker or as against subsequent purchasers or mortgagees in good faith.

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

Harry R. Ankeny and *Frank Kelley*, for appellant.

Squires, Johnson & Johnson and *Sullivan & Wilson, contra.*

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

GOSS, C. J.

This is a suit in equity, brought as a creditors' bill, by a judgment creditor to set aside, as fraudulent, conveyances of real and personal property to members of the family of William H. Mackley, the debtor, and by them to others, subsequent to the incurring of the debt upon which the claim of the creditor is based; for a decree that title to the property is in William H. Mackley and to subject it to plaintiff's judgment. Plaintiff appeals from a decree rendering judgment for defendants and dismissing its petition.

The record, the evidence and the briefs, though they are able and helpful, are unusually voluminous, as might be expected in a suit of this nature, covering so much land, so divided up, so conveyed and so mortgaged, and setting forth the history of so many persons dealing with it for more than 40 years; even to state the salient facts and conclusions will take much space, and to give them in full detail would extend an opinion beyond all reasonable bounds.

The judgment against William H. Mackley, upon which plaintiff based its suit, was for $10,179.83, with 10 per cent. interest from February 12, 1929, with costs, entered September 12, 1929, in accordance with a mandate from this court in a suit between these two parties after extended and continuous litigation begun on March 3, 1922. But the debt between them was first evidenced by Mackley's note for $5,000 in favor of Sarvis Lumber Company, dated June 20, 1919, due in one year, and purchased by plaintiff June 19, 1920, a day before it was due. It was renewed on December 20, 1920, and again on April 29, 1921, at which time Mackley executed to plaintiff one note for the $5,000 principal and one for $745 for interest due. It was upon these notes, due August 29, 1921, the original

suit between the plaintiff and William H. Mackley was brought and the judgment was obtained. That the defendant William H. Mackley is a judgment debtor thereon and the plaintiff is his judgment creditor is fully adjudicated. Whether, in the meantime, after the debt was created, Mackley conveyed his property to other defendants to hinder and delay plaintiff is the gist of this action.

Mackley had filed a homestead entry on the southeast quarter of section 5, township 15, range 25, in the eighties and proved up and got his patent from the government about 1898. It is on the table-land and about nine miles south of Arnold, in Custer county. He was married in January, 1891, and from that time this quarter section has been the homestead of himself and wife, Rose B. Mackley. They weathered the hard years of the nineties on this homestead. Their children were born there, Margaret on December 3, 1891, Elizabeth on January 26, 1894, Mary on October 4, 1895, and Anna (now Mrs. Faherty) on December 27, 1899. Rose B. Mackley and these daughters, with the husband of Anna, who married, are among the defendants. Another daughter, Agnes, was born in 1893, but she died and was buried on the farm. A son, James, was born November 1, 1897, another, John, was born January 7, 1902, and the last, Edward, was born August 24, 1906. The sons are not parties.

From time to time other land was acquired until the holdings, in addition to the original homestead, included all of section four and the north half of section nine. Reference to a township map will show that this makes a compact body of 1,120 acres, the six quarter sections in sections four and nine making a rectangle and the original homestead in section five being just west of the middle of the rectangle.

February 20, 1920, William H. Mackley and wife mortgaged all of section four and the northwest quarter of section nine to the United States Trust Company for $25,000. This mortgage was recorded March 24, 1920, and is not affected by the proceedings.

The evidence shows, without objection, the following other conveyances and mortgages of these lands: March 8, 1920, William H. Mackley deeded the southeast quarter of section five to Rose B. Mackley, his wife, and the deed was recorded May 25, 1920; on May 13, 1921, Mackley and wife deeded the north half of section nine to their daughter Margaret Mackley, deeded the northeast quarter of section four to their daughter Anna Mackley (now Faherty), deeded the northwest quarter of section four to their daughter Mary Mackley, deeded the south half of section four to their daughter Elizabeth Mackley, and these four deeds were recorded May 16, 1921. The consideration recited in each deed to the wife and daughters was one dollar and love and affection. Each deed to the daughters recited that the land was free from incumbrance except a mortgage for $25,000 on that and other lands, and the particular deed to Margaret was stated to be subject, also, to another incumbrance for $10,000. On June 1, 1928, Anna Faherty (formerly Anna Mackley) and her husband deeded the said northeast quarter of section four to Margaret Mackley, subject to the $25,000 mortgage, and this deed was recorded June 4, 1928. On September 11, 1928, Mary, Margaret and Elizabeth Mackley gave a mortgage for $10,000 (subject to the one for $25,000) to Arnold State Bank, a defendant herein, on all of section four and the northwest quarter of section nine and this mortgage was recorded September 13, 1928. On February 25, 1929, Mary, Margaret and Elizabeth Mackley gave a mortgage for $7,150 (subject to a first mortgage for $25,000 and a second mortgage for $10,000) to their uncle, James M. Mackley, of California, a defendant herein, on the same five quarter sections as in the Arnold State Bank mortgage last above; and on the same day, the same parties, joined by Anna Mackley Faherty, gave a chattel mortgage for $7,150, on certain described cattle, to James M. Mackley. This was filed March 6, 1929. Mary Mackley testified that the reason for this chattel mortgage for the same amount as the real estate mortgage was that Anna had not signed the real estate mortgage but was subject

to the same debt of the other sisters and that these cattle belonged to the makers of the mortgage.

The evidence also shows, without objection, that on April 1, 1921, William H. Mackley gave to James M. Mackley a chattel mortgage for $3,000 on 73 head of cattle and 12 work horses, described as in grantor's possession on section 5, township 15, range 25, Custer county, and this was duly filed May 16, 1921; and that on May 13, 1921, William H. Mackley executed to Rose B. Mackley, named as grantee, in consideration of $3,000, a bill of sale of 40 head of hogs, all farm machinery and tools, all grain and his share of planted and growing crops on said southeast quarter of said section five and on said sections four and nine. This bill of sale was filed May 16, 1921. Mrs. Mackley testified that she never bought any of the items described, never knew anything about the bill of sale, and that it was never delivered to her.

The mortgage of the defendant Arnold State Bank, dated September 11, 1928, heretofore referred to as for $10,000, stated that consideration and described a note for that sum. The note is in evidence and is for that amount, but it bears an indorsement of a credit of $4,900 as of September 11, 1928. The cashier of the bank testified that the girls were wanting to get more money, but after the mortgage was negotiated he did not care to go further with it and so the note was credited with $4,900, leaving the debt and mortgage $5,100, which was what they already owed the bank except about $160 which was loaned at the time. On cross-examination he explained that part of the indebtedness to the bank was in the form of notes by William H. Mackley, but it was arranged with the girls and Mr. Mackley to take all the indebtedness up with this mortgage. The bank knew of the deeds of lands to the girls more than seven years earlier and considered the mortgage as security for the "indebtedness of the outfit out there—of the outfit, the Mackley folks."

The evidence clearly shows that the southeast quarter of section five has continued to be the home of William H. Mackley and Rose B. Mackley from the time she went

there as a bride in 1891. The improvements were very meager until some years after the government patent was received in 1898. Mrs. Mackley testified that, with the aid of a small amount of money she received from her mother's estate and other money she had made and saved, she paid off a small claim against the place and bought the lumber for a new house 18 by 28, which was built on the land about two years after they got their patent. The total cost was about $600. She said her husband had wanted to give up the place, as others in that community were doing, but she was unwilling because one of her children was buried there; that he had promised to deed the land to her and she made these improvements on the faith of that promise; that in 1905 her husband's father, who had a fatal cancer, came there and asked her to take care of him until he died, which she did in consideration of $1,800 which he gave her, and that this money was put into an addition to the house and other improvements; that Mackley said he would deed the place to her and told everybody around there it was hers; that in 1920 her husband wanted to borrow $25,000 on other lands he had acquired, and asked her to join in the mortgage, but that she refused unless he deed this home place to her, which he then did, and she joined him in the mortgage; when she got this deed in March, 1920, she knew nothing about his indebtedness to the Sarvis Lumber Company. She knew he had six quarter sections of land and had cattle and horses and had been prosperous so far as she knew. He told her he owed his brother in California $5,000 and he had given a $10,000 mortgage to the Great American Insurance Company and he wanted the $25,000 to pay out on his land. She thought he had personal property enough to pay all his debts except the mortgages. He had always paid his debts and she had no knowledge of any fraud or any intent to defraud any one when she took this deed to the homestead.

Mr. Mackley had received a serious injury to his arm in 1892 and had not been able to do much heavy work since that time. The chief income from the land had

come from dairying. Through the years the family kept many milch cows and sold butter and milk, shipping butter in the earlier years. As the daughters grew up they became useful in caring for the cows and in work in the fields. By the time they became of age their father considered them as valuable as men for his purposes. The testimony shows that, as they became 18 years of age, he induced each of them to remain at home and work for definite, promised wages. Margaret Mackley became of age in 1909, Elizabeth in 1912, Mary in 1913, and Anna in 1917. (Until the act of April 20, 1921, girls reached their majority at 18. Laws 1921, ch. 247.) Margaret and Elizabeth were promised $35 a month until 1913, when Mary was promised $40 a month, and their wages were increased to a like amount, and Anna had a contract for a like wage from the time she reached her majority. One at least of the girls taught school for a time and turned her wages over to her father. They carried out their part of the contract, planting, cultivating and harvesting crops, caring for live stock, milking cows, ranging in number from 25 to 55, and assisting in domestic duties necessarily involved in the operation of a large farm. Up to the time the deeds to the lands were made their father had not paid them, and there was due them, without interest, approximately the following amounts: Margaret Mackley $5,000; Elizabeth Mackley $3,600; Mary Mackley $3,300; and Anna Mackley $1,600. At this time when the deeds were made there was on the six sections deeded to the daughters a total of $35,000 in mortgages, and the father owed about $7,175 of unsecured debts, of which the daughters had notice and which they agreed to pay. Some of these grantors knew of his note or debt of $5,000 to the Sarvis Lumber Company, assigned to plaintiff and renewed, but not to become due until August 29, 1921. Eleven competent witnesses for the defendants testified to the value of the lands in the spring of 1921 and fixed the value all the way from $25 to $45 an acre. Taking the highest valuation, it would amount to considerably less than the total wages due grantees plus the debts they as-

sumed. The experienced trial court who heard the witnesses found: "That on said date the said land was of the fair and reasonable value of $30 per acre, as disclosed by the vast preponderance of the evidence." Taking that valuation, the land was not worth the indebtedness assumed, even leaving out of view the consideration of wages claimed by the grantees to be due them.

The evidence shows that the four sisters remained on the land, operating it together, until 1927, when Anna was married and moved to a home provided by her husband, the defendant, John W. Faherty, and that thereafter the three sisters remained on the land working together. By their joint efforts they had reduced the $25,000 mortgage to $13,700 at the time of the trial and had kept the interest paid. They had also paid off more than $1,000 of other debts of their father assumed by them at the time their deeds were given them almost ten years ago.

On the facts we have outlined, the district court found that the transfer of the homestead to Rose B. Mackley was founded upon a good, valuable and adequate consideration, without fraud or intent to hinder, delay or defraud any creditor of her husband; found likewise as to the deeds to the daughters; and ordered the petition of the plaintiff dismissed.

In argument much discussion was had over the fact that the grantees in these deeds kept no books or memoranda nor took from Mr. Mackley any written evidence of promises or of his debts to them; and also that they did not exercise entire dominion over the land and transact in their own names all the business arising out of it to the exclusion of Mackley. In view of the circumstances and the relations between the parties, we do not think this is so important or controlling. It goes more to the value of their evidence than to the ultimate truth in relation to it.

The appellant complains because the wife and daughters were allowed to introduce evidence of a consideration other than one dollar and love and affection, as expressed in their deeds from William H. Mackley. Section 36-407, Comp. St. 1929, provides that the consideration for any

instrument required by the statute of frauds to be in writing need not be set forth in the instrument itself "but may be proved by any other legal evidence." Section 36-405, Comp. St. 1929, same chapter, says: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

In *Columbia Nat. Bank of Lincoln v. Baldwin,* 64 Neb. 732, a creditors' bill case, it was held: "Where a deed is assailed by third parties as fraudulent, and proof by them is introduced to impeach the recited consideration, the grantee may show by parol evidence the actual consideration, though different from the one recited in the deed."

In *Wells v. Aufrecht,* 96 Neb. 402, this court held that, where the consideration expressed in an instrument forms no part of a promise to pay but is only the recital of a fact, the true facts as to the consideration may be proved by parol.

In the recent case of *American Surety Co. v. School District,* 117 Neb. 6, it is said, citing numerous cases, that this court is thoroughly committed to the doctrine, which it expressed in the syllabus as follows: "The rule excluding parol evidence to vary or contradict a written instrument applies only between the parties to such instrument and those claiming under them. It has no application to controversies between a party to the instrument on the one hand and a stranger to it on the other." The district court was right in allowing parol testimony to be received and in relying thereon under the well-established rule in this state, so as to ascertain the true consideration for the deeds involved.

As to the homestead, deeded to Rose B. Mackley; the district court found, and, without reciting at length the testimony relating to the subject, we are of the opinion that the finding was justified, that Mrs. Mackley made the contribution and advancements of her own money for the

improvements on the homestead upon the promise of her husband, and her reliance thereon in good faith, that he would convey the land to her; that he was not then in debt to any material extent; that the land, exclusive of the improvements which she had paid for, was not worth to exceed $2,000; that ever since not later than 1907, when she provided most of the money for the improvements, she was the equitable owner, and since she received the promised deed therefor on March 8, 1920, she has been the absolute owner thereof. She was in possession of the homestead at all times involved, and plaintiff was bound to take notice of her ownership and interest in the land.

It is proper to say, also: "The homestead of a debtor and his family is not subject to the claims of his creditors, and fraud cannot be predicated upon the transfer of the homestead interest by the debtor to his wife." *McCormick v. Brown,* 97 Neb. 545. See, also, *Smith v. Neufeld,* 61 Neb. 699; *Jayne v. Hymer,* 66 Neb. 785; *Herring v. Whitford,* 119 Neb. 725.

With respect to the deeds to the daughters, the situation differs little from that of the mother, except in the latter case the land deeded was the actual homestead. The girls were creditors of their father. They were not creditors subsequent in point of time to plaintiff, if that makes any difference, but the promise to pay them wages was earlier than the debt on which plaintiff relies, and they had performed before the evidence of plaintiff's debt matured. The property of an insolvent debtor is not a trust fund in the hands of the debtor in favor of creditors "which interferes with a *bona fide* sale of it by the debtor." *Crites v. Hart,* 49 Neb. 53. "The essential thought running through all our cases bearing on this question is that to make a conveyance a fraudulent transfer, a fraudulent intent participated in by both parties to the transfer must exist. In the absence of a mutual fraudulent intent, the law does not interfere with the right of a person, be he solvent or insolvent, to make such disposition of his property, based upon a valid consideration, as his judgment dictates." *Farmers & Merchants Nat. Bank v. Mosher,*

63 Neb. 130, 135. Under section 36-405, Comp. St. 1929, not only is the question of fraudulent intent a question of fact, and not of law, but we agree with the district court that the grantees in the deeds paid William H. Mackley a valuable consideration for all they obtained thereby. Even if Mackley intended to defraud appellant, the daughters did not. On their part at least there was no mutual fraudulent intent. They took by their deeds only what was due them as creditors.

Appellant's brief mentions the fact that the decree did not make any specific reference to the $3,000 chattel mortgage made by William H. Mackley to James M. Mackley on certain cattle and horses, dated April 1, 1921, and recorded May 16, 1921. Plaintiff pleaded this as one of the fraudulent transfers and introduced the chattel mortgage in evidence. Under section 36-303, Comp. St. 1929, a chattel "mortgage shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the filing of same or copy thereof." Appellant points out no evidence, as required by our rules, nor do we find any, as to whether or not this personal property is still in existence. We are not advised as to whether it may or may not be levied on as the property of William H. Mackley, irrespective of this creditors' bill. The district court's decree found generally in favor of the defendants and against the plaintiff. We cannot say that the court erred, nor do we think it necessary in the circumstances to consider the particular subject further.

Many other propositions of law are argued in the briefs. We think those we have presented and decided are controlling. The decree of the district court was right as to the title of Rose B. Mackley to the home and as to that of the daughters to the six other quarter sections. The conveyances thereof were not fraudulent as to appellant.

The district court found that the mortgages made to the Arnold State Bank and James M. Mackley by the respective grantors were valid liens. Inasmuch as these grantors have not cross-appealed, and as they had title to the lands

so mortgaged, free from any claim of plaintiff, under the conclusions arrived at in this opinion, the decree should be affirmed as to these matters. The district court decreed that the bill of sale of the personal property from William H. Mackley to his wife should be canceled and set aside. This, too, was correct, for the evidence showed that it had never been delivered to or accepted by the wife.

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

AFFIRMED.

STATE, EX REL. JAMES B. PIERCEY ET AL., APPELLANTS, V. FRANK STEFFEN ET AL., APPELLEES.

FILED APRIL 10, 1931. No. 27626.

Highways: COUNTY ROADS: MAINTENANCE. All "county roads," designated under sections 39-227 to 39-229, Comp. St. 1929, shall be maintained at the expense of the county.

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

Perrin & Kier, for appellants.

Stanley A. Matzke, Thomas & Vail and *C. F. Barth, contra.*

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

GOSS, C. J.

This is a mandamus suit against a county board of supervisors to compel maintenance of a road. The district court ultimately refused the peremptory writ and relators appealed.

The petition, filed on June 25, 1927, alleged that a certain described road had for several years been designated and maintained, under the provisions of what is now section 39-227, Comp. St. 1929, as a part of the highway system of Seward county. The road was alleged to be a "county road, having been designated as a part of the

county highway system and said road being a direct highway leading to and from a rural school where ten or more grades are being taught and being a highway connecting cities, villages and market centers and a main traveled road," as under what is now section 39-229, Comp. St. 1929; and it was averred that the road must be maintained at the expense of the county under the mandate of the last named section, which says: "All county roads designated in accordance with the preceding sections of this act shall be maintained at the expense of the county." The relators alleged that for several years after the establishment of the road the county maintained it but that since about June 1, 1926, the respondents have refused to maintain it. The prayer was for a writ, commanding the respondents to maintain the road as a county road at county expense. An alternative writ was issued by the district court. Respondents filed their return to the writ, denying each and every allegation thereof. A hearing was had. The bill of exceptions does not contain the evidence on that hearing. The court took the matter under advisement until February 27, 1928, when it filed a memorandum opinion and a decree, shown in the transcript.

The decree found that the road "is a public road in Seward county, Nebraska, with which the county board of supervisors of Seward county, Nebraska, have the duty and liability imposed by law of control, supervision, maintenance and keeping in repair. The court further finds that the county board of supervisors in good faith, but under a misunderstanding of the road statutes of Nebraska, have, since June, 1926, failed to assume the duties and liabilities imposed by law in respect to said road, claiming the township had complete control of the same."

Thereupon the court ordered and decreed that the board had the duty and liability imposed by law of the control, supervision, maintenance and keeping in repair of the road described. The court did not order the writ issued, but further ordered, upon motion and showing that the county board "have failed to comply with this decree, that the writ issue directing compliance herewith." The respond-

ents filed a motion for a new trial, which was overruled. They did not appeal. The relators evidently were satisfied with the order directing the county board to maintain the road.

On October 16, 1928, the relators filed a motion alleging that the county board had failed to comply with the decree of February 27, 1928, and moving for the issuance of the peremptory writ in accordance with the decretal order. A hearing was had, evidence was taken in the form of oral evidence and of affidavits, and, on April 5, 1930, the court entered a final order overruling the motion. The court found, "as in the decree filed herein February 27, 1928, that the road in question is a public road in Seward county, Nebraska, with which the county board of supervisors of Seward county, Nebraska, have the duty and liability imposed by law of control, supervision, maintenance and keeping in repair, and that the said board has assumed that duty in good faith. The court further finds that the said county board, as shown by the evidence, has not failed to comply with said decree and that the motion should be overruled." The appeal by relators is from this final order, which overruled the motion of relators for the issuance of the peremptory writ. The bill of exceptions contains only the evidence given on the hearing on the motion. The respondents have not cross-appealed.

This was the first final order in the case from which an appeal need be taken by the relators; the court had not yet finally allowed or denied the writ prayed for, nor had the case been dismissed. *State v. Higby*, 60 Neb. 765.

The memorandum opinion of the district court says: "We do not deem that it is necessary in the instant case to pass on the question of whether the road in controversy is a county road or not. It is a public road of which the county has the responsibility of maintenance." The original decree and the final order, while describing the road as a public road, fixed upon the county the duty of maintaining and keeping it in repair. Such a duty is attributable to a county in its relation to a county road. As to township, precinct, or district roads, the county board,

through its county highway commissioner, has control, government and supervision because they too are public roads. Comp. St. 1929, sec. 39-1302. But it is not required to maintain these roads at county expense. It is merely required to see that the roads under the jurisdiction of these smaller political units are maintained and repaired. The orders themselves are ambiguous as is the memorandum opinion. They are not certainly and definitely responsive to the issues made by the pleadings. The question at issue was whether the road was a county road, to be maintained by the county at county expense. All highways are public roads. A county road is a public road, but a public road is not necessarily a county road. Yet the decree found and ordered the county to maintain and repair this public road as if it were a county road, whereas the opinion indicates that the court was not passing on that question; and a perusal of the evidence shown in the bill of exceptions indicates that the county is not maintaining the road but is merely exercising some supervision and inspection of the road as maintained by the smaller governmental unit.

We find ourselves unable to determine from the record whether the county should maintain this particular road or whether its duty is discharged by seeing that it is maintained. That depends entirely on the conclusion of fact as to whether this is a county road. We think the district court should have decided that point.

We therefore reverse the judgment of the district court and remand the cause, with directions to take evidence and determine whether the road is a county road within the meaning of section 39-229, Comp. St. 1929, and preceding sections. To save time and expense the court will, of course, exercise his discretion to permit the parties to consider the evidence heretofore taken on the subject as if taken anew and thus made available for consideration of the district court and for review on appeal, if any.

REVERSED.

ANTHONY DOLL & COMPANY, APPELLANT, V. ALBERT M. STRIEN ET AL., APPELLEES.

FILED APRIL 10, 1931. No. 27667.

Appeal. Assignments of error that require an examination of the evidence are unavailing on appeal in absence of a bill of exceptions.

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

Wells C. Jones, for appellant.

Beeler, Crosby & Baskins, contra.

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

ROSE, J.

This is an action to recover $156 in damages for breach of a contract to compensate plaintiff for advertising matter furnished to defendants. The execution of the contract was admitted in the answer to the petition, but defendants pleaded that they canceled the contract before any work had been performed by plaintiff under it and that plaintiff was not damaged. Upon a trial of the issues the district court directed a verdict in favor of plaintiff for one cent. From a judgment for nominal damages only, plaintiff appealed.

The assignments of error cannot be sustained without an examination of the evidence. On motion of defendants the bill of exceptions was quashed and cannot now be considered. The pleadings sustain the judgment. While the answer admits the execution of the contract, there is nothing in the record to show substantial damages or error, in absence of a bill of exceptions.

AFFIRMED.

CLARENCE G. BLISS, APPELLANT, V. COBE S. VENNER ET AL., APPELLEES.

FILED APRIL 10, 1931. No. 27556.

1. **Principal and Surety: NOTES: ACCOMMODATION MAKER.** Where a promissory note is executed and certain defendants are sureties thereon for the debt of another, the fact that such sureties were financially interested in the consideration for which the note was given is sufficient cause to negative the defense that they signed the note merely as an accommodation to the bank pursuant to the provisions of section 62-206, Comp. St. 1929.
2. **Banks and Banking: AUTHORITY OF CASHIER.** In an action by the receiver of an insolvent bank to recover on a promissory note executed by certain defendants as sureties thereon, where the cashier of the bank assumed to assure such defendants at the time they signed the note that they would not be liable for the payment thereof, such cashier went beyond the scope of his authority in the premises, and the defendants, in a proper case, are liable thereon.

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

Clarence G. Miles and *George H. Risser*, for appellant.

Charles E. Matson and *Richard O. Johnson, contra.*

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

DEAN, J.

The Farmers & Mechanics Bank of Havelock, hereinafter called the bank, was declared insolvent July 17, 1929, and was taken over by the department of trade and commerce. Subsequently, Clarence G. Bliss, secretary of the above named department, began this action in the district court for Lancaster county, wherein Cobe S. Venner and Mintie Schmidt are named as defendants, to recover $2,253.42, with interest at the rate of 10 per cent. per annum. This sum, it is alleged, represents the balance due on a promissory note in the principal sum of $2,500, which was made and executed July 15, 1927, by Joe Dorfler, as principal, and signed by defendants Venner and Schmidt,

as sureties. Dorfler was adjudged a bankrupt and the action was thereupon commenced against the defendants, as Dorfler's sureties, to recover the amount due on the note. The jury returned a verdict for the defendants and against the plaintiff receiver, and a judgment in pursuance of the verdict was rendered thereon. The receiver has appealed.

The defendants argue that, on or about July 15, 1927, Dorfler purchased a garage business in Havelock, including all of the stock, tools, office equipment, fixtures, and all of the accessories of the business generally. And they contend that they were induced by the bank officers to sign the note in suit upon certain oral representations made to them that Dorfler would execute and deliver to the bank a mortgage on the stock hereinbefore mentioned. Afterwards the mortgage was given by Dorfler to the bank, and, besides, he executed a chattel mortgage on a new Oldsmobile car in favor of the bank, and he also agreed to assign a policy of life insurance to the bank as additional security for the note in question here. But the defendants contend that the bank permitted Dorfler to exchange the Oldsmobile car for another car, and that later still another exchange in cars was made by Dorfler without an accounting to either the bank or the defendants in respect thereof. And defendants contend that the bank did not collect the $50 a month rent from Dorfler as agreed, and that the bank permitted Dorfler to dispose of his business without an accounting therefor to the real parties in interest. And the defendants also allege that, after the bankruptcy proceedings were instituted, Dorfler offered to withdraw his petition and reopen his garage business in an effort to pay the note, but that the bank refused to accept his offer. The contention is that they signed the note merely as an accommodation to the bank, and that they received no consideration therefor, and that they are therefore not liable for its payment.

From the submitted facts it appears that the garage building and the bank building belonged to defendant Schmidt. And it also appears that Dorfler purchased his

garage business from the former tenant and owner of the garage, namely, C. A. Cox. Some time in 1925 the evidence shows that Schmidt and Venner signed a note for Cox, which was subsequently renewed from time to time, the last renewal being shortly before the Cox garage was sold to Dorfler. And it also appears that the Cox note was canceled at the time the garage business was sold to Dorfler.

From the evidence of Schmidt it appears that some time in May, 1928, after the note in suit was executed, he became the owner of more than $50,000 worth of bank stock, and was thereafter made president of the bank. And it also appears that both defendants were directors of the bank from thence until the bank was closed almost a year later. But the defendants testified that they had no knowledge that the note in suit had never been paid by Dorfler.

In view of the fact that the Cox note was canceled when the Dorfler note was signed by the defendants, and that Schmidt owned the garage that was rented to Dorfler, we think there was sufficient consideration to induce the signing of the note by the defendants and that they are bound thereby.

The defendants, as noted above, contend that the bank permitted Dorfler to dispose of his garage without an accounting therefor, but the evidence does not clearly appear to sustain this viewpoint. In fact, it appears that an inventory of the stock was taken some time after the note was signed, and that Schmidt himself collected the rent for the garage each month. Schmidt testified that the garage stock appeared to be undiminished and that he did not at any time observe a substantial dissipation of the stock.

Under our statutes, an accommodation party is one who has signed an instrument without receiving any value therefor, and for the purpose of lending his name as surety only. Comp. St. 1929, sec. 62-206. But where a promissory note is executed with certain defendants as sureties thereon, for the debt of another, the fact that such sureties were financially interested in the proposition for which

the note was given is sufficient consideration to negative the defense that they signed the note merely as an accommodation to the bank pursuant to the provisions of section 62-206, above cited. "A valuable consideration, sufficient to support a contract, may consist of some right, interest or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Union Bank v. Sullivan,* 214 N. Y. 332.

Defendants rely on an affirmance of the judgment from the fact that the bank cashier gave them assurance, as they allege, that they would never be called upon to pay the note. But in *Farmers Nat. Bank v. Ohman,* 112 Neb. 491, where a note was signed in reliance on an oral agreement that the signature was appended merely to assist the bank, and to satisfy the demands of the bank examiner, we held that such agreement did not constitute a defense to defeat recovery on the note. The following rule is announced in 3 R. C. L. 448, sec. 75: "Unless specially empowered to do so, he (a bank cashier) is not authorized to release, otherwise than in due course of business and on payment, the makers of notes or other debtors of the bank, or to release sureties or indorsers."

And in a recent case, where a bank president made an agreement with a defendant that such defendant would not be obligated on a note if he would sign it, the court held that such agreement was beyond the authority of the president to make. *Markville State Bank v. Steinbring,* 179 Minn. 246. And in *Farmers Nat. Bank v. Ohman, supra,* we held to the familiar rule that: "A promissory note, in the usual commercial form, is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence." And in the present case, where the cashier of the bank assumed to assure the defendant sureties that they would not be liable for the payment of the note in suit, as the defendants contend, we hold that such officer went beyond the scope of his authority in the premises.

Complaint is made of certain instructions given by the court and of the refusal to give certain other instructions tendered by the plaintiff. In its instruction numbered 9, the court informed the jury that if they found that the defendants were induced to sign the note as sureties on the representation that the note was amply secured, and if they found that the bank permitted such security to be dissipated, without being applied on the debt, they should find for the defendants. We think the court erred in submitting this instruction to the jury, from the fact that it is not disclosed by the evidence that the bank permitted, nor that it had knowledge of, the dissipation of the security given for the payment of the note.

Under the law applicable to the facts, we conclude that the judgment of the district court must be and it hereby is reversed, with directions that a judgment be entered in favor of the plaintiff receiver for the amount due on the promissory note, as above noted, with interest thereon at 10 per cent. per annum from maturity.

REVERSED.

INTERNATIONAL MILLING COMPANY, APPELLANT, V. CARL F. STAMM, APPELLEE.

FILED APRIL 10, 1931. No. 27614.

Sales: RESCISSION. Where a plaintiff milling company shipped flour of an inferior grade to the defendant purchaser, under a written contract therefor, and later, in an attempt to satisfactorily adjust a complaint made by the purchaser, shipped other flour, which was also defective and of another brand than that specified in the contract, in such case the defendant was justified in rescinding the contract and refusing to accept the remainder of the shipment, and such plaintiff company cannot recover damages for the alleged breach.

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

Sidney W. Smith, G. F. Nye, H. L. Hoidale and *Collins & Collins*, for appellant.

William P. Nolan, contra.

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

DEAN, J.

The International Milling Company, plaintiff herein, brought this action in the district court for Sarpy county to recover damages for an alleged breach of contract wherein the plaintiff agreed to sell and the defendant agreed to buy 150 barrels of flour at $9 a barrel. The jury found for the defendant, and from the judgment so rendered thereon by the trial court, the plaintiff has appealed.

The facts disclose that the plaintiff shipped and the defendant received and paid for 50 barrels of flour at the rate of $9 a barrel. In his answer the defendant admitted signing the contract, but he alleged and testified that, after using some of the flour in his bakery, he discovered that it was inferior in quality to that which he had ordered and which he had formerly bought from the company in the usual course of his business. Subsequently a considerable quantity of the flour was returned to the plaintiff and this was replaced by plaintiff with other flour. But the evidence discloses that this shipment was also inferior and was not the quality of flour specified in the contract of sale. The defendant then sent a written notice to the plaintiff milling company, in which the company was informed that he, the defendant, refused to accept the remainder of the flour under the contract because it was not the quality which was specified in the contract, nor was its quality equal to that which he had formerly received from the plaintiff. At the close of the defendant's evidence the court overruled the plaintiff's motion for a directed verdict and also refused to allow the defendant's counterclaim for the damages which he alleges he sustained as a result of a decrease in the volume of his business because of the alleged defective quality of the bread he made from the flour bought from the plaintiff.

The record fairly discloses that the flour shipped to the defendant by plaintiff was of an inferior grade and was

not that specified in the contract. We conclude that where the plaintiff milling company shipped flour of an inferior grade to the defendant purchaser, under a written contract therefor, and later, in an attempt to satisfactorily adjust a complaint made by the purchaser, shipped other flour, which was also defective and of another brand than that specified in the contract, in such case the defendant was justified in rescinding the contract and refusing to accept the remainder of the shipment, and such plaintiff company cannot recover damages for the alleged breach. No other verdict than that rendered should have been returned by the jury.

Reversible error does not appear. The judgment is in all things

AFFIRMED.

MARTHA CAMPBELL, APPELLEE, V. BRANDEIS INVESTMENT COMPANY: J. L. BRANDEIS & SONS, APPELLANT.

FILED APRIL 10, 1931. No. 27640.

1. **Municipal Corporations: AUTHORIZATION TO CONSTRUCT SUBWAY: INJURY TO PEDESTRIAN.** Under an ordinance granting permission to a defendant to remove certain pavement, in the construction of a subway between two buildings, under the condition that defendant repair any settling of the pavement that might occur by reason of such removal, *held*, that, in such case, where a plaintiff sustained injuries by reason of the defendant's failure to keep such pavement in a proper condition, such defendant is liable in damages to plaintiff.
2. ———: ———: **AGREEMENT TO MAINTAIN STREET SURFACE.** Where an ordinance permits the construction of a subway and provides that the owner of adjacent property shall maintain the "street" surface in a proper condition after the removal of the pavement, such provision embraces and includes sidewalks and public thoroughfares that were affected by the construction of such subway.
3. **New Trial.** In a personal injury action, where defendant's counsel failed to advise the court during the trial, and before the evidence was all submitted, that certain jurors had examined certain of the property at the scene of the accident, *held*, that the court did not err in overruling defendant's motion for a new trial.

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

Kennedy, Holland, DeLacy & McLaughlin and *Dykes & Story*, for appellant.

Milton R. Abrahams and *Richard A. O'Connor, contra.*

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

DEAN, J.

This personal injury action was begun in the district court for Douglas county by Martha Campbell, plaintiff, against J. L. Brandeis & Sons, hereinafter called the defendant, and H. A. Wolf & Company and the Brandeis Investment Company. The action was dismissed as to H. A. Wolf & Company and the Brandeis Investment Company, but, in respect of the J. L. Brandeis & Sons company, the action was submitted to the jury and a verdict was returned against the company and in favor of plaintiff for $10,000, upon which the court rendered judgment. The defendant has appealed.

In August, 1909, the Omaha city council granted permission to the above named defendant "to construct and maintain a subway underneath Seventeenth street," and provision was made in the permit that:

"All pavements taken up in connection with any such subway shall be replaced by said J. L. Brandeis & Sons in good workmanlike condition, and any settling of the street surface caused by such construction shall be repaired and the surface of the street restored and maintained in a proper condition for smooth surface pavement."

The Brandeis store is located on the southeast corner of Seventeenth and Douglas streets, and the Brandeis theatre building is located on the southwest corner. The two buildings are connected by a subway that was constructed pursuant to the city ordinance hereinbefore referred to. After the construction of the subway, the street surface water seeped into the Brandeis store space, lo-

cated in the subway, in such quantity that it became necessary to remove the sidewalk which was built over such subway and to resurface it with asphalt and cement. From the evidence it appears that, after the asphalt covering was laid, a two-inch drop occurred and the condition of the sidewalk became "jagged and cracked."

The plaintiff in substance testified that, on February 2, 1929, while she was walking on the sidewalk above the subway, she stepped upon a portion of the sidewalk near the curb that had been cracked and that the defendant had previously removed and replaced. The sidewalk at this point was constructed on an abrupt or sharp grade and, at the time in question here, it was covered with ice and snow upon which the plaintiff slipped and fell. She alleged that, as a natural consequence of the fall, she sustained severe injuries to the muscles and ligaments of her left leg, her left wrist, her left arm, her left shoulder, and her left hip, and that, in direct consequence of such fall, she was compelled to go to a hospital for eleven days and was thereafter compelled to remain in bed for eight weeks, and for five months thereafter she was unable to move about without the aid of crutches.

The defendant contends that the plaintiff slipped on the ice after she had stepped from the curb to the street. But we think there is sufficient corroboration of plaintiff's testimony to show that she fell to the street after her foot had slipped into the depression on the sidewalk and before she had stepped from the curb to the street. It was clearly defendant's duty to repair such settling as may have occurred in the sidewalk because of the removal thereof after the subway was constructed and to at all times maintain it in the proper condition. While the ordinance permitting the defendant to construct the subway provides that the defendant shall maintain the "street" surface in a proper condition after the removal of the pavement, we think that such language embraces and includes the sidewalks or any public thoroughfares that were affected by the construction of such subway.

In *James v. City of Portage,* 48 Wis. 677, the court said: "If, then, a street in a city is adopted or laid out and opened as a public highway for all kinds of travel thereon, and, without any direction or interference of the city or its authorities, a portion thereof alongside of the part used for teams and carriages is used by the people who travel on foot as a footway or sidewalk, that part so used becomes as much a part of the traveled part of such street as that used for the passage of teams and carriages." And in *Marini v. Graham,* 67 Cal. 130, the court held: "The sidewalks of a public street of a city are parts of the street, and the obstruction thereof is a public nuisance."

In view of the fact that the defendant was granted permission to construct the subway upon condition that the surface should be maintained in a proper condition, and where the evidence shows that the ordinance granting such permission was not complied with, the defendant is liable in damages to plaintiff for injuries she sustained when she fell on the sidewalk above the subway. *City of Omaha v. Philadelphia Mortgage & Trust Co.,* 88 Neb. 519; *Jenree v. State Railway Co.,* 86 Kan. 479; *Fowler v. Chicago Railways Co.,* 285 Ill. 196; *Pennsylvania and Ohio Canal Co. v. Graham,* 63 Pa. St. 290; *McMahon v. Second Avenue R. Co.,* 75 N. Y. 231.

Counsel for defendant filed affidavits wherein they alleged that certain of the jurors had been seen when examining the sidewalk. Plaintiff's counsel filed a counter affidavit wherein he stated that defendant's counsel had told him about the incident during the course of the trial. Under the circumstances, however, where defendant's counsel failed to advise the court during the trial, and before the evidence was all submitted, that the jurors had examined the sidewalk, the court did not err in overruling defendant's motion for a new trial. *Consolidated Ice-Machine Co. v. Trenton Hygeian Ice Co.,* 57 Fed. 898; *Very v. Willi,* 293 S. W. (Mo. App.) 500.

Defendant complains that the verdict is excessive, but, in view of the evidence, we do not think so. The evidence shows that plaintiff was about 50 years of age at the time

of the accident, and that, in her occupation as a cook, she was earning $30 a week, and because of the injuries she sustained the loss of her earnings during the time in question amounted to more than $2,000. And the plaintiff testified that she was unable to continue in her occupation and do acceptable service as a cook because of her injuries. It may be added that the evidence discloses that her injuries are permanent. In view of the facts, we decline to disturb the verdict. Other assignments of alleged error have been pointed out by the defendant, but reversible error has not been shown.

The judgment is therefore

AFFIRMED.

CLEMENT L. WALDRON ET AL., APPELLEES, V. JOE LAPIDUS, APPELLANT.

FILED APRIL 10, 1931. No. 27684.

1. **Continuance.** The time when a cause shall be heard in court cannot be made to depend on the whim or convenience of a litigant.
2. **Appeal:** CONTINUANCE. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed.
3. **Continuance:** SHOWING. Where a continuance is sought on the ground that defendant is absent and is a material witness in his own behalf, the showing in support of the motion is insufficient if it fails to disclose the material facts to which defendant would testify, if present.

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

Friedman & Stern, for appellant.

Howell, Tunison & Joyner and *Waldron, Silverman & Newkirk, contra.*

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

GOOD, J.

This is an action to recover a balance alleged to be due on a contract for legal services. Defendant denied the terms of the contract and set up a counterclaim to recover for overpayment. There was a directed judgment for plaintiff, and defendant has appealed.

The only error complained of is the refusal of the trial court to grant a continuance of the cause for a period of a few days.

By stipulation of the parties, the cause had been placed on the trial calendar for trial during the week beginning May 12, 1930. The case was subject to call at any time during that week. On Thursday, the 15th, counsel for the respective parties were notified that the cause would be taken up on Friday morning, the 16th. On the previous Wednesday, defendant, desiring to be absent from Omaha, interviewed his attorney to ascertain whether the case would likely be reached for trial during the week. His attorney examined the trial calendar and, noting a number of cases thereon previous to this cause, advised his client that he did not think the cause could be reached.

It appears that defendant did not leave the city of Omaha until Friday morning. Had any diligence been shown by his counsel, he could have been notified, before he departed from Omaha, that his cause would be up for trial. Whether counsel for defendant gave this information to his client is not disclosed. In any event, defendant went to Lincoln on Friday morning, and during that morning was notified by telephone that his case was about to be taken up for trial. He replied, in effect, that he relied on his attorney to secure a continuance. Had he desired, he could have reached Omaha within two hours after this notice and been present to testify. He chose not to heed the warning and to disregard the fact that the case was set for trial. The absence of defendant was voluntary and after he knew that his cause had been placed on the trial calendar and was likely to be called up for trial at any time during the week. We are not advised as to whether any imperative business called him away from Omaha.

Apparently without reason, he absented himself on his own private affairs.

The time of trial of causes in court cannot be made to depend on the whim, caprice, or convenience of litigants. Unless good cause can be shown, litigants should be ready to proceed with the trial of their causes when regularly reached. A motion for continuance is addressed to the sound discretion of the trial court, and, unless an abuse thereof is shown, its ruling will not be disturbed. *Dilley v. State*, 97 Neb. 853; *Ridings v. State*, 108 Neb. 804; *Smith v. State*, 109 Neb. 579; *Middaugh v. Chicago & N. W. R. Co.*, 114 Neb. 438.

In the affidavit for a continuance it was suggested that the evidence of defendant was necessary for a proper presentation of his case. The affidavit failed to set forth what evidence the defendant would or could give, if present. Where a continuance is sought on the ground that defendant is a material witness in his own behalf as to facts relied on as a defense, the affidavit is defective if it fails to show that defendant would testify as to such facts if present at the trial. *Good v. Bonacum*, 78 Neb. 792.

The affidavit in this case failed to show what material testimony defendant would give, if present. The affidavit was defective and did not set forth sufficient grounds to require a continuance. We do not find that the court abused its discretion.

The judgment is

AFFIRMED.

RALPH MYERS, APPELLANT, V. WILLIAM T. FENTON, APPELLEE.

FILED APRIL 10, 1931. No. 27779.

1. **Criminal Law**: CHANGE OF SENTENCE. A trial court is without power to set aside a sentence after the defendant has been committed thereunder and a portion thereof served, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts so to do is void, and the original judgment remains in full force.

2. **Habeas Corpus: REMAND.** While it is the duty of the court to release a person held in prison on a void process of commitment, so far as that process is concerned, yet if there is a valid judgment of imprisonment against him, of which a duly certified copy is produced and received in evidence; it is the duty of the court, when such record is brought before it on habeas corpus, to remand the relator to such custody as may be required by the terms of such judgment for the full performance of the sentence imposed thereby.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Dale P. Stough, for appellant.

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

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

EBERLY, J.

This is an application for a writ of habeas corpus. Ralph Myers, as relator, petitioned the district court for Lancaster county to release him from the custody of the warden of the state penitentiary. From a judgment in effect remanding him to confinement in the state reformatory for men at Lincoln, there to serve a sentence of eighteen months' imprisonment imposed by the district court for Adams county, this relator prosecutes an appeal. The state presents no cross-appeal.

The following constitute the pertinent facts of the record submitted: The relator introduced in evidence a certified copy of the sentence imposed, disclosing that, in the district court for Adams county, on the 7th day of March, 1930, on a plea of guilty to an information charging him with the commission of forgery, the relator was "sentenced to eighteen months in the reformatory for men at Lincoln." The relator also introduced a certified copy of a purported sentence, imposed later, setting forth that in the district court for Adams county on the 15th day of March, 1930, further proceedings were had, and upon motion of the

county attorney to set aside the sentence of March 7, 1930, for the reason that Ralph Myers had theretofore been convicted of a similar offense and served time in the reformatory for men, and that this is his second offense, a further sentence was imposed and judgment entered purporting to set aside the order of March 7, 1930, and to impose for and in lieu thereof a sentence of imprisonment in the penitentiary at Lincoln, Nebraska, for a period of two years.

The record also establishes that on September 2, 1930, on a writ of habeas corpus issued upon petition of relator and pursuant to the prayer thereof, the sentence imposed on March 15, 1930, by the district court for Adams county was by the district court for Lancaster county adjudged void under the rule announced by this court in *Hickman v. Fenton,* 120 Neb. 66; that by the terms of this judgment the relator was remanded to the men's reformatory at Lincoln to serve the sentence of March 7, 1930.

In *Hickman v. Fenton, supra,* it will be noted that Rose, J., in the opinion, in support of the rule therein announced, quoted and approved the following: " 'It seems to be well established that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void, and the original judgment remains in force.' 44 A. L. R. 1203."

On September 3, 1930, it appears that the board of control of Nebraska caused an "Order of Transfer" to be made and issued, which by its terms required the transfer of the relator from the state reformatory for men at Lincoln, Nebraska, to the state penitentiary, and further commanded the warden thereof to receive such prisoner for care and custody as provided by law. Thereafter the relator instituted the present proceeding as an independent and original proceeding in habeas corpus, challenging therein the validity of the process under which he was held, viz., the "Order of Transfer" last referred to. In this proceeding the district court for Lancaster county, after

hearing, entered an order on the 8th day of October, 1930, adjudging and determining "that the order of the board of control transferring the said Ralph Myers from the state reformatory for men to the state penitentiary was made without authority of law and is invalid and void;" and further in effect remanding the relator to the state reformatory for men for the completion of the sentence imposed by the district court for Adams county on March 7, 1930.

It is solely from that part of the final order remanding the relator to the reformatory for men, there to complete his sentence, that this appeal is prosecuted. This court in no manner passes upon, approves or disapproves any adjudication referred to in this opinion but not expressly by the relator challenged and presented for review.

It may be said, however, in passing, that the members of this court are agreed that the sentence imposed upon the relator on the 7th day of March, 1930, by the district court for Adams county, Nebraska, in a case then duly pending before it, where the trial court had jurisdiction of the offense and of the party charged with the same, appearing in all respects fair and regular on its face, is not subject to collateral attack. Indeed, its validity may not be questioned except upon proceedings in the nature of a review. And in a habeas corpus case it must be taken as good and valid in all respects. The court is further of the opinion that the suggestion that Myers, defendant, at the time this sentence was imposed, was then a second offender and not subject to commitment to the reformatory for men at Lincoln carries no force whatever. The terms and conditions of his sentence were matters for the determination of the trial court upon the evidence before it and the provisions of the statutes relating thereto. Its decision thereon, as well as upon other questions of fact involved in the case, its jurisdiction as to offense and parties being conceded, is not open to collateral attack or to review, except in a direct proceeding provided by law for that purpose. Such sentence must, therefore, under the penalties provided by law, be implicitly obeyed by executive officers concerned in its enforcement.

It was the unquestioned duty of the authorities in charge of the state reformatory for men at Lincoln to receive Myers on commitment under, and to comply with, the sentence of March 7, 1930, imposed by the district court for Adams county, even though the officers in charge of that institution had personal knowledge of a previous conviction for a felony and the service of such sentence by relator.

Indeed, the sentence of March 7, 1930, is the only legal and valid sentence, so far as shown by the present record, ever imposed on the relator. He is not in position to challenge the correctness of the conclusion that the sentence imposed on March 15, 1930, was invalid and void. Upon and pursuant to his own petition in the district court for Lancaster county, it was so adjudged and determined, pursuant to the rule announced by this court in *Hickman v. Fenton, supra.* Habeas corpus is in the nature of a civil proceeding, and the rule that it is a sound and salutary principle that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about is fully applicable here and precludes a change of position on the part of the relator on the question now before us.

A void judgment is one which, from its inception, is and forever continues to be absolutely null, without legal efficacy; ineffectual to bind parties or support a right; of no legal force and effect whatever, and incapable of confirmation, ratification or enforcement in any manner or to any degree. In short, the purported judgment of March 15, 1930, being utterly void and so determined by a court of competent jurisdiction, the original judgment of March 7, 1930, imposing a sentence of eighteen months upon the relator, was in no manner set aside, nullified, modified, or affected in any way or in the slightest degree, and at all times remained in full force and effect *Hickman v. Fenton,* 120 Neb. 66.

It is obvious, therefore, that when the district court for Lancaster county in the instant case, from the evidence before it, determined that the "Order of Transfer" of

September 3, 1930, was really invalid and of no force and effect, its duty was plain. As already set forth, a duly certified copy of the sentence imposed by the district court for Adams county on the 7th day of March, 1930, and also of the purported but void judgment of March 15, 1930, together with a history of the proceedings had and adjudication thereon (including the invalidity of the latter sentence), were all embraced in the record submitted to it. Under these circumstances, the rule unquestionably applicable and controlling, in view of the situation, is: "So, while it is the duty of the court to release a person held in prison on a void process of commitment, so far as that process is concerned, yet if there is a valid judgment of imprisonment against him, of which a certified copy can be obtained, it is the duty of the court, when brought before it by habeas corpus, to retain the prisoner until a reasonable time allowed for the purpose of producing it has elapsed, and, if produced, to remand him." 12 R. C. L. 1252, sec. 70. *Ex parte Gibson,* 31 Cal. 619, 91 Am. Dec. 546. See, also, *Matter of Mason,* 8 Mich. 70; notes to *Koepke v. Hill,* 87 Am. St. Rep. 161, 197.

It will be remembered that the certified transcript of the valid judgment of March 7, 1930, placed in evidence by relator, supplied and completely fulfilled the statutory requirements with reference to delivery of convicts to the penitentiary. Comp. St. 1929, sec. 83-935. It would seem that these provisions are equally applicable to the state reformatory for men. The Lancaster county district court was therefore thus fully advised as to the rights of the state of Nebraska by the terms of the sentence imposed, and, pursuant to such sentence, the remand by the district court for Lancaster county of the relator as a prisoner to the state reformatory for men was an imperative compliance with the terms of the sentence lawfully imposed.

It not appearing that the relator is unlawfully deprived of his liberty, the action of the trial court in remanding him to the custody of the state reformatory for men is proper, and is

AFFIRMED.

ALMA ACTON, APPELLANT, V. ALFRED SCHOENAUER, APPELLEE.

FILED APRIL 10, 1931. No. 27686.

1. **Contracts: IMPLIED CONTRACT.** An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract.
2. ———: ———. There can be no implied contract where there is an express agreement between the parties relative to the same subject-matter.

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

M. H. Leamy, for appellant.

Fred H. Free, contra.

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

DAY, J.

This is an action on an implied contract for services rendered by the plaintiff in nursing and caring for defendant's wife. Plaintiff is the stepdaughter of the defendant. At the close of the plaintiff's testimony, the trial court directed the jury to return a verdict for defendant.

The defendant's wife was ill and, at a time when they thought she would not recover, the relatives sent for the plaintiff to come, because the mother wished to see her daughter. Plaintiff testified: "I went because it was my mother, with no arrangements made for pay." The mother recovered and testified at the trial: "I did not employ her as a nurse or as a housekeeper, but I told her to come, because I was so I could not wait on myself. I only had one hand and I could not hardly use it."

The evidence in this case clearly discloses that the defendant had no arrangement or agreement to pay the plaintiff and that she was not in his house at his request. He contends that, when a child renders services for the parent, the presumption is that it is gratuitous; and in

support of this contention he cites *Kloke v. Martin*, 55 Neb. 554. In that case the child was a member of the household. The plaintiff points out that she was not a member of the defendant's household for 26 years, and that this case comes within the rule of *Bell v. Rice*, 50 Neb. 547, and *In re Estate of Wieland*, 104 Neb. 412. In these cases it was said that the presumption that services rendered by the child are gratuitous is not conclusive and the child may recover if the evidence shows that they were rendered under such circumstances as to justify the inference of such a contract. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract. Such is not the situation in this case. The evidence in this case considered in the most favorable light to the plaintiff, as it must be upon a motion to direct a verdict, conclusively establishes the fact, without any contradiction whatever, that there was a refusal to contract to pay for the services even on the part of the defendant's wife. It is the universal rule that there can be no implied contract where there is an express agreement between the parties relative to the same subject-matter. 13 C. J. 243. In the instant case the plaintiff's mother and the relatives with whom she corresponded refused to agree to even pay plaintiff's car fare from Dayton, Ohio, to Plainview, Nebraska. The defendent having refused to make any agreement with the plaintiff and no one having made an agreement for him, it must be assumed that the plaintiff came to take care of her mother of her own accord and because she wanted to do something for her mother. The plaintiff's mother thought this was the situation, and testified that she had in the past gone to plaintiff's home and nursed her without charge. The trial court did not err in refusing to submit the question of an implied contract to the jury, since the evidence would only support the finding that the plaintiff nursed her mother in accordance with an express agreement that she was not to be compensated.

However, the plaintiff contends that the defendant, as the husband, is liable for the necessary care furnished to his wife. The husband's liability in such a case is not based upon a contract, express or implied, but is an obligation imposed by law. The basis of this common-law obligation is the refusal or the neglect of the husband to supply the wife with suitable necessaries. In such a case she may bind him by contracting with third parties for such necessaries. The evidence in this case is such that this rule does not apply. The mother of the plaintiff and the wife of the defendant, when called as a witness for the plaintiff, testified: "We had medical attention, all we needed; I was going to say more than we needed; but if we had known the conditions of everything we could probably have done a little different, but I had medicine." The evidence also is that other relatives were taking care of the plaintiff's wife, and there was no evidence that the defendant refused or neglected to hire a nurse for his wife when necessary. The fact is that for a large part of the time during which the plaintiff was at the defendant's home he did employ a nurse. There could be no recovery from the defendant upon this theory.

We have carefully examined the entire record and there is no evidence to support a verdict for the plaintiff against the defendant upon any theory of the case presented. The judgment of the trial court is accordingly

AFFIRMED.

LEROY C. SPENCE, APPELLANT, V. SCHOOL DISTRICT NO. 3, ARTHUR COUNTY, APPELLEE.

FILED APRIL 10, 1931. No. 27703.

1. **Schools and School Districts: TEACHERS: CONTRACTS.** Except in so far as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally. Thus, the contract must be mutual, certain and definite in its terms and free from fraud and illegality. 35 Cyc. 1081.
2. ———: ———: ———: **RESCISSION.** A false representation of a material fact, such as the term of his certificate, by a

teacher, with knowledge of its falsity, with intent to induce a school board to enter into a contract of employment to teach, constitutes fraud sufficient to entitle the district to avoid the contract.

3. ———: ———: ———: ———. In order to avoid such a contract, it must appear that the district was damaged or prejudiced by the execution of the contract. It is not necessary that the damage be monetary, but it is sufficient that it was induced to contract for something different than it intended.

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

Beeler, Crosby & Baskins, for appellant.

Halligan, Beatty & Halligan and *W. I. Tillinghast, contra.*

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

DAY, J.

This is a suit for damages for the breach of a contract to employ the plaintiff to teach in school district No. 3 of Arthur county. The district sought to avoid the consequences of the contract for that it was induced by false and fraudulent representations. The plaintiff appeals from a verdict in favor of defendant.

The plaintiff contracted to teach the school of defendant district for nine months beginning in August, 1927. It is agreed that the school would continue until sometime in May. The fraud complained of by the defendant is that the contract, which was prepared by the plaintiff, contained the representation that he held a certificate good in said county beyond the term of the contract; and that said certificate was issued May 20, 1925, and expired May 20, 1928. This representation as to his certificate was false and known by plaintiff to be false, as his certificate expired April 20, nearly a month before the expiration of the contract. About ten days later the members of the board discovered the fraud and insisted that plaintiff qualify for the entire term of the contract. This was early in June

and he could have qualified by attending a normal school during the summer. He even contends that he could have qualified by means of an extension course during the term of the contract. However, from a careful consideration of the record, it is apparent that the plaintiff had no intention of renewing his certificate and so expressed himself to the members of the school board. It is a fair inference from the record that he intended to teach only until his certificate expired. The members of the board relied upon his false and fraudulent representation and signed the contract. When he refused to renew his certificate they refused to let him teach. He seeks to recover his salary for the portion of his contract during which his certificate permitted him to teach. Except in so far as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally. Thus, the contract must be mutual, certain and definite in its terms and free from fraud and illegality. 35 Cyc. 1081. It is said in 13 C. J. 382: "It may be laid down as a general rule that any false representation of a material fact, made with knowledge of its falsity and with intent that it shall be acted on by another in entering into a contract, and which is so acted on, constitutes fraud and will entitle the party deceived thereby to avoid the contract or to maintain an action for the damages sustained." The plaintiff in this case contends that this contract cannot be avoided by the district for that the district has not been prejudiced or injured by the fraud, but it is not necessary that the damage be monetary. We are of the opinion that the school district was prejudiced and injured in this case, in that they contracted with a teacher who represented himself to be qualified to teach the entire term, when as a matter of fact he was not. The board had a discretion as to whether or not they would hire a man under the circumstances, and they were deprived of the free exercise of that discretion by the misrepresentations and fraud of the plaintiff.

Questions of fact in this case were all submitted to the jury under proper instructions, and, there being no reversible error, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF JOHN HUSA.
P. I. HARRISON, EXECUTOR, ET AL., APPELLANTS, V. ANNA BODTKE ET AL., APPELLEES.

FILED APRIL 17, 1931. No. 27677.

1. **Evidence** examined, and *held* to support the verdict and judgment rendered thereon.
2. **Statutory Provision.** "Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writing of the same person which is proved to be genuine." Comp. St. 1929, sec. 20-1220.

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

J. P. Baldwin, George W. Wertz, W. B. Sadilek, P. I. Harrison and *L. F. Otradovsky,* for appellants.

Hall, Cline & Williams, Walter C. Weiss and *J. L. Richards, contra.*

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

PER CURIAM.

This is an appeal from the judgment of the district court for Thayer county, denying probate to an instrument in writing purporting to be the last will and testament of John Husa, deceased, in which the proponent P. I. Harrison is named as executor.

Appellants contend that the evidence in the record is wholly insufficient to support the verdict of the jury, upon and pursuant to which the judgment appealed from was entered; also, that the trial court erred in admitting in evidence, over objection, certain writings, made during the trial, as a basis of comparison for the determination of

the genuineness of certain disputed documents theretofore received in evidence.

We do not agree with the views of counsel for appellants as to the weight of the evidence in the record, and are impressed with the thought that there is presented thereby a matter of conflicting evidence properly to be determined by the jury.

If we are wrong in this conclusion, it may be said that, after the evidence had been received at the trial, and all parties had rested, appellants in no manner challenged the sufficiency of defendants' evidence, by motion, demurrer thereto, or otherwise. But, eighteen requests for instructions were then and thereupon submitted in their behalf, none of which were proper, save and except in a case involving substantially conflicting evidence submitted to a jury for decision on the merits. One of these instructions, so submitted, was given; others, though formally refused, were in whole or in part incorporated in those given by the court as a part of "Instructions given by the Court." In view of the record before us, we deem the rule announced in the following cases applicable and controlling: *Waters v. Nebraska Mutual Ins. Co.*, 108 Neb. 1; *Farmers Bank of Nebraska City v. Garrow*, 63 Neb. 64; *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610.

Nor, in the light of the actual issue being tried, to which the evidence in controversy relates, and the circumstances surrounding the procurement of the writings which were admitted over proponents' objections as a basis of comparison for determination of the genuineness of certain disputed documents, are we impressed with the view that proponents were prejudiced by the action to which they object. *Johnson v. Lane*, 100 Neb. 177; *Morfeld v. Weidner*, 99 Neb. 49; *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307.

So, it would seem that the trial judge's rulings on the matters here discussed have the support of the express words of our Civil Code, which provides: "Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writing of the same per-

son which is proved to be genuine." Comp. St. 1929, sec. 20-1220. See, also, *First Nat. Bank of Madison v. Carson*, 48 Neb. 763; *Singer Mfg. Co. v. McFarland*, 53 Ia. 540; *Ashwell v. Miller*, 54 Ind. App. 381; 4 Wigmore, Evidence (2d ed.) 250, 253, 280.

Indeed the history of the development of the judicial doctrine or concept, embodied in our Civil Code, just quoted, suggests or tends to support the conclusion that the following provision is likewise applicable, and possibly controlling in the instant case: "Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." Comp. St. 1929, sec. 20-1211.

In conclusion, it may be said that we have examined the entire record and find it to be free from prejudicial error.

AFFIRMED.

CLARENCE G. BLISS, APPELLEE, V. GEORGE L. REDDING ET AL.: ELIZABETH TYNON ET AL., ADMINISTRATRICES, APPELLANTS.

FILED APRIL 17, 1931. No. 27649.

1. **Statutes.** "Unless it is clearly disclosed that the legislature intended a legislative act to operate retrospectively, it will be held to operate prospectively only." *War Finance Corporation v. Thornton*, 118 Neb. 797.
2. **Mortgages: SUBSEQUENT INCUMBRANCERS.** Under section 20-202, Comp. St. 1929, a "subsequent incumbrancer" is one who acquires his incumbrance after the statute has run against the prior incumbrance shown on the record.

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

Paul Jessen and *Ernest F. Armstrong*, for appellants.

C. M. Skiles, Edgar Ferneau, Fred G. Hawxby and *John A. Skiles, contra.*

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

GOSS, C. J.

Elizabeth Tynon and Josephine Tynon Vance, administratrices of the estate of William Tynon, mortgagees, appealed because their mortgage, though originally first, was decreed to be second to the mortgage represented by the receiver.

On June 15, 1929, the department of trade and commerce took over the Nemaha County Bank, and on August 12, 1929, Clarence G. Bliss, secretary of the department, was appointed receiver for the bank. Among the assets was a note of $2,500, dated February 25, 1924, and a mortgage to secure it, executed February 27, 1924, on 40 acres of land in Nemaha county, both note and mortgage executed by defendants George L. Redding and Fannie Redding, husband and wife. This mortgage recited that it was "subject to a certain mortgage of three thousand dollars ($3,000) to Nemaha County Bank, which mortgage is recorded in Book 37, Mortgages, page 344." The mortgage was duly recorded March 1, 1924. On March 5, 1929, the Reddings executed and delivered a $2,500 note, due six months after date, in favor of the bank, but recited that it was not delivered and accepted in payment but for the purpose of extending the time of payment of the former described note.

On March 31, 1915, the same makers had executed and delivered to the Nemaha County Bank their note for $3,000, due three years after date; and to secure the payment thereof the same makers executed and delivered their mortgage on the same 40 acres, which mortgage was recorded on April 1, 1915, in Book 37 of Mortgages, on page 344. On April 17, 1915, this last described note and mortgage were sold and assigned by Nemaha County Bank to William Tynon, now deceased, who is represented herein by the defendants as administratrices of his estate. Tynon paid full face value for the note and mortgage. On said April 17, 1915, the Nemaha County Bank, in writing, assigned to William Tynon the mortgage and the debt secured thereby, but this assignment was not filed for record and recorded until February 15, 1927, when it was re-

corded in Book 49, at page 645. Redding and wife annually paid the interest on said note and mortgage up to March 31, 1926. This is the mortgage to which plaintiff's mortgage was expressly made subject.

The court found and decreed that the $3,000 note became due March 31, 1918; that the cause of action accrued on the note and mortgage at that time; that the statute of limitations on said mortgage expired on March 31, 1928; and, as this suit was not commenced until March 3, 1930, that the mortgage is barred by the statute of limitations, has ceased to be a lien as to plaintiff's mortgage and is subject thereto, the receiver being described by the district court "as a subsequent incumbrancer for value." The court found and decreed plaintiff's lien to be first for an amount stated and the Tynon mortgage to be second for an amount stated and ordered foreclosure in the usual form. The defendants Redding promptly filed a request for a stay but were brought here on appeal.

Both parties agree that this case depends entirely on the construction to be placed on the act of April 1, 1925, being chapter 64, Laws 1925, amending section 8507, Comp. St. 1922. This section as amended is now known as section 20-202, Comp. St. 1929.

The full section under consideration, paragraphed as in the session laws, is as follows:

"An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued: Provided, no limitation shall apply to the time within which any county, city, town or village or other municipal corporation, may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots.

"For the purposes of this act, a cause of action for the foreclosure of a mortgage shall be deemed to have accrued at the last date of the maturity of the debt or other obligation secured thereby, as stated in, or as ascertainable from the record of such mortgage or in an extension there-

of duly executed and recorded, and if no date for any maturity be stated therein or be ascertainable therefrom, then not later than twenty years from the date of said mortgage: Provided, however, if the mortgage creditor shall, before the mortgage is barred under the provisions of this act, refile in the recorder's office the mortgage, or a sworn copy thereof for record, then said cause of action shall not be barred until the expiration of ten years from the date of said refiling: Provided, further, that the time within which an action may be brought upon a mortgage having no date of maturity stated therein shall not be more than ten years from the maturity of the debt secured thereby.

"At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid, and the mortgage and the record thereof shall cease to be notice of the mortgage as unpaid and the lien thereof shall then cease absolutely as to subsequent purchasers and incumbrancers for value; said period of ten years shall not be extended by nonresidence, legal disability, partial payment, or acknowledgment of debt.

"No action for the recovery of the title or possession of lands, tenements, or hereditements; or for the foreclosure of a mortgage thereon shall be begun after one year from the passage of this act by any person whose right of action would be otherwise barred hereby, unless within such year, the holder of an existing mortgage which would otherwise be barred hereby shall file for record a duly executed extension of such mortgage and such period of one year shall not be extended by nonresidence or legal disability."

The decree bases the result squarely on the sole ground that the receiver was "a subsequent incumbrancer for value." It would seem that in holding the Tynon mortgage still enforceable against the land the district court, as between the mortgagee and mortgagors, gave established force and effect to section 8522, Comp. St. 1922, now section 20-216, Comp. St. 1929. That section follows:

"In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise."

We have held that under this section a part payment on the debt or interest thereon tolls the statute on a mortgage securing the debt. *Teegarden v. Burton,* 62 Neb. 639; *McLaughlin v. Senne,* 78 Neb. 631; *Gillilan v. Fletcher,* 80 Neb. 237; *Girard Trust Co. v. Paddock,* 88 Neb. 359.

Was the plaintiff within what was meant by the legislature when it described a subsequent "incumbrancer for value?" The statute, heretofore quoted, provides that ten years from the date the cause of action accrues the record shall cease to be notice of the mortgage as unpaid, "and the lien thereof shall then cease absolutely as to subsequent purchasers and incumbrancers for value." The Tynon mortgage became due and a cause of action accrued on it March 31, 1918, good for ten years more against the world. Plaintiff's principal, the bank (into whose shoes he stepped when he was appointed receiver), became an "incumbrancer" on March 1, 1924, by reason of its $2,500 mortgage. The bank mortgage was by the same makers as the Tynon mortgage and was expressly subject to it. These makers have always continued to own the property and are defendants here. The bank held its mortgage as a second mortgage for many years and it is still second unless the term "subsequent incumbrancer" can be said to be retrospective. Appellants argue that it means only one whose incumbrance is secured after the Tynon mortgage had failed to be refiled on or after March 31, 1928.

Language similar in effect to that under consideration has been construed by this court. It is true it involved a chattel mortgage, but we cannot see that that makes the principle of construction, or the meaning of the word "subsequent," any different. The case is *Arlington Mill & Elevator Co. v. Yates,* 57 Neb. 286. The opinion was by

Irvine, C. The subject is concisely stated on page 291 as follows: "Next it is said that the mill company is protected by section 16, chapter 32, Compiled Statutes, whereby a chattel mortgage 'shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the filing of the same or copy thereof.' While there is some conflict as to the construction of similar statutes, the better authority and the better reason favor the view that the object is to protect persons who acquire rights after the expiration of the time named, not to protect those rights accrued when they were bound to take notice of the record, but against whom enforcement is not sought until after the period. *Farmers & Merchants Bank v. Bank of Glen Elder,* 46 Kan. 376; *Nix v. Wiswell,* 84 Wis. 334." The syllabus on this point is: "The statute, whereby a chattel mortgage ceases to be valid as against creditors or subsequent purchasers or mortgagees in good faith after the expiration of five years from the filing thereof, protects only creditors, purchasers and mortgagees whose rights accrued after the five years."

The above cited case of *Farmers & Merchants Bank v. Bank of Glen Elder,* 46 Kan. 376, holds: "A subsequent mortgagee, who becomes such before the expiration of the year from the first filing of a prior chattel mortgage, cannot take advantage of an omission to renew the chattel mortgage within the year." It follows *Howard v. First Nat. Bank of Hutchinson,* 44 Kan. 549, which expressly construed the words "subsequent purchasers or mortgagees in good faith" to mean only those who took after the expiration of the year allowed by statute from the filing of the mortgage.

A New York statute requires chattel mortgages to be filed and provides that they should "cease to be valid as against the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof," unless they should be refiled within thirty days before the expiration of the year, with a statement showing them to

be still in force. A mortgage on file, but never refiled, though in force when another was taken, while the other was refiled each year, was held to be prior and valid against the other. The opinion by Denio, C. J., holds: "The omission to refile a chattel mortgage pursuant to the third section of the act on that subject does not render it invalid as against purchasers or mortgagees intermediate the original filing and the omission to refile. The term 'subsequent' in the third section of the act, means after the time for refiling has elapsed." *Meech v. Patchin,* 14 N. Y. 71.

1 Wood, Limitations (4th ed.) 68, sec. 12b, says: "It is generally held, as stated in section 12, that a statute of limitations will not be given retroactive operation unless it appears by express provisions or necessary implication that such was the legislative intent. This has been held in equitable actions; actions to foreclose mortgages; actions by a state or municipality; actions relating to real estate, and actions on judgments."

In *War Finance Corporation v. Thornton,* 118 Neb. 797, a decision that the statute there under consideration did not operate retrospectively is supported by this text on page 800: "A well-recognized rule of statutory construction, and one firmly established in this jurisdiction, is that a statute will be held to operate prospectively and not retrospectively unless the legislative intent or purpose that it should operate retrospectively is clearly disclosed. The following are some of the decisions of this court supporting the rule announced: *Blunk Bros. v. Kelley,* 9 Neb. 441; *State v. City of Kearney,* 49 Neb. 337; *McIntosh v. Johnson,* 51 Neb. 33; *Commercial Bank of St. Louis v. Eastern Banking Co.,* 51 Neb. 766; *Adair v. Miller,* 109 Neb. 295; *State v. Federated Merchants Mutual Ins. Co.,* 117 Neb. 98."

Until March 31, 1928, the bank, as holder of the $2,500 mortgage, expressly made subject to the prior $3,000 mortgage, would not have claimed that it was more than a junior incumbrancer. We think the legislature intended to provide a cure and a remedy for stale mortgages—to

protect those purchasers and incumbrancers who, on searching the records, find no mortgages or incumbrances except those on which the statute has run, and then become purchasers, mortgagees or incumbrancers. It is abhorrent to equity, and an unworthy and unnecessary construction of the statute, to hold that this bank or its receiver, in such circumstances as exist here, may outrank a senior mortgage by a junior mortgage. It accords with standard rules of construction to say that a subsequent incumbrancer for value is one who obtains his incumbrance after the statute has run against the prior incumbrance, as shown by the public record relating to the latter; that the statute operates prospectively.

For the reasons stated, the judgment of the district court is reversed, with directions to place the lien of the appellants ahead of that of the appellee.

REVERSED.

STATE, EX REL. CHARLES L. CRAIG, APPELLANT, V. CASPER OFFUTT ET AL., APPELLEES.

FILED APRIL 17, 1931. No. 27659.

Cemetery Associations: BY-LAWS: AMENDMENT. Where the by-laws of a cemetery association, organized under the provisions of chapter 13, art. V, Comp. St. 1929, provide that they may be amended at any meeting, the members "having been duly notified for that purpose," but do not provide the manner nor time of notice, an amendment made without any notice whatever is invalid.

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

A. W. Jefferis and *O. B. Clark,* for appellant.

Brogan, Ellick & Van Dusen, contra.

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

GOSS, C. J.

This is a mandamus action by relator, claiming to be

the secretary-treasurer, to compel the secretary and the treasurer of a cemetery association to deliver over to him the property of the association held by them. From a judgment for respondents, denying a peremptory writ and quashing the alternative writ, previously issued, relator appeals.

The suit involves official control of Forest Lawn Cemetery Association. This association was organized in May, 1885, under the laws then in force and which are in substance and effect carried down to the present as section 13-501 and following sections in article V, ch. 13, Comp. St. 1929. It is a corporation not for profit, has no capital stock, and is composed of persons having rights and relations to the cemetery as provided by the by-laws duly adopted for the government of the association under the authority of the statutes.

Under this simple form of incorporation, as soon as the county clerk enters of record the true record of the meeting at which the association is organized and the first trustees are elected, "the said trustees, and their associated members, and successors, shall be invested with the powers, privileges and immunities incident to aggregate corporations." Comp. St. 1929, sec. 13-502. The trustees of the association chosen from time to time have perpetual succession. Comp. St. 1929, sec. 13-503. The association has power to prescribe the terms of membership, the number of trustees, the time and manner of their election and appointment, the time and place of meeting for trustees and association, "and to pass all other such by-laws as may be necessary for the good government of such association," not inconsistent with the statutes or Constitution. Comp. St. 1929, sec. 13-504.

The merits center around Tuesday, October 15, 1929, the date of the annual meeting provided by the by-laws. The regular notice for that meeting had been duly published. No notice of proposed amendment to the by-laws was contained therein nor otherwise given. Relator and enough of his supporters were present to outnumber and outvote respondents and their supporters and voted to

elect relator to the office of secretary-treasurer. Herbert S. Mann was the secretary, and Casper Offutt had been the treasurer, but he had, after the annual meeting and before the return and before demand had been made upon him, turned over all money and securities of the association to Howard Kennedy, his successor as treasurer.

Under the by-laws in force for many years, the management consisted of nine trustees, one to be chosen each year at the annual meeting. The by-laws gave the trustees the power to elect a secretary and treasurer and to appoint a superintendent and any other officer or agent and to define his duties and fix the compensation of these officers. The by-laws provided: "These by-laws may be altered or amended at any meeting of the association, the members thereof having been duly notified for that purpose, and three-fourths of the members present voting for said alteration or amendment." At the annual meeting, about the first thing that was done by relator and his supporters was to adopt a new set of by-laws, by the terms of which, among other changes, the secretary-treasurer was to be elected by the members at the annual meeting. After those present at the annual meeting voted to adopt these new articles, the majority of the members present voted to elect relator secretary-treasurer, and it is by virtue of this proceeding that he claims the rights asserted. Respondents take the position that the old by-laws are still in force because no notice of any change was ever given; and that the trustees in office pursuant to the former by-laws are the only ones who can elect or appoint a secretary and a treasurer. If notice was required, then the relator's election was invalid and he had no right to the offices and property he demands.

In *Rottmann v. Bartling*, 22 Neb. 375, a constitution of a church society provided for a three months' notice of any proposed change in the constitution. Without giving such notice, a meeting was called and it was attempted to change the constitution so as to allow a transfer of the church to another denomination. It was held that a change made "without giving such notice is invalid and of no ef-

fect." About the only apparent difference in that case and this, as to the notice, is that there a three months' notice was required, whereas, in the instant case, notice is required, but a definite time of notice is not set forth in the by-laws.

In *Lange v. Royal Highlanders,* 75 Neb. 188, this court said: "Another well-established principle is that a subsequent by-law providing for a forfeiture will be strictly construed most strongly against the association, and if passed in contravention of the provisions either of the articles of association, the constitution and by-laws of the society, or the statutes governing it, it will be held *ultra vires* and of no effect."

In *Deuble v. Grand Lodge, A. O. U. W.,* 72 N. Y. Supp. 755, there was involved an attempt to amend the by-laws of a mutual benefit society organized under the New York law. It was held that "An amendment to a by-law of a mutual benefit association, specifying the manner in which the by-laws shall be amended, adopted without compliance with the provisions of the by-law sought to be amended, is invalid." The court of appeals affirmed the judgment without opinion. 172 N. Y. 665.

Even where there is no provision in the by-laws for notice of an intention to make changes, and radical changes are made without reasonable notice, amendments have been held void. *Bagley v. Reno Oil Co.,* 201 Pa. St. 78.

While the by-laws required notice, yet no notice was given to thousands of members of the cemetery association, who were eligible to vote. Probably none had notice except those, fewer than 20, who appeared at the annual meeting with an elaborate set of by-laws already typed, consisting of 22 articles, radically changing the form of government of the corporation. They outvoted the half dozen or so who were conventionally present to hold the annual meeting but had no advance notice of any proposal to amend the by-laws.

This association came into existence through a very simple general statute. From this it derived its life. This

basic statute places few restrictions on such an association and does not attempt to detail the definite rules by which its affairs shall be conducted. The by-laws of such an association are to an unusual degree the rules of its life. In this instance they provide that notice of amendments shall be given. They do not provide what that notice shall be. The purpose of requiring notice is that those concerned may know, or at least have some opportunity to know, what is to be done in the way of changing the governing rules. Where no fixed time or method is stated, it seems just and fair that such method should be used in giving the notice, and it should be given for such time, as would reasonably be calculated to impart notice or to result in notice to those interested. We are of the opinion that the by-laws were not amended, but that the proposed amendments were invalid for lack of reasonable notice. The secretary and treasurer were justified in refusing to yield to the relator.

Other and collateral subjects are discussed in the briefs, but our conclusion on the subject of notice does away with any necessity for further discussion. The judgment of the district court was right and it is

AFFIRMED.

ELIZABETH TYNON ET AL., ADMINISTRATRICES, APPELLEES, V. CLARENCE G. BLISS, APPELLANT.

FILED APRIL 17, 1931. No. 27680.

1. **Statutes.** "Unless it is clearly disclosed that the legislature intended a legislative act to operate retrospectively, it will be held to operate prospectively only." *War Finance Corporation v. Thornton*, 118 Neb. 797.
2. **Mortgages: SUBSEQUENT PURCHASERS FOR VALUE.** Under section 20-202, Comp. St. 1929, a "subsequent purchaser for value" (who seeks to be relieved as against an incumbrance) is one who acquires the title to real estate after the statute has run against a prior incumbrance shown on the record.
3. ———: **ASSUMPTION BY PURCHASER: DEFENSE.** One who, as a part of the consideration for a deed to him of real estate incumbered by mortgage, assumes and agrees to pay the mort-

gage and pays the interest thereon, may not, as a matter of equity, defend against that mortgage on the ground that it is barred by failure of the mortgagee to do some act or acts required by section 20-202, Comp. St. 1929, to be done as to a subsequent purchaser for value.

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

C. M. Skiles, Edgar Ferneau, Fred G. Hawxby and *John A. Skiles*, for appellant.

Paul Jessen and *Ernest F. Armstrong, contra.*

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

GOSS, C. J.

The defendant, receiver of a state bank, appealed because the court decreed two mortgages to be liens on a farm owned by the bank. On June 15, 1929, the department of trade and commerce took over the Nemaha County Bank and on August 12, 1929, Clarence G. Bliss, secretary of the department, was appointed receiver for the bank. On November 6, 1915, the defendants, H. B. Bohlken and Mathilda Bohlken, husband and wife, had conveyed to the bank, for a stated consideration of $20,000, the southeast quarter of section 4, township 4, range 13, in Nemaha county, Nebraska, subject to a certain mortgage of $8,000 and a second mortgage of $5,400, "which mortgages the said grantee assumes and agrees to pay as a part of the purchase price herein mentioned." The deed containing the above provision was duly recorded January 13, 1916.

This suit was begun March 3, 1930. The mortgages foreclosed by the plaintiff are upon the same land and are identified as the same mortgages referred to in the deed to the bank. The $8,000 mortgage was made by the Bohlkens in favor of the Nemaha County Bank on December 14, 1912, and recorded two days later. It was to secure a note for $8,000 dated December 14, 1912, and due five years after date. The $5,400 mortgage was made by the Bohlkens in favor of the Nemaha County Bank December

14, 1912, and recorded two days later. It was to secure a note of like amount dated December 14, 1912, and due five years after date. The evidence shows that on or about December 17, 1912, the Nemaha County Bank sold and assigned the $8,000 note and mortgage to William Tynon, now deceased, and on or about December 10, 1914, sold and assigned the $5,400 note and mortgage to William Tynon; that plaintiffs are the administratrices of the estate of William Tynon, deceased, and are the owners and holders of said notes and mortgages.

The Bohlkens paid the interest on the notes and mortgages up to February 15, 1915, and the bank continued, after it became the owner of the land in 1915, to pay the interest on these notes and mortgages, and the receiver likewise paid all the interest due thereon after he took charge of the bank, the last payment being in December, 1929. There were no written extensions of the debts and no written extensions of the mortgages were ever recorded. By appropriate pleadings the receiver challenged the existence of the mortgages and raised the question that, under chapter 64, Laws 1925, taking effect April 1, 1925, the mortgages had ceased to be liens upon the said premises and the bank and its receiver as successor were the owners of the premises, free and clear of any liens and incumbrances, and that the receiver is a "subsequent purchaser for value" under said act. That act is now known as section 20-202, Comp. St. 1929.

The decree of the district court found in favor of the plaintiffs for the full amount due on the notes and mortgages, which amounts are specifically set forth therein, and ordered the premises sold in the usual manner to satisfy the decree; also found that the bank, and the receiver, was not a "subsequent purchaser for value" of said real estate as contemplated in the act of 1925. The decree indicates that the reason why the court found that the bank was not a subsequent purchaser of the real estate for value was because, as fully set forth in the decree, the bank as a part of the consideration for the deed had specifically assumed and agreed to pay these two mortgages.

This case was argued the same day and, while involving different lands, is between the same parties, although there are other different parties to the action, as are the main parties in *Bliss v. Redding, ante*, p. 69. For the reasons why the district court might have decided the controversy here adversely to the receiver, irrespective of the assumption and agreement to pay the mortgages, reference is hereby made to the text in the opinion in *Bliss v. Redding, supra*. The notes and mortgages did not mature according to their original terms until December 14, 1917. The bank took title to the real estate November 6, 1915. Under section 20-202, Comp. St. 1929, a "subsequent purchaser for value" (who seeks to be relieved as against an incumbrance) is one who acquires the title to real estate after the statute has run against a prior incumbrance shown on the record.

The decree of the district court was right in holding that the defense of the receiver was not available. One who, as a part of the consideration for a deed to him of real estate incumbered by mortgage, assumes and agrees to pay the mortgage and pays the interest thereon may not, as a matter of equity, defend against that mortgage on the ground that it is barred by failure of the mortgagee to do some act or acts required by section 20-202, Comp. St. 1929, to be done as to a subsequent purchaser for value.

The judgment of the district court is

AFFIRMED.

McCOOK COOPERATIVE BUILDING & SAVINGS ASSOCIATION, APPELLEE, V. JAMES J. GRAGG ET AL., APPELLEES: R. WHITMER, APPELLANT.

FILED APRIL 17, 1931. No. 27693.

Mortgages: MERGER. Where a mortgagee, without making other mortgagees parties to a foreclosure suit, forecloses his mortgage, sells the mortgaged real estate at judicial sale, and takes title to the fee under a sheriff's deed, his mortgage is extinguished by merger in the fee, if he had no intention of keeping the two estates separate or of preserving the lien of his mortgage.

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

Perry, Van Pelt & Marti and *Butler & James*, for appellant.

Cordeal, Colfer & Russell, Kelley & Kelley and *C. H. Boyle, contra.*

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

ROSE, J.

Plaintiff commenced this suit to foreclose a 4,000-dollar mortgage on lots 10, 11, and 12, block 26, in the first addition to McCook. The mortgage was dated March 2, 1923, and recorded March 3, 1923. The McCook Cooperative Building & Savings Association, plaintiff, is the mortgagee. The mortgagors are James J. Gragg and Dollie A. Gragg, defendants. John E. Kelley and R. Whitmer are also defendants. Kelley filed a cross-petition for the foreclosure of an 8,000-dollar mortgage on the same lots, executed by the Graggs March 3, 1923, and recorded March 8, 1923. Claiming a lien superior to plaintiff's and Kelley's Whitmer, in a cross-petition, pleaded an 8,000-dollar mortgage executed by the Graggs, in favor of the Citizens State Bank of McCook, dated August 29, 1922, and recorded July 10, 1923, alleged he had succeeded to the rights of the bank and prayed for a foreclosure. Whitmer in his pleadings traced his title from the bank in the following manner: From July 25, 1923, to August 24, 1929, Van E. Peterson was receiver of the Citizens State Bank of McCook, mortgagee. In a suit begun by the receiver December 13, 1927, to foreclose the bank's mortgage, he procured a decree for $9,060, purchased the lots at sheriff's sale thereunder for $9,000, had the sale and sheriff's deed confirmed, sold the lots or the fee to Whitmer and executed therefor a receiver's deed pursuant to orders of the district court. Whitmer alleged further that plaintiff and Kelley were not parties to the receiver's foreclosure suit and that the bank's mortgage was and still is the first

lien. The order in which the liens attached was put in issue by formal pleadings of the adverse parties. Upon a trial of the cause the district court established liens in the following order: Plaintiff, first lien, $5,449.83; Kelley, second lien, $8,108.83; Whitmer, claim of $9,688.17, subject to first and second liens with right to redeem. In reaching these conclusions the trial court found, upon consideration of the evidence and surrounding circumstances, that the lien of the mortgage acquired by the receiver merged in the deed to him under the former foreclosure and that the fee or the equity of redemption passed to Whitmer by a deed executed by the receiver. Whitmer alone appealed.

In the appellate court there is no controversy between plaintiff and Kelley. Each contends his lien is superior to that of Whitmer as decreed by the trial court. On the question of merger, Whitmer states his position as follows:

"Where real property is sold under a decree of foreclosure of a mortgage, and the holder of a mortgage lien junior to that of the prior mortgage is not made a party to the proceedings and is not concluded thereby, the lien of the prior mortgage does not merge in the legal title of the purchaser for the benefit of the junior lienholder."

In this connection reference is made to cases applying the following rule: It will be presumed that the intention of a prior lienholder was to preserve the lien against intervening claims and that merger will not ensue where the best interests of the prior lienholder require preservation of the lien. Merger in the present instance was not thus defeated. The proper inference from the entire record is that the receiver had no intention of keeping the bank's mortgage lien in force in spite of his foreclosure and the subsequent conveyances based thereon. The bank's mortgage was extinguished by merger in the fee. The decree of the district court responds to the demands of equity. These conclusions make the discussion of other questions unnecessary.

AFFIRMED.

JOHN F. REAMS, APPELLANT, V. GEORGE CLOPINE ET AL., APPELLEES.

FILED APRIL 17, 1931. No. 27645.

1. **Appeal.** Where the evidence is conflicting as to a material fact in a law action, the verdict of the jury thereon will not be disturbed unless clearly wrong.
2. **Evidence** examined and outlined in the opinion, *held* to justify the verdict.
3. **Instructions**, given and refused, examined, and *held* to be free from prejudicial error.
4. **Courts.** A court speaks by its orders and judgments. The opinion of the appellate court merely states the reasons and bases for its orders and judgments.
5. **Judgment.** The pleadings and judgment, but not the opinion of the appellate court, may be introduced in evidence to support a plea of *res judicata*.
6. **Trial: VIEW OF PREMISES.** Whether the jury shall be permitted to view the *locus in quo* is a question addressed to the sound discretion of the court.

APPEAL from the district court for Franklin county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

George J. Marshall and *Max Marshall*, for appellant.

C. P. Anderbery, Leon Samuelson and *C. R. Stasenka, contra.*

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

GOOD, J.

Plaintiff sued to recover for damage to his land and crops thereon, which he avers was caused by the negligence and wrongful acts of the defendants in constructing and maintaining a dike across Wortham creek ditch which caused the waters of said ditch to flow over plaintiff's land, doing great injury thereto, as well as to the crops growing thereon. Defendants admit the construction of the dike in 1902 and its maintenance since then, but deny that plaintiff's damage, if any, was caused by any wrongful or negligent act of theirs. The trial to the court and jury resulted in a verdict for defendants and judgment thereon. Plaintiff appeals.

The errors assigned may be grouped under the following headings: The verdict is not supported by the evidence and is contrary to law; error in the exclusion of evidence; error in the giving and refusing of instructions.

The record discloses that plaintiff is the owner of the northeast quarter of section 11; that Earl Bell is the owner of the northwest quarter of section 11; and that the defendants are the owners of that part of section 2 lying south of the Republican river, all of said lands being in township 1, north of range 14, in Franklin county. These lands are all in the valley of the Republican river. The south side of the valley at the particular place is about one mile in width. The defendants' lands are adjacent to the river. The lands of plaintiff and Bell are immediately north of and adjacent to the bluffs on the south side of the river. Wortham creek has its source about ten miles southwest and drains an area of eight or ten square miles. It emerges from the bluffs into the valley on the land of Bell, where it ceases to have any defined channel. There the waters spread out over the valley, draining principally to the northeast across Bell's land over the land of plaintiff. After leaving the mouth of Wortham creek the waters become surface waters. It may also be observed that Wortham creek is ordinarily a dry creek and carries water only in times of rain, but in times of heavy rains it carries a very large volume of water, as much as 960 cubic feet per second for a short time.

In 1888 the then owners of plaintiff's and Bell's lands and of part of section 2 constructed a private ditch (hereinafter referred to as the Bell ditch) from the mouth of Wortham creek in a northerly direction across Bell's land, across the highway and into the land in section 2. There is evidence tending to show that this ditch had a carrying capacity of only 10 to 20 per cent. of that of Wortham creek. In ordinary rains it was sufficient to carry the waters that came down Wortham creek, but the evidence tends to show that it was wholly inadequate to carry the waters of the creek when there was a heavy or excessive rainfall. About 1902 the ownership of the land in sec-

tion 2 had changed. That part of the ditch in section 2 had become so filled with silt that it was nearly obliterated. The then owners of section 2 constructed a dike across the Bell ditch at the south boundary of their land and constructed a ditch (hereinafter called the Clopine ditch), running directly east along the south side of section 2 for a distance of about one mile. The evidence tends to show that the carrying capacity of the Clopine ditch was in excess of any water that came to it through the Bell ditch. The water coming down Wortham creek in times of heavy rainfall carried a large volume of silt and debris and filled up the Bell ditch to a considerable extent. The former owners of the Bell land from time to time cleaned out the ditch. The last time it was cleaned out appears to have been in 1921. After that Bell permitted it to be filled up to such an extent that it would not carry more than a very small percentage of the waters from Wortham creek in times of heavy rainfall. In the summer of 1927 there was a heavy rainfall in the vicinity, the evidence tending to show that it amounted to six inches in two hours. A large volume of water came down Wortham creek, and, the Bell ditch being insufficient to carry it, the overflow ran to the northeast over the Bell land and onto the land of plaintiff, causing damage to his crops and land. In 1928 there was a similar occurrence.

With respect to the carrying capacity of the Bell ditch and the Clopine ditch, the evidence is somewhat in conflict, but the great weight thereof clearly shows that the Clopine ditch was sufficient to and did carry all of the water that came to it, but that the Bell ditch was wholly insufficient to take care of the waters from Wortham creek. The evidence is amply sufficient to sustain, if not to require, a finding that plaintiff's damage was not caused by defendants' dike.

Plaintiff contends that because the Bell ditch had existed from 1888 to 1902 he had thereby obtained a prescriptive easement to flow the water of the Bell ditch onto the lands of the defendants, and that this question was settled by this court in the case of *Reams v. Clopine*, 87 Neb. 673.

For the sake of argument, it may be conceded that an easement was thereby created, but it does not necessarily follow that the easement continued until 1927 and 1928. However, we do not consider that question of vital importance, since the question was fairly submitted to the jury that, if the dike constructed by defendants was the cause of the damage to plaintiff's land and crops, then plaintiff was entitled to recover.

Plaintiff complains of the refusal of the court to give to the jury a number of requested instructions. We have examined all of the instructions and find that the substance of most of them was contained in those given by the court on its own motion. We find no error in the refusal to give any of them.

It is argued, however, that instructions numbered 3 and 4, given by the court, are erroneous. Instruction No. 3 informed the jury that at the time defendants' dike was constructed plaintiff had an easement to flow the waters of the Bell ditch onto the lands of defendants, and that when the defendants constructed the dike and changed the course of the waters, if, as a result thereof, plaintiff suffered damage thereby, then he was entitled to recover for such damage as the evidence shows he has sustained. This instruction may be subject to criticism but not by the plaintiff. Plaintiff would be entitled to recover for only such damage, if any, as was the direct result of the construction of the dike. Certainly, plaintiff was not prejudiced by this instruction. We have carefully examined instruction No. 4 and find no error therein. It correctly stated the law with reference to the right of a landowner to drain his lands by an open ditch carrying the water into a natural course, provided he does not thereby cause damage to another.

Plaintiff complains of the refusal of the trial court to permit the opinion by this court in *Reams v. Clopine, supra,* to be read to the jury. The pleadings, judgment of the district court and mandate of this court in that case were all introduced in evidence. The court speaks by its judgments and orders. The opinion is only the reasoning of

the court for its judgment. We think the evidence was properly rejected.

Plaintiff also urges that the trial court committed error in permitting the jury to view the *locus in quo*. Ordinarily, this is a matter addressed to the sound discretion of the trial court, and it may be observed that no abuse of discretion is shown.

No error prejudicial to plaintiff has been found. The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF GEORGE W. MATTINGLY.
NORA MATTINGLY BURNHAM ET AL., APPELLANTS, V.
CHARLES W. BENNISON ET AL., APPELLEES.

FILED APRIL 17, 1931. No. 27593.

Appeal. It is a sound and salutary principle that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

James E. Brittain and *Frederick M. Deutsch*, for appellants.

Coufal & Shaw, contra.

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

EBERLY, J.

This is an appeal by Nora Mattingly Burnham et al., who are the sole and only heirs of George W. Mattingly, deceased, from an order made and entered on the 12th day of May, 1930, in the district court for Butler county, sustaining their motions to dismiss certain proceedings then and there pending as an appeal from the county court of Butler county.

One of these motions was directed against the appeal so far as prosecuted by Charles O. Crosthwaite, the other

was directed against the appeal as prosecuted by all of the appellants in the district court, "for the reason that no final and appealable order was entered therein against the said defendants or either of them, and for the further reason that the district court for Butler county, Nebraska does not have jurisdiction of the same."

There appears no irregularity in the record so far as taking the appeal and lodging the same in the district court in turn. All parties interested having made due appearance in the county court and by pleading submitted their claims, it is obvious that the words of the motion, "for the further reason that the district court for Butler county, Nebraska, does not have jurisdiction of the same," must be deemed to be a challenge to that court's right to proceed in the case, based upon a claim of no jurisdiction of the subject-matter vested in the district court by the lodging of the appeal therein.

It is unquestionably true that in an appeal from the county court to the district court the jurisdiction of the district court over the subject-matter is dependent upon and limited by the jurisdiction of the county court. *Redell v. City of Omaha,* 80 Neb. 178; *Stone v. Blanchard,* 87 Neb. 1.

The motions thus tendered in behalf of the appellants in this court (appellees in the district court) were sustained as made. In the order sustaining these motions appears incorporated a finding of the trial court to the effect that the district court was vested with no jurisdiction over the subject of the action, because of a like lack of jurisdiction of the county court from which the appeal was prosecuted. It is thus disclosed by the record that what was done was done at the request of the appellants here, and the results which ensued were necessarily within the purpose of the action which they took. It is obvious that under these conditions the appellants may not predicate error on the record before us, even if in truth error has been committed. We have long been committed to the doctrine: "The party moving an erroneous order, as the dismissal of an action, has no right to complain of it, nor

of the consequences resulting therefrom." *Campbell v. Crone*, 10 Neb. 571. The case of *Norwegian Plow Co. v. Bollman*, 47 Neb. 186, is also an authority for the principle just above quoted.

In *Missouri P. R. Co. v. Fox*, 60 Neb. 531, this court held: "It is a sound and salutary principle that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about." See, also, *Storm v. Holmes*, 2 Neb. (Unof.) 16.

There is no error in the record of which appellants can rightfully complain, and the judgment of the trial court is

AFFIRMED.

ARZA MCINTOSH, APPELLANT, V. STANDARD OIL COMPANY, APPELLEE.

FILED APRIL 17, 1931. No. 27760.

1. **Courts.** "Under the statute providing for the appointment of a supreme court commission, the decisions of such commission 'shall establish no precedent and be authority only in the particular case.'" *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60.
2. **Master and Servant: WORKMEN'S COMPENSATION ACT: CONSTRUCTION.** "The workmen's compensation act 'is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.'" *Speas v. Boone County*, 119 Neb. 58.
3. **Action: SPECIAL PROCEEDING.** Where a statute, which creates a right or confers the means of acquiring it, prescribes an adequate special mode of determining by a judicial investigation "in cases of dispute" between the parties in interest, the remedies and procedure prescribed are exclusive, and particularly so when so denominated by the terms of such enactment.
4. **Statutory Provision.** By the express provisions of our Civil Code, when by a general or special statute a civil action, legal or equitable, is given, and the mode of proceeding therein is prescribed, until the legislature shall otherwise provide, this Code shall not affect proceedings under such statutes; and also the clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him, not only

by the provisions of the Civil Code, but by other statutes, and by the common law.

5. **Master and Servant:** WORKMEN'S COMPENSATION CASES: APPEAL. The terms of the workmen's compensation act impose on clerks of the district courts the duty of immediate issuance of summons upon the filing in their office of a proper petition on appeal, as prescribed by that act, and contain no requirement that a præcipe shall first be filed therefor.

6. ———: ———: ———: PROCESS. To constitute the issuance of summons, the process must be made out, properly attested, and delivered to the proper officer to be executed and served as by law provided.

7. ———: ———: ———. It appearing without dispute in the record in the instant case that appellant in due time filed proper notice of appeal with the compensation commissioner, and also filed his petition on appeal in the office of the clerk of the district court when and in the manner prescribed by statute, the failure or delay of the court officers to carry out their respective duties, without contributing fault on the part of appellant, does not deprive him of his right of review in this tribunal.

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

H. L. Lehman and *Butler & James,* for appellant.

William H. Herdman, contra.

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

EBERLY, J.

This is an appeal from a decision of the district court for Hitchcock county in a workmen's compensation case, sustaining a challenge of the defendant Standard Oil Company to the jurisdiction of that court "over its person and over the subject-matter of this appeal."

The following are the facts. On May 10, 1930, the compensation commissioner entered an order, after hearing and appearance of parties, dismissing plaintiff's claim for compensation. On May 17, 1930, the plaintiff filed his notice of appeal therefrom. Five days later he also filed his petition on appeal in the district court for Hitchcock county. He filed no præcipe, however. On August 18,

1930, summons was issued by the clerk of the district court, which two days later was served on the defendant. On August 29, following, defendant filed its special appearance challenging the jurisdiction of the court on the ground that the appeal was not perfected within the time fixed by law, for that no summons was issued on the petition filed in the district court within the time required by law. In its brief the defendant elaborates the basis of its contention, including therein the failure of plaintiff to "file a præcipe for, or cause issuance of, summons out of the district court in which petition is filed, within fourteen days from the date of the order" appealed from, and that "no summons was issued out of the district court until one hundred days from the date of order." The defendant states the precise question involved herein is: "When is an appeal from the order of the compensation commissioner perfected?" The following quoted from its brief fairly, clearly and succinctly represents its position.

"The filing of the petition on appeal in the district court was no mandate, under statute or otherwise, to the clerk of the district court to issue a summons. Likewise the clerk of the district court is without right or authority to issue a summons *sua sponte*. This is so because of section 9503, Comp. St. 1922. * * * The language of the statute is plain. Not only is the clerk without right or power to issue process of any kind upon his own motion, but such issuance is prohibited, unless 'a præcipe shall be filed with the clerk demanding the same.' So that, in this case, in perfecting his appeal, plaintiff was required to file with the district clerk a præcipe demanding the issuance of a summons on the petition. There is no pretense in this case that any such præcipe was filed. Indeed, there is no pretense that even an oral demand was made on the clerk to issue a summons. Hence, the failure to issue a summons 'upon the filing of the petition' was the fault of plaintiff, and not of the district clerk. Had plaintiff filed such præcipe, or possibly made oral demand on the clerk for the issuance of same, and the clerk failed to issue the summons, plaintiff having done in due

time all that was legally required of him to perfect his appeal, the court, within the doctrine announced in *Drexel v. Reed,* 69 Neb. 468, and *Drexel v. Rochester Loan & Banking Co.,* 65 Neb. 231, and other cases, would have sustained the appeal, because the fault and omission was that of the clerk of the court, and not of the plaintiff. But that is not the case. Here the plaintiff was at fault in that he failed to do and perform that which the statute required of him in order to perfect his appeal."

The plaintiff, in reply to this contention, insists that he had in this proceeding, in due time, done all that was legally required of him to perfect the appeal, and that therefore his case falls within the scope of the decisions referred to in the above quoted portion of defendant's brief. It may further be said that plaintiff insists that the principle announced in the case of *Keil v. Farmers Irrigation District,* 119 Neb. 503, is controlling. In view of the facts involved, we are inclined to accept the view, for the purpose of this case at least, that the proper application of the principles announced in the *Keil* case to the present contention would not extend its doctrine beyond the scope of the admission contained in the defendant's brief above quoted.

As to the case of *Lincoln Drug Co. v. Davidson,* No. 24-836, on which the defendant relies, it may be said that this court can give no consideration whatever to the latter in the instant case. It is a commission opinion. "Under the statute providing for the appointment of a supreme court commission, the decisions of such commission 'shall establish no precedent and be authority only in the particular case.'" *Burkamp v. Roberts Sanitary Dairy,* 117 Neb. 60.

A careful consideration of the provisions of the statutes referred to by the defendant, we feel, when properly construed, does not sustain its contention. The following are the provisions of statutes which defendant insists are pertinent and control the issues herein: Section 48-137, Comp. St. 1929, provides: "All disputed claims for compensation or for benefits under this article must be submitted to the compensation commissioner for an award.

If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court of the county in which the accident occurred: * * * *Provided, however, if either party appeals from the award of the compensation commissioner notice of the appeal shall be given to the commissioner and the petition on appeal filed in the district court within fourteen days from the date of the award.*" It will be noted, however, that, if this section be taken as defining the right of appeal, but two things are made essential to the jurisdiction of the district court attaching thereto: First, the notice of appeal filed with the compensation commissioner; and, second, the filing of the petition on appeal in the district court within 14 days from the date of the award. Flansburg, J., in discussing this provision in *Mucha v. Morris & Co.*, 105 Neb. 180, makes use of the following language: "The provision for the filing of notice with the compensation commissioner was for the purpose of giving the adverse party knowledge of the appeal." The defendant also cites section 48-139, Comp. St. 1929, and quotes therefrom. In this respect we will extend the quotation made by defendant so as to include the commencement and termination of the section now under consideration. Its language is as follows: "Procedure in cases of dispute shall be as follows: Either party may file with the compensation commissioner a verified petition setting forth * * * *Upon the filing of such petition a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy of the petition.* * * * In case either party refuses to accept the recommendation or awards of the compensation commissioner, either party may submit to the district court a verified petition, setting forth * * * *Upon the filing of such petition a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy of the petition.* * * * Any appeal from such judgment (of the district court) shall be prosecuted in accordance with the general laws of the state regulating appeals and actions at law except that such appeal shall be perfected within

thirty days." The statute fairly implies that the procedure of appeal from the district court to the supreme court shall be governed and controlled by "the general laws of the state regulating appeals." But this reference is expressly made with reference to that limited procedure only. It had no possible application to the proceedings before the compensation commissioner, or to appeals from his tribunal to the district court.

It is quite obvious, therefore, that the issue here presented is to be determined by the provisions of the Nebraska workmen's compensation law. This legislation was originally enacted as chapter 198, Laws 1913, and under the following title: "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment. Modifying common law and statutory remedies, in such cases. Establishing an elective schedule of compensation. *Regulating procedure for the determination of liability* and providing methods for payments of compensation thereunder. Repealing all acts and parts of acts in conflict herewith." This legislation has by universal acceptance been construed by this court as an independent enactment, substantially complete within itself, and not in any sense amendatory of previous legislation. Indeed, considering it as a strictly remedial statute, this court has heretofore announced as a general rule of construction applicable to it: "The workmen's compensation act 'is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.'" *Speas v. Boone County*, 119 Neb. 58; *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445. Construing the act referred to with reference to its title, it will be noted that the words, "regulating procedure for the determination of liability and providing methods for payments of compensation thereunder," appearing in the title, suggest that the authority to regulate includes the power to control. Justice Maxwell in construing the word "regulate," as used in the title of an enactment, in *State v. Ream*, 16

Neb. 681, 683, states: "Webster defines the word 'regulate' as 'to adjust by rule, method, or established mode; to direct by rule of restriction; to subject to governing principles or laws.' The definition of the word 'govern,' one of the synonymns, he gives: '1. To direct and control, etc. 2. To regulate; to influence; to direct; to restrain; to manage; as to govern the life or passions; to govern the motion of the ship,' etc. Thus it is seen the word 'regulate' includes in its meaning the power to control." The meaning of the term "regulate" is not limited to the imposition of restrictions, but "is of far broader meaning, and includes all direction by rule of the subject-matter." *Newark v. Mount Pleasant Cemetery Co.*, 58 N. J. Law, 168, 172.

An examination of the workmen's compensation act as an entirety justifies the conclusion that the statute specifically defines rights and liabilities created thereby, both as to those within its scope that assent to its terms, and those who elect not to take advantage of its provisions. As to the former class, the provisions of part II of our workmen's compensation act contemplate recourse to the remedies expressly provided by the act. This situation is not forced upon the employer or the employee, but it results from their implied or express acceptance of its provisions. Indeed, all or either of the parties may avoid its provisions entirely by taking the necessary steps prescribed therein. However, by affirmatively electing to come within its provisions, or by failure to take steps to obviate its provisions, the employer and the employee are under the provisions of part II of the act, and may indeed be said to have stipulated as to the rights and remedies therein set forth, including the procedure to be followed as the exclusive means of their enforcement. *Nosky v. Farmers Union Cooperative Ass'n*, 109 Neb. 489. Indeed, this court has early affirmed this general doctrine as applicable to a similar situation in the absence of any express statutory provision relating to it. In *Tecumseh Town Site Case*, 3 Neb. 267, we held: "Where a statute, which confers the means of acquiring a right, prescribes

an adequate special mode of determining, by a judicial investigation, the fact upon which the right depends, that mode is exclusive." See, also, *Richards v. County Commissioners*, 40 Neb. 45; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374, 471. In *Keith & Barton v. Tilford*, 12 Neb. 271, 273, Cobb, J., says in the opinion: "Where a statute confers a right and prescribes adequate means of protecting it, the proprietor of the right is confined to the statutory remedy." In addition to this, it seems by the terms of the statute the assent or agreement or election of the party to be bound by its terms expressly makes its remedies and procedure prescribed exclusive. Section 48-111, Comp. St. 1929, provides: "Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in part II of this article (48-109 to 48-115)." See *Navracel v. Cudahy Packing Co.*, 109 Neb. 506.

The conclusion follows that in compensation cases under our statute, in the absence of a contrary legislative intent expressly set forth therein, there is no right not in this statute expressly conferred, no remedies not therein defined, and the parties are necessarily limited to the adjective procedure either expressly or by necessary implication therein set forth.

In the light of these principles of interpretation, we will proceed to the consideration of the other paragraphs of the statute upon which the defendant relies. In addition to those heretofore set forth, it cites paragraph (g) of section 48-157, Comp. St. 1929, which is as follows: "Every claim for benefits under the provisions of * * * (48-101 to 48-161) * * * may be presented to the compensation commissioner for adjudication and an order and an award. * * * Every order and award of the compensation commissioner shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition

of the order or award: Provided, that the order and award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties."

And appellee also cites section 20-2204, Comp. St. 1929, which is: "All writs and orders for provisional remedies and process of every kind, shall be issued by the clerks of the several courts. Before they shall be issued a præcipe shall be filed with the clerk, demanding the same; which præcipe shall be for the direction of the clerk, and not material to the papers in the case after the issuing of such writ or process."

Two observations may be suggested by the language employed in section 48-157, Comp. St. 1929: First, there is no reference to a "time limit" except in connection with the filing of notice of appeal; second, the language used expressly differentiates between the perfection of the appeal and the "service had upon the opposite party or parties." The language employed is incapable of being construed to mean "until the appeal has been perfected and service had upon the opposite party or parties," but the perfection of the appeal and the service are each unconnected, separate, and distinct. In view of the other provisions heretofore quoted, it would seem logical that the writers of the statute had in mind the perfection of the appeal by the filing of the petition, and thus completed prior to the issuance and service of the summons. Nor are we impressed with the view that appellee's contention finds support in the provisions of section 20-2204, Comp. St. 1929, above quoted.

Sections 20-2215, 20-2226, 20-2219, Comp. St. 1929, by their terms, are also, it seems, applicable to the matter before us. The first of the Code provisions last referred to reads as follows: "The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this Code, by other statutes, and by the common law." Section 20-2226 provides: "Where, by general or special statute,

a civil action, legal or equitable, is given and the mode of proceeding therein is prescribed, this Code shall not affect the proceedings under such statute, until the legislature shall otherwise provide; but in all such cases," etc. Then, by section 20-2219, it is further provided, with reference to our civil procedure: "Its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice."

It would seem beyond question that the provisions last referred to, construed in connection with section 20-2204, Comp. St. 1929, would result in the conclusion that it is obvious that the workmen's compensation enactment may properly be deemed to be "other statutes" contemplated by the provisions of section 20-2215, Comp. St. 1929, and that the "powers" and "duties" required to be exercised by the provisions of the compensation act may, and do, impose upon the clerk of the district court the duty to issue process with no other prerequisite than those expressed and contained in the workmen's compensation act, viz., the filing of the petition. It would follow, therefore, that the provisions of the Code requiring as a prerequisite the filing of a præcipe have no application to the situation before us. But also a careful reading of section 48-139, Comp. St. 1929, considered as providing procedure in cases of dispute, sustains the conclusion that it implies but a single prerequisite to the issuance of the summons, viz., "the filing of such petition." In the district court no other duty than to file his petition is imposed by its terms upon the moving party. Even if we apply the words "as in civil causes" to both the issuance and service of summons, the conclusion stated is still unaffected. It is to be remembered that the language "as in civil causes" does not of itself necessarily imply "civil causes in the district court," for we have civil causes before justices of the peace, as well as within the justice's jurisdiction of the county court, and in neither of these is there a statutory requirement that a præcipe be filed prior to the issuance of summons. If we proceed further and consider the sentences quoted in connection with section 48-139, of which

they form a part, we reach no other or different conclusion. We find this sentence twice employed in this section, in exact terms and applicable to a similar subject-matter; once in connection with the commencement of the proceedings before the compensation commissioner, and once as applicable to an appeal to the district court. In the first instance the power it creates and the duty it enjoins arise when a dispute arises and the action is first commenced, and in the second instance after determination in the first tribunal, "in case either party refuses to accept the recommendation or awards of the compensation commissioner." There can be no question but what the practice which prevails in that initial tribunal, and has so prevailed ever since the enactment of the statute under consideration, has been that no præcipe is necessary.

Not only this fact but other cognate provisions of the compensation act justify this conclusion. For instance, under the Civil Code the statute of limitations is not tolled by the commencement of a civil action only from the date of a summons served on the defendant, but section 48-138, Comp. St. 1929, of the workmen's compensation act provides: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, * * * one of the parties shall *have filed a petition* as provided in section 3680 (48-139) hereof." The absence of the Civil Code requirement of service of summons to toll the statute is evidently not the result of a mere accident, but is a plainly expressed legislative intent.

So, too, this conclusion is entirely consistent with the identical language appearing in the second proviso attached to section 48-137, Comp. St. 1929, relative to notice and filing of petition on appeal within fourteen days, etc. As we proceed to the second use of this identical sentence in section 48-139, Comp. St. 1929, where it is applied to the method of accomplishing an appeal to the district court, it is to be noted that the object sought to be attained is identical with the requirements following the use of this language as applied to the compensation commissioner,

and there is no difference indicated as to the acts to be performed.

In view of the independent nature of the act we are considering, and the fact that it is deemed complete within itself, there can be no justification for determining that identical words thus used in the same paragraph of this act are to be given a construction which would cause them to mean one thing when first used and an entirely different mandate when employed a second time. There would be no justification to read into either of these sentences any implied conditions not expressed within the plain words of the act before us. Indeed, to create or raise conditions unexpressed by use of construction would violate the fundamental principle announced in this court, and would, in effect, be a palpable violation of the rule that the act "should be so construed that technical refinements of interpretation will not be permitted to defeat it."

The words, "a summons shall issue and be served upon the adverse party, as in civil causes," must be construed solely with reference to the terms of the compensation act, and particularly with reference to the language employed in the section in which it is found. In this connection it is to be remembered that the word "issue," in relation to process, has acquired a definite meaning. "It means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff for service." *Webster v. Sharpe,* 116 N. Car. 466, 471. "A writ or notice is 'issued' when it is put in proper form and placed in an officer's hands for service." *Oskaloosa Cigar Co. v. Iowa C. R. Co.,* 89 N. W. (Ia.) 1065. It is completed at the time it becomes a perfected process. *Blain v. Blain,* 45 Vt. 538. In relation to process the word "issue" may import the idea of delivery. *Heman v. Larkin,* 99 Mo. App. 294, 298. To constitute an issuance, the process must be made out, properly attested and delivered to the proper officer to be executed by him. *Mills v. Corbett,* 8 How. Pr. (N. Y.) 500; *Smith v. Nicholson,* 5 N. Dak. 426.

Reading the sentence under consideration, keeping in view of the controlling rule of construction, and in the

light of the definitions just referred to, the conclusion is patent that all that is required by this sentence, both as applied to the compensation commissioner and to the district court, is that upon the filing of the petition it is the duty of the clerk or commissioner to make out, properly attest, and deliver to the proper officer to be executed by him, a summons, to be served upon the adverse party as in civil causes. There is no express requirement that a præcipe be filed. Neither the Code nor the act under the circumstances, either expressly or by implication, requires it to be done. In short, all procedure required by the compensation act, except where express provisions require to the contrary or inevitable necessity compels, is to be determined by its own provisions, and the general Code provisions have no application whatever to the subject-matter. *State v. District Court of St. Louis County,* 129 Minn. 423, 425.

The conclusion follows that, no præcipe being contemplated under the provisions of the compensation act, in the instant case when the plaintiff filed both the notice of appeal with the compensation commissioner and also his petition on appeal in the district court in due time he had fully performed all statutory requirements relative to appeals both under the compensation act and the Code, and the failure or delay of the court officers to carry out their respective duties enjoined by this statute, and over which the appellant had no control, and without contributing fault on his part, does not, and should not, deprive the appellant of his right of review in this tribunal.

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

REVERSED.

EDWIN NICHOLS, APPELLEE, V. OWENS MOTOR COMPANY, APPELLANT.

FILED APRIL 17, 1931. No. 27492.

1. Trial: IMPANELING JURY. The plaintiff may show at the beginning of a trial, while the jury are being impaneled, that an insurance company is interested in defending an action for personal injuries, in order that the right of challenge may be intelligently exercised.
2. ———: WITNESSES: CROSS-EXAMINATION. A plaintiff in a personal injury action may by appropriate interrogatories on cross-examination elicit testimony proving that the defendant is indemnified from loss by insurance.
3. ———: ———: ———. "The purpose of such inquiries is to inform the court, jury, attorneys, and litigants as to the true status and actual interest of the parties concerned as well as those participating in the litigation." *Sloan v. Harrington*, 117 Neb. 809.
4. Appeal: REFUSAL OF INSTRUCTION. It is reversible error for the court, when requested by the tender of an appropriate instruction, to refuse to limit the jury's consideration of testimony relative to defendant's indemnification from loss by a policy of public liability insurance to the purposes for which it may be received.

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

Morrow & Morrow, for appellant.

Mothersead & York, contra.

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

DAY, J.

This was an action for damages for personal injuries brought by Dr. Nichols against the Owens Motor Company. The defendant was engaged in selling automobiles and the plaintiff was a prospective customer. While an agent of the company was demonstrating an automobile to the plaintiff for the purpose of consummating a sale of said car, the accident occurred and the plaintiff was injured. From a verdict and judgment in favor of the plaintiff, the defendant appeals.

In this case, after the jury had been impaneled and sworn, the plaintiff, in his opening statement, stated that he would prove that the defendant was indemnified by a policy of public liability insurance. Thereafter, he proved by his first witness that the defendant was so indemnified. "It is not improper to ascertain at the beginning of the trial and while the jury are being impaneled whether an insurance company is interested in the defense of an action for personal injuries, and whether any agent or officer of such corporation is upon the panel, so that the right of challenge may be understandingly exercised." *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120. See, also, *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18; *Koran v. Cudahy Packing Co.*, 100 Neb. 693. The reason that plaintiff is permitted to show the interest of an insurance company is to determine whether the relationship of the prospective jurors and the insurance company was such as would disqualify them, because by implication they might be biased and prejudiced.

Again, we have held that it is proper for the plaintiff in a personal injury action by appropriate interrogatories on cross-examination of the defendant or any of his witnesses to show that the defendant is indemnified from loss by an insurance company. *Miller v. Central Taxi Co.*, 110 Neb. 306; *Jessup v. Davis*, 115 Neb. 1; *Frickel v. Lancaster County*, 115 Neb. 506. "The purpose of such inquiries is to inform the court, jury, attorneys, and litigants as to the true status and actual interest of the parties concerned as well as those participating in the litigation." *Sloan v. Harrington*, 117 Neb. 809.

To summarize: The rule relative to showing the interest of an insurance company in the litigation is that a plaintiff may show the fact of insurance for the purpose of intelligently questioning jurors on *voir dire* examination and that he may also cross-examine the witnesses for the defendant in order to show their motive, bias, or interest. No reason of the rule required or permitted the introduction of the testimony upon direct examination by the plaintiff as part of his case in chief to prove that the defend-

ant was indemnified from loss by a policy of insurance. At the time of the introduction of this testimony the jury had been impaneled and sworn and the information was not necessary or useful for an intelligent examination of prospective jurors. At that time no witness had testified for the defendant. Therefore, there was no question of the motive, bias or interest of any witness and the introduction of such testimony was clearly improper. The defendant objected to the opening statement of the attorney and objected to every question asked of the witness who testified relative to the matter of insurance. It has been repeatedly suggested by this court that, when the purpose of an inquiry relating to insurance has been met, it should cease, and it is the duty of the trial judges to restrict the inquiry to these purposes. *Sloan v. Harrington,* 117 Neb. 809; *Frickel v. Lancaster County,* 115 Neb. 506. We have also held recently that it was improper, where the plaintiff makes no attempt to show that the defendant is indemnified from loss by an insurance company, for the defendant to offer testimony showing that he is not so indemnified. *Taulborg v. Andresen,* 119 Neb. 273. It seems to be apparent that the proceedings followed in this case were erroneous; that it was an extension of the rule heretofore announced in *Jessup v. Davis, supra,* and that it should not have been permitted by the trial court.

However, we are of the opinion that, since in this case the plaintiff calmly and dispassionately conveyed the information to the jury by direct evidence that the defendant was indemnified from loss, it was not prejudicial to the defendant. The plaintiff could have conveyed the same information to the jury in at least two other ways. In view of the entire record in this case, it does not appear that the defendant was prejudiced by this error. To warrant the reversal of a judgment, it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining. *Combs v. Owens Motor Co., ante,* p. 5, citing *Morfeld v. Weidner,* 99 Neb. 49, and *Cronin v. Cronin,* 94 Neb. 353.

In *Sloan v. Harrington,* 117 Neb. 809, we considered the rule relative to cross-examination of the defendant and stated its purpose. We held that, if requested to do so, the court should have by an appropriate instruction limited the jury's consideration of such testimony to the purpose permitting its reception in evidence. In the *Sloan* case no instruction was requested upon this matter. The defendant in this case requested an instruction relative to the purpose of the reception of testimony relating to indemnity insurance. The instruction tendered was not a proper instruction limiting the consideration of the jury to the purposes for which such testimony is received, as enunciated in the numerous cases in which this court has discussed the question. In the requested instruction the defendant sought to have the court instruct the jury that they should "totally and absolutely disregard this evidence," which is not in conformity with the holdings of this court and clearly an improper instruction. The failure to charge the jury upon this question is not reversible error unless a suitable instruction has been tendered. "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction." *Osborne v. State,* 115 Neb. 65; *Berggren v. Hannan, O'Dell & Van Brunt,* 116 Neb. 18. See *Maxson v. J. I. Case Threshing Machine Co.,* 81 Neb. 546; *Union P. R. Co. v. Stanwood,* 71 Neb. 150. It is reversible error for the court, when requested by an appropriate instruction, to refuse to give an instruction limiting the jury's consideration of testimony relative to the defendant's indemnification from loss by a policy of public liability insurance.

The defendant assigns as error and argues that its negligence was not the proximate cause of the accident and that the accident was not the proximate cause of the plaintiff's injury. We have carefully examined the record and find that there is sufficient evidence to sustain the finding of the jury upon these questions of fact. There is no complaint that the verdict is excessive, but only that no

verdict should have been returned. We find no reversible error, and the judgment of the trial court is

AFFIRMED.

SIMON D. MIHAN, APPELLEE, V. GREAT WESTERN SUGAR COMPANY: ALBERT ROTHWEILER, APPELLANT: FIRST NATIONAL BANK OF LYMAN ET AL., APPELLEES.

FILED APRIL 17, 1931. No. 27692.

1. **Equitable Liens.** In order to establish an equitable lien by agreement, it must clearly appear that it was the intention to charge the particular fund with a lien.
2. ———: REQUISITES. It must also be established that there was a distinct appropriation of the fund *pro tanto* by the one entitled to it, either by giving an order on the specific fund, or by transferring it otherwise, so that the holder of the fund is authorized to pay it directly to the assignee without any further intervention.
3. ———: IMPLICATION. An equitable lien may arise by implication, but facts and circumstances must present ground for equitable relief. Such a lien will not be implied where the parties have agreed for a party's legal liability.

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

Wright & Wright, for appellant.

Morrow & Morrow and *Robert W. Patterson, contra.*

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

DAY, J.

This action was brought by one Mihan against the Great Western Sugar Company to collect the sum of $1,814.04 for beets grown upon plaintiff's land. The company filed an interpleader acknowledging that it owed the said sum for beets grown upon the premises, but that certain parties claimed an interest in said fund. The money was paid to the clerk of the district court to be held subject to further orders of the court. Although all parties claiming an interest in the fund filed petitions of inter-

vention, we mention only those involved in this appeal. The intervener Rothweiler claimed that there was due him $978.76 by virtue of hand labor performed in the growing and harvesting of said crop. He claims a lien by reason of an express promise to pay by the plaintiff and the mortgagee, the First National Bank of Morrill. The First National Bank of Morrill claimed an interest in the beets by reason of a chattel mortgage executed by the landlord Mihan.

The court found that the entire sum was due to Mihan, but that it should be paid to the First National Bank of Morrill by reason of its chattel mortgage. It also found that Rothweiler and other interveners had no interest whatsoever in the money, and especially found that Rothweiler had no equitable lien. Only Rothweiler has appealed from that finding. The beets involved in this controversy represent the landlord's share, the tenant's portion having been previously harvested. Rothweiler refused to harvest them because he felt uncertain that he would be paid. It was to the interest of the landlord Mihan and of the First National Bank of Morrill, who held a chattel mortgage securing the debt of Mihan, that these beets be harvested and marketed. Under these circumstances the cashier of the Morrill bank, Mihan and the representatives of the sugar company had a conference to consider the harvesting of the beets. Mr. Andrews, a representative of the sugar company, testified the cashier of the Morrill bank, Mr. Karpf, stated that "he was not interested in what had taken place prior to this time, but that he would agree to guarantee the payment of the labor for the harvesting of the balance of crop," and that Mr. Mihan stated that, "if they get all of my beets out, I will see that the labor is paid." The representatives of the sugar company thereupon informed Rothweiler of the agreement made by the cashier of said bank. Relying upon this promise, Rothweiler harvested said beets. It is upon this state of facts that Rothweiler predicates an equitable lien upon the sum due from the Great Western Sugar Company for the beets. The contract price for the labor performed after this agreement is $452.65.

In 1 Jones, Liens (3d ed.) sec. 50, it is said: "To constitute an equitable lien on a fund, there must be some distinct appropriation of the fund by the debtor, such as an assignment or order that the creditor should be paid out of it." And section 52 of the same work states: "The promise of a debtor to pay a debt out of a particular fund is not sufficient. There must be an appropriation of the fund *pro tanto,* either by giving an order on the specific fund, or by transferring the amount otherwise in such a manner that the holder of the fund is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

In 37 C. J. 318, is the following: "A mere promise to pay a debt out of a particular fund, without any appropriation of the fund, does not operate as an equitable assignment of the whole or any part of such fund, and is not sufficient to create an equitable lien on the fund, even though the fund was created through the efforts and outlays of the party claiming the lien."

Although an equitable lien may be established by a parol agreement, the intention to charge particular property or a fund derived from the sale of said property with a lien as security for a debt must clearly appear. *Jackman v. Newbold,* 28 Fed. (2d) 107, citing *Great Northern State Bank v. Ryan,* 292 Fed. 10, and *Christmas v. Russell,* 14 Wall. (U. S.) 69. The intervener cites *Phillips v. Hogue,* 63 Neb. 192, to support his contention that an equitable lien was created here. In that case it was held: "A mere naked promise to pay an existing debt out of a particular fund, unaccompanied by any words of transfer, or the giving of any power or authority over the fund, does not operate either to create a lien thereon or to work an equitable assignment thereof." In the instant case there was no agreement to assign or transfer a particular fund to the payment of the intervener's claim. The undisputed testimony is that the cashier of the bank agreed to "guarantee the payment of the labor for the harvesting of the balance of the crop" and to "see that the labor is paid." In order to establish an equitable lien by agreement, it

must clearly appear that it was the intention to charge the particular fund with a lien. It must also be established that there was a distinct appropriation of the fund *pro tanto* by the one entitled to it, either by giving an order on the specific fund, or by transferring it otherwise, so that the holder of the fund is authorized to pay it directly to the assignee without any further intervention.

There is no express contract in this case creating an equitable lien in favor of intervener. In 37 C. J. 319, it is said: "In absence of an express contract, an equitable lien * * * may arise by implication. * * * Such a lien will not be implied or enforced where the facts and circumstances present no grounds for equitable relief, and there is an adequate remedy at law, as where the parties themselves have stipulated for a purely legal liability." In this case the bank and Rothweiler have contracted for a legal liability. The evidence clearly established an original undertaking upon the part of the bank to employ the intervener to harvest these beets. It was interested in getting the beets out. The facts are that the beets in this controversy represented the landlord's share; that the landlord refused to harvest them; that the bank was entitled to them by reason of a chattel mortgage, and that Rothweiler refused to furnish the labor necessary to harvest them until the bank made an agreement for payment. This was the situation at the time the cashier of the bank made an agreement which, although intended to be somewhat equivocal, induced the intervener to furnish the labor necessary. These circumstances suggest that the bank, as a matter of justice, right and legal obligation, should have paid for this labor. However, the bank was not influenced by any such just consideration, which accounts for this controversy.

Reluctantly we find that the facts and circumstances of this case are not such as present grounds for equitable relief and that the intervener Rothweiler has no equitable lien. However, we do not find in this case that the intervener Rothweiler is not entitled to recover from the

bank in a proper proceeding. Since the finding of this court is the same as that of the trial court, the judgment is

AFFIRMED.

MILES KELLY, ADMINISTRATOR, APPELLEE, V. HELEN GAGNON ET AL., APPELLANTS.

FILED APRIL 17, 1931. No. 27610.

1. Automobiles: OPERATION: CARE REQUIRED. The owner of an automobile is required to exercise ordinary care in its operation to prevent injury to an invited guest riding therein.
2. ———: GUESTS: ASSUMED RISKS. A father, who had frequently accepted an invitation to ride with his adult daughter in her automobile, accepted whatever risk attended the degree of proficiency as a driver which the daughter possessed.
3. ———: OPERATION: CARE REQUIRED. The owner and driver of an automobile assumes a position of responsibility when she invites guests to accompany her. She must exercise at all times that degree of ordinary care which the great mass of mankind under the same or similar circumstances would exercise.
4. ———: ———: LIABILITY. The driver and owner of an automobile, who acted in good faith and in accordance with her best skill in an emergency, cannot be held liable for the death of her father, who was riding as her guest, on the theory that she failed to exercise ordinary care in the management of the car solely because she applied the brakes, which may have contributed to its overturning.
5. Negligence: QUESTION FOR JURY. Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence.
6. Automobiles: NEGLIGENCE. The puncture of an automobile tire by a large spike, causing the car to upset and fatally injuring a guest therein, will, under the evidence set out in the case, be considered an accident, which is a casualty which could not be prevented by ordinary care and diligence.
7. ———: ———. Under the evidence in this case, the motion for a directed verdict should have been sustained.

APPEAL from the district court for Richardson county: FREDERICK W. MESSMORE, JUDGE. *Reversed.*

Chambers & Holland and *Reavis & Reavis*, for appellants.

John C. Mullen, contra.

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

PAINE, J.

This is an action for damages brought by Miles Kelly, administrator of the estate of John Gagnon, deceased, appellee, against three adult children of the deceased, Helen Gagnon, Clara Gagnon, and Joe Gagnon, appellants. The petition alleged that the action was brought for the benefit of Ella Gagnon, the widow of the deceased, and John Gagnon, an incompetent son of deceased, and charged that the daughter, Helen Gagnon, invited her father, now deceased, to take a trip in her automobile with her as her guest. While so riding in South Dakota one of the tires was punctured by a nail and the car overturned, and from injuries received at said time the father, John Gagnon, died the next day.

The petition, as a basis for the recovery of $10,000 damages, set out six specific acts of negligence on the part of Helen Gagnon, as follows: (1) Her failure to have the automobile in proper working order at the time she invited the deceased to ride with her, in that the tires of the said automobile were out of repair; (2) in driving the automobile when she knew that the said tires were liable to burst; (3) by inviting her father to take a ride in the said automobile when she knew she could not control it in the event one of the tires became punctured; (4) in driving the said automobile at an excessive and dangerous rate of speed when she knew she could not control it in the event one of the tires burst; (5) in driving the said automobile at a rate of speed which she knew would endanger the life of her father; (6) in grossly, negligently and carelessly applying the brakes of the said automobile, bringing it to a violent stop and causing it to overturn.

The answer of the appellants denied all of the allega-

tions of negligence, and pleaded that the cause of the accident was the sudden and unforeseen puncturing of the automobile tire by the spike, which caused the air to be suddenly expelled, and denies that the defendants or either of them were guilty of any negligence which contributed in any way to the accident.

Trial was had to a jury, and a verdict was returned, signed by ten jurors, for $2,000, and motion for a new trial was overruled.

Two of the errors relied on for a reversal of the case are, first, that no negligence was proved on the part of Helen Gagnon, and, second, that the court should have sustained the defendants' motion for a directed verdict at the close of the plaintiff's testimony.

The facts, as shown by a careful reading of the bill of exceptions, disclose that on September 13, 1929, Helen Gagnon and her sister Clara, who were self-supporting women, living at home, purchased this Studebaker sedan of a local dealer in Falls City, Nebraska, trading an old car in on it and paying the balance in cash; that during the following month the car was driven almost daily, and then Helen Gagnon invited her father, mother, and youngest brother, John, to take a trip to South Dakota with her as her guests. The accident happened on October 12, 1929, about two miles from Gregory, South Dakota, when they were traveling on a good country road, with no other cars in the immediate vicinity, and driving about 30 miles an hour. A 5-inch, 16-penny spike penetrated the tire on the left rear wheel. The car swayed from side to side, and the driver, Helen Gagnon, applied the brakes and the car tipped over, her father receiving a cut on the head and an injury to his spine, from which injury he passed away near Fremont, Nebraska, the following day as they were taking him to an Omaha hospital. The deceased was 81 years of age, a lawyer, who had been in good health and earning around $2,500 a year. His wife and the youngest brother, John, who were in the car at the time of the accident, were both entirely dependent upon the deceased for support. John Gagnon, above referred to, was 26

years of age, but unable to do any work at all, having been operated upon 23 times for brain abscesses.

During the trial a stipulation was made a part of the record that the expectancy of the deceased was from 4.78 years by the American table to 5.51 years by the Carlisle table, and that the speed law of the state of South Dakota allows 40 miles an hour in driving automobiles upon roads such as the one where the accident occurred.

Shortly after the case was filed the defendants' attorneys, Chambers & Holland, took the evidence of their client, Helen Gagnon, and also of the garageman and the mechanic in South Dakota, by deposition.

They complain in their brief that, when the case was tried, Helen Gagnon was the first witness called by plaintiff, and in the brief claim they are preparing their case without a client. When the plaintiff closed his evidence, the defendants moved for an instructed verdict, and, upon this motion being overruled, defense rested without introducing any evidence, as the depositions they had taken in South Dakota were offered and used by the plaintiff.

1. The first four specific acts of negligence charged in the petition, as set out herein, relate to driving the car with tires not new but somewhat worn.

The evidence on the condition of the tires was given by the defendant Helen Gagnon, as follows: "Q. What was the condition of the tires? A. Well, they were worn; in places they were worn clear through to the fabric. * * * Q. Had you given any considerable thought as to whether these tires might blow out on the road? A. Well, I really didn't expect them to blow out; I thought they would get us there and bring us home again. Q. Well, they didn't blow out, did they? A. Well, they didn't make any noise; no. Q. The thing that caused this accident was the spike entering the tire, wasn't it? A. Yes, sir. Q. So it wasn't a blow-out or a defect as far as you know in this left rear tire that caused that spike to enter? A. No, sir." "Q. About how large a spike was it? A. Oh, it looked to me to be almost as big around as my little finger. Q. And about how long? A. Well, it was at least an inch and a

half, that was bent over on the outside of the tire. * * * Q. A spike large enough to enter almost any tire if it got in the right way? A. I think so. * * * Q. At that time after this spike entered the tire, you did think though that the best thing to do would be to put on the brakes? A. Yes, sir. * * * Q. And that was your best judgment at the time this accident happened? A. I thought I had better stop."

John Sully, a mechanic, 42 years of age, gave his evidence by deposition. Having been sent out to bring in the automobile, he found the car upright with the left rear tire down and took it off and put on the spare tire and drove the car into town, and on direct examination testified: "Q. As to the character of the casings as to being worn or otherwise, what would you say as to that? A. The casings were worn to a certain extent. Q. Was the part of original roughness on the tread of the casing? A. Yes. Q. Does that answer apply to the casing that you removed from the car as well as the other casings on the car? A. Yes."

It is clear that these tires were in fair, second-hand condition, not all of the tread being worn smooth.

The owner of an automobile who invites another to ride with him as a guest, the invitation being accepted, does not thereby become the insurer of the safety of the guest, but is bound to use ordinary care not to increase the danger to the guest. See *Bauer v. Griess*, 105 Neb. 381.

"Where the owner of a private motor vehicle gratuitously carries another person therein as a passenger, he owes such passenger the duty of exercising ordinary care in the operation of the vehicle, and will be liable in damages if his failure to exercise such care is the proximate cause of injury to his passenger." *Jessup v. Davis*, 115 Neb. 1.

Nebraska in these two cases has taken its stand with the great majority of states which hold that the owner and driver of an automobile owes an invited guest the duty of exercising reasonable care in its operation so as not to unreasonably expose him to danger and injury by

increasing the hazard of travel. Many authorities supporting this view being given in the note in 61 A. L. R. 1252, and the minority rule being followed by Massachusetts, Washington, Georgia, and Pennsylvania.

The fifth act of negligence charged in the petition is that the defendant was driving the car at a rate of speed which she knew would endanger the life of her father. There is no dispute in the evidence that her speed was 30 miles an hour and that the legal speed in South Dakota was 40 miles an hour. There were no cars in sight and the road was level, and no negligence was shown in her manner of driving.

2. The sixth and last act of negligence charged is that, when the tire was punctured, the driver stopped the car by grossly, negligently and carelessly applying the brake as soon as the rear of the car began to sway, thereby bringing it to a violent stop. Let us examine the evidence on that point. Helen Gagnon testified as follows: "Q. Was that a considerable sway? A. Well, I thought so. Q. Enough so that you knew that something had happened, didn't you? A. Yes, sir. Q. Did it startle you? A. Oh, I just put the brake on, that was the first thing I thought of."

A fairly careful search of digests and through the several texts on automobiles, and also under the subject of negligence, discloses no reported cases where claim was made that the owner of a car was guilty of negligence for driving with the tires somewhat worn.

The only case found indexed under "Tires" is *Regan v. Cummings,* 228 Mass. 414, where the driver heard the air escaping from a punctured tire and was held negligent for not pushing on the foot brake and stopping the car, as he might have done almost instantly rather than to let the car run at least 20 feet, when a casing locking ring came off the rim when the tire was partially deflated, rolled upon a sidewalk and injured a pedestrian. In this one reported case the driver was at fault in not applying the brakes.

Now, on the contrary, in this case at bar it is argued that a highly skilled driver should not apply the brakes when the car sways from a tire going down.

A father who had frequently accepted an invitation to ride with his adult daughter in her automobile accepted whatever risk attended the degree of proficiency as a driver which the daughter possessed.

3. Conduct which would otherwise be negligence cannot be excused on the ground that the actor made a mistake of judgment, unless the judgment exercised was that which an ordinarily careful and prudent man would have exercised under the same circumstances. *Reliable Auto Renting Co. v. Brooklyn City R. Co.*, 192 N. Y. Supp. 803.

"The mere fact that one errs in judgment is not conclusive proof that he did not act as a reasonably prudent person would have acted under like circumstances." *Stiles v. Corbett*, 136 Wash. 670.

The owner and driver of an automobile assumes a position of responsibility when she invites guests to accompany her. She owes to such guests a degree of care for their safety which should not be treated too lightly. She must be more careful in situations of greater danger and exercise at all times that degree of ordinary care which the great mass of mankind under the same or similar circumstances would exercise.

4. "Guests who accept the hospitality of the driver of an automobile accept whatever risk attends the degree of proficiency of such driver and his usual and customary habits of driving with which they are familiar" is a rule set out in *Olson v. Hermansen* (196 Wis. 614) 61 A. L. R. 1243, with notes, and is approved by this court. The driver and owner of an automobile, who acted in good faith and in accordance with her best skill in an emergency created by a tire going suddenly flat when punctured by a large nail, cannot be held liable for the death of her father, who was riding as her guest, on the theory that she failed to exercise ordinary care in the management of the car because she applied the brakes, which may have contributed to its overturning.

"When a person without his fault is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present." *Frish v. Swift & Co.*, 97 Neb. 707, quoting from *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342. See *Harris v. Parks*, 58 Utah, 42.

"In the event the driver of an automobile is suddenly met with an emergency which naturally would overpower the judgment of a reasonably prudent and careful driver, so that momentarily he is thereby rendered incapable of deliberate and intelligent action, and as a result injures a third person, the driver is not negligent, provided he has used due care to avoid meeting such an emergency, and, after it arises, he uses such care as a reasonably prudent and capable driver of an automobile would use under the unusual circumstances." *Wilson v. Roach*, 101 Okla. 30.

"When two alternatives are presented to a traveler upon the highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence in taking either." *Skene v. Graham*, 114 Me. 229.

5. It is only when the facts are not in controversy, or the evidence is of such a character as but one rational inference can be drawn therefrom, that the court is warranted in determining the question of negligence as a matter of law. *Chicago, B. & Q. R. Co. v. Winfrey*, 67 Neb. 13; *De Griselles v. Gans*, 116 Neb. 835; *Long v. Omaha & C. B. Street R. Co.*, 108 Neb. 342.

"It is the settled rule in this state that where different minds may draw different inferences from the same state of facts as to whether such facts establish negligence, it is a proper question for the jury and not for the court. But that rule is subject to the qualification that the inference of negligence must be a reasonable one. Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a ques-

tion for the jury, and the court should direct a verdict for the defendant." *Chicago, B. & Q. R. Co. v. Landauer,* 36 Neb. 642.

"Where the question of negligence is presented by the pleadings, and there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question is for the court." *Olson v. Nebraska Telephone Co.,* 83 Neb. 735. See *Brady v. Chicago, St. P., M. & O. R. Co.,* 59 Neb. 233.

6. Appellee objects to the fact that the transcript as prepared by the appellants does not include the instructions given by the court, and claims the verdict would have been larger if the district judge had not given an instruction upon contributory negligence, which was not alleged in the answer. The court cannot consider this question in the condition of the record, and also calls attention to the fact that the reporter did not sign his certificate at the close of the bill of exceptions, although it is certified to by the district judge.

In this case, at a time when an automobile was being carefully driven on an open country road at less than the legal speed, a large spike, sufficient in size to penetrate any tire if struck, penetrated a rear tire, causing the car to sway and upset, which brought about the death of an elderly gentleman. It is a general rule that the mere fact that an accident occurs raises no presumption of negligence on the part of either of the parties to it. *Tsiampras v. Union P. R. Co.,* 104 Neb. 205. Was this unfortunate death caused by an accident? What is an accident? Under the workmen's compensation act we have had many definitions of accident in various states. Under many suits brought under accident policies the courts have passed on the question in nearly every state. The Iowa court has said: "An accident is any casualty which could not be prevented by ordinary care and diligence." *Sprecher v. Ensminger,* 167 Ia. 118.

In *Stasmos v. State Industrial Commission,* 80 Okla. 221, 15 A. L. R. 576, is found this statement: "Accident in the legal signification is difficult to define; it is not a

technical legal term with a clearly defined meaning, and is used in more senses than one. * * * The word denotes * * * an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore unexpected."

7. The defendants at the close of plaintiff's evidence made the following motion: "Mr. Holland: The defendants Helen Gagnon, Joe Gagnon and Clara Gagnon move that the court direct a verdict in their favor and against the plaintiff for the reason that the evidence is insufficient to constitute a cause of action against one, either or all of the defendants, and in favor of the plaintiff, and for the further reason that the evidence is insufficient to show that Helen Gagnon, the driver of the automobile, was negligent towards the plaintiff in any degree, and for the further reason that the evidence is conclusive that the defendant Helen Gagnon did everything possible that she could have under the circumstances to avoid an accident after the spike entered the tire of her automobile. Motion overruled. Defendants except. Defendants rest."

It is the opinion of all of the members of this court that, for reasons stated in this opinion, this motion should have been sustained, and for the error in overruling the same the judgment is

REVERSED.

EDWIN LYNN, APPELLEE, V. KEARNEY COUNTY, APPELLANT.

FILED APRIL 21, 1931. NO. 27642.

1. **Action:** DECLARATORY JUDGMENTS ACT. Declaratory judgments act examined, and *held* to be applicable to actions wherein there is an actual controversy, and where only justiciable issues are presented by proper parties. So construed, the act does not confer on the courts nonjudicial powers.
2. **Highways:** TOWNSHIP ROADS. Counties are without the power, express or implied, to contract with townships, whereby, for an agreed consideration, the county will construct and maintain township roads.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

C. A. Sorensen, Attorney General, Clifford L. Rein and *J. L. McPheely,* for appellant.

King & Bracken, contra.

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

GOOD, J.

This is an action praying for a declaratory judgment, wherein plaintiff seeks to have determined the power of defendant to make and execute contracts with the several townships of the defendant county, whereby the defendant, for an agreed consideration, will construct and maintain township roads within the borders of the several townships with which it has executed such contract, and with other townships with which it contemplates making similar contracts and performing similar work. The trial court found and determined that defendant had no such power, and entered judgment conformable to the prayer of plaintiff's petition. Defendant has appealed.

In the minds of some of the justices of this court, grave doubts have arisen as to the jurisdiction of the court to entertain an action for a purely declaratory judgment. The jurisdiction of the court to entertain such a proceeding and to enter such a judgment is not assigned as error, or discussed in the briefs. Since the validity of such a judgment depends on the court's jurisdiction, we feel impelled to examine into the question, notwithstanding it has not been raised by the parties to this proceeding.

From a somewhat extensive investigation, we find that the declaratory judgment was first authorized and used in the Roman law. Later it found its way into court procedure in Germany, Spain, France and Austria. Still later, and about 400 years ago, it found its way into the procedure adopted in Scotland, and more than 50 years ago it was adopted in the jurisprudence of England. It is now recognized and applied in Canada, Australia, New Zealand and in a number of the sister states of this country. Unavailing efforts have been made to induce the

congress of the United States to enact a law authorizing the federal courts to render declaratory judgments. In 1922 the national conference of commissioners on uniform state laws prepared a model act which is known as the "Uniform Declaratory Judgments Act." This act has been adopted, substantially as drafted, in 12 or more of the states. Nebraska adopted the act in 1929, and it now appears as sections 20-21,140 to 20-21,155, Comp. St. 1929.

In a brief by Professor Borchard of Yale University, favoring the enactment by congress of a bill authorizing federal courts to render declaratory judgments, printed in 1919 for the use of the senate judiciary committee of the sixty-fifth congress, there is contained an extensive review of the history and use made by the courts of other countries of this procedural reform. The question of the desirability of such an act has been discussed by a number of eminent jurists and professors of law. Among the very interesting and instructive articles on this subject the following may be noted: "A Modern Evolution in Remedial Rights—the Declaratory Judgment," by Professor Sunderland of the University of Michigan, appearing in 16 Mich. Law Review, 69; notes by T. Munford Boyd in 15 Va. Law Review, 79; and articles by Professor Borchard appearing in 28 Yale Law Journal, 1, and 37 W. Va. Law Quarterly, 127.

In 1919 the legislature of Michigan passed an act purporting to authorize courts of record in that state to make binding declaration of rights. In *Anway v. Grand Rapids R. Co.*, 211 Mich. 592, also reported in 12 A. L. R. 26, by a divided court the act was held unconstitutional upon the theory that it required performance by the court of acts nonjudicial in character and in conflict with the constitutional provision vesting judicial power in the courts. In that case, as in this, the question of the validity of the act was not raised by the parties. Appended to the opinion of that case reported in 12 A. L. R., at page 52, is an exhaustive note dealing with practically every phase of declaratory judgments acts, and wherein it is disclosed that the federal courts have generally refused to render

eo nomine declaratory judgments, but it is also pointed out that, in effect, such judgments have been rendered by the federal courts. As shown in the note, many, if not all, of the states of the Union have, from time immemorial, rendered judgments that are, in their nature, merely declaratory of the rights of the parties, and wherein no consequential relief was afforded; that is, any relief which could be enforced by execution. An action to annul a void marriage, because of incapacity of one of the parties to enter into the marriage contract, action to quiet title, where plaintiff's possession or title has not been threatened by another, action for construction of a will, and an action by a trustee for instruction and direction in the performance of his duties are illustrative of the use of declaratory judgments.

In 1929 the legislature of Michigan enacted another law authorizing the courts to render declaratory judgments, and the validity of this act was before the supreme court of that state in *Washington-Detroit Theater Co. v. Moore,* 249 Mich. 673. In the opinion in that case it was held that the act was not unconstitutional and did not require the court to perform nonjudicial functions. It was held that declaratory judgments are self-enforcing to the extent of being final, and constitute *res judicata.* It appears that the later act of the Michigan legislature authorized the rendering of declaratory judgments only in cases of actual controversy. In a separate concurring opinion by Wiest, C. J., it was said: "I can see no *legal* objection to the statute if, in practical application, it is limited to *bona fide* justiciable issues. The advisability of such a law is a legislative question, but its applicability in a particular instance is a judicial question. The statute does not supplant present legal and procedural methods, estop suits at law or in equity, or remit one having a right of action to its employment. With this understanding, I am constrained to concur in the opinion of Mr. Justice Fead (the writer of the principal opinion)."

In 1921 the Kansas legislature enacted a law authorizing the rendition of declaratory judgments. In the case of

State v. Grove, 109 Kan. 619, 19 A. L. R. 1116, the supreme court of that state had before it the validity of the act. It was therein held: "A statute authorizing the rendition of merely declaratory judgments is not unconstitutional on the ground of attempting to confer nonjudicial power upon courts. Such judgments may be judicial acts although rendered in actions admittedly brought before a right has been invaded, and although no consequential relief is given or sought." In the course of the opinion in that case it was said (p. 622): "Against the validity of the statute it is urged that the occasion for judicial action cannot arise until a claim is made that an actual wrong has been done or is immediately threatened and moreover (what is much the same thing stated in another way) that a decision cannot properly be classed as a judgment, as a strictly judicial act, unless besides determining the merits of the controversy between the parties, deciding which is right, it affords (or denies) some additional remedy—in other words 'consequential relief'; and therefore that power to decide a controversy in the absence of the conditions indicated is not judicial and cannot be conferred upon courts by the legislature. This view appears to us to be unsound and to be the result of confusing declaratory judgments with advisory opinions and decisions in moot cases, and perhaps also of an inclination to treat a general practice that has been long established as having acquired the force of a constitutional guaranty. A mere advisory opinion upon an abstract question is obviously not a judgment at all, since there are no parties to be bound and the rights of no one are directly affected. The situation is substantially the same where opposing parties present a moot question—one the decision of which can have no practical effect. Where a judgment is sought of such character as to be of no benefit unless accompanied by an order the carrying out of which is impossible, the futility of the proceeding is a sufficient basis for a court's refusal to entertain it, whether or not jurisdiction to do so exists. But some judgments are wholly or in part self-operative. They perform a

valuable function in and of themselves. It is often said that a cause of action arises only upon the breach of a duty—the invasion of a right. This, however, is merely the announcement of a general rule of practice subject to possible exceptions and to legislative change. Actions to quiet title and to construe wills are recognized methods of invoking judicial action which do not originate in the actual commission of a wrong nor terminate in a judgment inflicting a penalty, granting compensation or injunction, or otherwise giving 'consequential relief,' the declaration of rights being all that is necessary to fit the requirements of the case. The decree in an action to quiet title is sometimes so drawn as to order the setting aside or cancelation of a deed. A declaration that the instrument is void and without effect amounts to the same thing. The judgment does not change the condition of the title but simply declares where it is vested. It gives the only relief that is necessary to settle the controversy—the determination of the ownership of the property. Why the legislature cannot authorize similar procedure in like situations to meet like needs is not apparent. It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant criminal) if he is mistaken in his view of the law.

"The mere judicial determination that one party to litigation is right in his contentions and his opponent wrong accomplishes in some instances all that he seeks and in others at least a considerable part of it; it conclusively and finally settles the question of liability between the parties."

Similar rulings have been announced by the courts of last resort in a number of states. We reach the same conclusion as did the courts of Michigan and Kansas. The

proper construction of the Nebraska declaratory judgments act is that it is applicable when there is an actual controversy, where only justiciable issues are presented by proper parties. So construed, the act does not confer on the courts nonjudicial powers.

The one remaining question for consideration is: Did the county have the power to make and execute contracts with the townships whereby the former, for an agreed consideration, would construct and maintain township roads within the township with which the contract was made?

The rule in respect to powers of counties is stated in 15 C. J. 419, in this language: "As a county is a quasi corporation and a governmental agency of the state, with no independent sovereignty, it possesses only such powers as are expressly given, or necessarily implied, in statutes constitutionally enacted."

In *Lancaster County v. Green,* 54 Neb. 98, it was held: "A board of county commissioners, in addition to the powers especially conferred by statute, has such other powers as are incidentally necessary to enable such board to carry into effect the powers granted.

"The word 'necessary' considered and, in respect to the implied powers of boards of county commissioners, *held* to mean no more than the exercise of such powers as are reasonably required by the exigencies of each case as it arises."

In *Garver v. City of Humboldt,* 120 Neb. 132, it was held: "Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein."

It therefore follows that if the county has power to enter into such contracts as are involved herein, it must be found in the statutes, or it must be necessarily implied from the express powers which are granted. Defendant contends that such power does exist and may be found in sections 26–104, 39–101, 39–212, 39–214, 39–233 to 39–236, and 39–1205, Comp. St. 1929.

We have carefully examined each of these sections and

find that none of them confers any express power upon counties to enter into such contracts; nor can we find that such power is necessary to a proper and reasonable exercise of any of the powers expressly granted. We therefore conclude that the county is unauthorized to enter into such contracts.

The judgment of the district court is right.

AFFIRMED.

JOSEPH E. WEIR, IMPLEADED WITH GEORGE S. ALDRICH, V. STATE OF NEBRASKA.

FILED APRIL 24, 1931. No. 27834.

ERROR to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Dismissed.*

McNeny, Gilham & Sprague, for plaintiff in error.

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

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

PER CURIAM.

In this case an indictment was returned by a grand jury impaneled in Nuckolls county, Nebraska, charging the defendant Aldrich (plaintiff in error) and another with an offense. To this indictment the defendant Aldrich interposed a plea in abatement, which was tried to the court and by it overruled. From that decision the defendant prosecutes error. The record discloses that this proceeding in error is here presented by stipulation of the parties, and that, pending its determination, proceedings in the case below are by agreement continued, and also that no final disposition thereof had been made at the time of this hearing.

The rulings of the district court in a criminal case cannot be reviewed by this court prior to the rendition of final judgment in the prosecution, and consent of the parties

is incapable of conferring jurisdiction of the subject-matter.

"An order of the district court overruling a plea in abatement to an indictment is not a final order within the meaning of the statute, and a petition in error cannot be prosecuted therefrom previous to the prisoner's conviction." *Gartner v. State,* 36 Neb. 280. See *Green v. State,* 10 Neb. 102; *Farrington v. State,* 116 Neb. 712.

The present condition of this record therefore necessitates the dismissal of the petition in error for want of jurisdiction.

DISMISSED.

REINHOLD WIEGAND, APPELLANT, V. LINCOLN TRACTION COMPANY ET AL., APPELLEES.

FILED APRIL 24, 1931. No. 27602.

Trial: QUESTIONS FOR JURY. "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Perrine v. Union Stock Yards Co.,* 81 Neb. 790.

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

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

Flansburg & Lee, John O. Sheldahl, H. W. Baird and *Hall, Cline and Williams, contra.*

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

GOSS, C. J.

Action by a minor for damages for personal injuries. At the conclusion of the evidence of all parties the court directed a verdict for defendants, overruled a motion for new trial and entered judgment on the verdict. Plaintiff appealed from the judgment.

The facts occurred about 4:30 p. m. on Armistice Day, November 11, 1929. Plaintiff, who was 17 years of age

on April 10, 1929, a messenger for the Western Union Telegraph Company, was riding his bicycle east on O street, carrying a message from the office of his employer at Tenth and O streets to a firm located between Thirteenth and Fourteenth on O street. He was injured as he was nearing Twelfth street. He alleged that, as he was riding about 75 feet ahead of the street car of defendant traction company, in its path and in plain view of the motorman and of defendant Goldenstein who was driving an automobile at plaintiff's right, the said Goldenstein carelessly and negligently turned to the left, somewhat across plaintiff's path, and the motorman continued to drive the street car toward plaintiff; that at a point near the intersection of Twelfth and O streets the street car and the automobile were driven into plaintiff and his bicycle, crushing him between them. The negligence alleged against both defendants is failure to keep a lookout, to keep their vehicles under proper control, to be properly equipped with brakes, and failure to stop to avoid colliding with plaintiff. The answers of the traction company and of Goldenstein denied negligence, and pleaded contributory negligence of the plaintiff. The telegraph company was a nominal party by reason of its right of subrogation as the employer of plaintiff, who was injured in the course of such employment.

Plaintiff was seriously injured. The vital question here is whether there was evidence that required the submission of the cause to the jury.

Evidence that seems to be uncontradicted shows that there was a solid stream of automobile traffic going east and that the south side of the street was parked full of cars facing the curb. Goldenstein was driving east past the parked cars and in the usual place a few feet south of the street car tracks. As he neared the intersection of Twelfth and O streets, the second automobile parked west of the safety zone, or yellow line, backed out from the curb and Goldenstein turned his car toward the south street car track but did not at any time get over on the track. Thereupon plaintiff's bicycle and the automobile

collided. The impact between these occurred about opposite the driver's seat in the automobile, the glass in the window there was broken by the bicycle, and plaintiff was "rolled" through between the street car and the automobile. When both were stopped, the automobile was opposite about the middle of the street car. The bicycle remained between the other vehicles. The automobile did not touch the street car.

Officer Jones, who was watching traffic at the southwest corner of Eleventh and O streets, standing close to the curb about 15 feet west of the crosswalk, and Sidney Graham, a geologist who was standing on the crosswalk waiting to take this particular street car home, both testified that they watched the street car, the Goldenstein automobile and the plaintiff and saw the accident. The effect of their testimony is that the boy never got up to the front of the street car and at no time was in front of it. Barrett, the motorman, and Goldenstein both testified they never saw the plaintiff until after the accident.

If the foregoing were all the evidence there would be no question that the district court properly directed the verdict.

But plaintiff urges that his own testimony and that of Grace McPherrin, his only other witness to the accident, required a submission of the facts to the jury.

Plaintiff testified that from Eleventh street up to about the middle of the block he rode his bicycle in a straight line about three or four inches south of the south rail. Then, because of the automobiles going in same direction, he turned over between the rails, but kept nearer the south rail. He heard the street car gong, looked back and saw the street car in front of a store 30 or 40 feet east of Eleventh street, so he kept on. He then testified: "I could hear the street car gong from behind, and all of a sudden I felt the street car give me a terrific blow from behind and pushed me into an automobile at the front, across in front."

Grace McPherrin, 17, a sophomore in the Lincoln high school, testified she was walking west on the south side

of O street. She first observed plaintiff as he was about in the middle of the block and she was in front of a store on the corner of Twelfth street. At first she thought he looked like a boy she had known. At that time the street car was about a quarter or a third of a block behind plaintiff. He continued to ride straight down the street, "inside of the tracks a little bit;" the street car kept coming, too, but it was going faster than he; a car backed out from the curb, a man driving a car east swerved toward the tracks; "the street car had filled up the gap by that time and it hit the boy and just knocked him into the car." She testified, also, that when the automobile began to turn the street car was about a street car's length behind the boy.

The testimony of this witness is attacked on account of inaccuracies, because of inability by reason of parked and moving cars to see some of the things she testified to, and the like. Her testimony and that of plaintiff is argued by appellees to be contrary to the physical facts and therefore required to be laid out of view by the trial court and by this court on review.

We find ourselves unable to accept the theory of the trial court and of the appellees that the evidence of the two witnesses for the plaintiff did not raise issues of fact to be submitted to the jury. It is possible that plaintiff on his bicycle was ahead of the street car, that he was struck by it from the rear, and that he was thus knocked against Goldenstein's car; and that thereupon the street car, moving faster than the automobile, came to a position where all agree they were after the accident. Neither the law of physics nor the facts preclude this. It is for the jury rather than for the court to appraise the credibility and accuracy of the witnesses and to say where the preponderance of the evidence is to be found.

The respective issues of negligence and contributory negligence were duly pleaded. The court, in effect, held that no negligence had been shown. "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or

contributory negligence, those issues must be submitted to the jury." *Perrine v. Union Stock Yards Co.*, 81 Neb. 790. See *Leon v. Chicago, B. & Q. R. Co.*, 102 Neb. 537; *Casey v. Ford Motor Co.*, 108 Neb. 352; *Luther v. Farmers Union Cooperative Ass'n*, 119 Neb. 676. The evidence should have been submitted to the jury for its determination.

For the reasons stated the judgment of the district court is reversed and the cause remanded, with directions to grant the plaintiff a new trial.

REVERSED.

ACME PLUMBING & HEATING COMPANY, APPELLEE, V. MARIE HIRSCH, APPELLANT.

FILED APRIL 24, 1931. No. 27647.

1. **Pleading**: VARIANCE. Where there is a variance between the pleadings and the proofs but such variance is not prejudicial to the adverse party and was not exercised in bad faith, *held*, that the trial court did not err in refusing to dismiss plaintiff's petition.
2. **Contracts**: PART PERFORMANCE: RECOVERY. Where a plaintiff installed certain plumbing and heating material in a building, in accordance with the specifications of a contract therefor, but the building before its completion was destroyed by fire without fault of either party, such plaintiff may recover for the value of the material installed and also for the value of his labor.

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

R. C. Rankin, for appellant.

Frederick J. Patz, contra.

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

DEAN, J.

The Acme Plumbing & Heating Company began this action in the district court for Lancaster county against Marie Hirsch to foreclose two mechanics' liens for $1,025 and $1,200, respectively. These liens represent a charge

for certain plumbing and heating material agreed to be installed in a 22-room house owned by the defendant and then under construction in Lincoln. The major portion of the plumbing and heating material provided for in the contracts had been installed when the house was destroyed by fire. It is agreed that the fire occurred through no fault of either party. The plaintiff alleges that the defendant neglected and continuously refused to meet any of the payments on the plumbing and heating material so installed. Thereupon the plaintiff filed liens against the property alleging full performance of the contracts and demanding payment for the full amounts named in the plumbing and heating contracts. After the trial was begun, however, the plaintiff was granted leave to amend its petition to the end that recovery might be had on a *quantum meruit* basis for the material and labor furnished, instead of for the full performance and full amounts of the contracts. Subsequently, upon submission of the evidence, the court rendered a decree in favor of the plaintiff and against the defendant for $1,291.12, for partial performance of both contracts as alleged. The defendant has appealed.

The defendant contends that the court erred in refusing to dismiss plaintiff's petition on account of alleged variance between the liens which were filed of record and the amended pleadings. While there appears to have been a variance between the pleadings and the proofs, such variance was not exercised in bad faith nor was it prejudicial to the defendant. Plaintiff contends that the action was commenced to recover the full amounts named in the contracts solely on the theory that the plaintiff was entitled to full reimbursement instead of only partial reimbursement for the material named in the contracts. We do not think the court erred in refusing to dismiss the plaintiff's petition. Section 20-846, Comp. St. 1929, provides:

"No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits."

And in discussing the rule as to the materiality of variance generally, a recognized authority points out that "a recovery will not be defeated because of a variance which is not substantial, or misleading, or prejudicial to defendant." 40 C. J. 454.

Shortly after the fire a member of the plaintiff company presented an itemized statement of the cost of the material and the labor expended on the building, and this statement was used by the defendant in arriving at the amount due her under her insurance policy from an insurance company. The plaintiff alleges that the defendant agreed to pay the amount due on the two liens if plaintiff would furnish an itemized statement of the plumbing and heating material lost and destroyed in the fire to assist in reaching the amount due her from the insurance company. But plaintiff further alleged that the defendant refused payment on the two liens after the insurance had been paid.

In *Matthews Construction Co. v. Brady*, 104 N. J. Law, 438, the court made this observation:

"Where under a contract for alterations and additions to an existing building performance depends on the continued existence of the structure, a condition is implied that impossibility of complete performance arising from its destruction without fault of the parties will absolve them from further liability, with the exception that the owner remains liable and the builder may recover for the value of the work done and materials delivered and accepted prior to such destruction."

And in *Angus v. Scully*, 176 Mass. 357, it was held:

"Where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, he may recover for what he has done, one of the implied conditions of the contract being that the building should continue to exist."

It appears to be established in cases of this character that, where the material installed in the building is in ac-

cordance with that specified in the contracts therefor, a plaintiff may recover for the value of such material, and also for the value of his labor, where the completion of the contract was prevented, as by fire in the present case, without the fault of either party.

In view of the facts presented by the record and of the law applicable thereto, we conclude that the judgment must be and it hereby is

AFFIRMED.

ROBERT L. HARMON, APPELLEE, V. J. H. WIESE COMPANY ET AL., APPELLANTS.

FILED APRIL 24, 1931. No. 27837.

1. **Master and Servant:** COMPENSATION: MODIFICATION. Under the provisions of section 48-142, Comp. St. 1929, the right to modification of an award of compensation does not depend alone on the future periodical payments. Such an award is subject to modification if the award covers a period of more than six months, part of which has elapsed at the time the award is made.
2. ———: ———: ———. In such case, section 48-142, Comp. St. 1929, limiting a modification of an award of compensation to that payable periodically for more than six months is to be construed with section 48-141, Comp. St. 1929, wherein provision is made for the modification of awards of compensation payable periodically for six months or more.
3. ———: ———: ———: APPEAL: ATTORNEY'S FEES. In a proceeding for additional compensation, under the workmen's compensation act, upon appeal to this court, the defendants not having reduced the amount of the modified award, *held*, that the plaintiff is entitled to an attorney's fee for services in this court.

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

Hall, Cline & Williams, for appellants.

Kinsinger & Ogden and *H. C. Henderson, contra.*

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

DEAN, J.

The J. H. Wiese Company and the Ocean Accident & Guarantee Corporation, Ltd., its insurer, defendants herein, have joined in an appeal from a judgment of the district court for Lancaster county wherein Robert L. Harmon, plaintiff, obtained additional compensation on account of personal injuries which he sustained on June 15, 1925, while he was in the employ of the Wiese company in wrecking and removing the old capitol building from the site of the present capitol building.

The trial court, upon reexamination, awarded plaintiff $742 as additional compensation for total disability from December 4, 1929, to December 10, 1930, and also allowed plaintiff $154 for necessary medical expenses incurred by him. The defendants were also ordered to pay plaintiff $14 each week for a period of 178 weeks from and after December 10, 1930, and, in addition thereto, the court decreed that plaintiff should, from thence, receive $9.45 each week from the defendants for and during the remainder of his life. The defendants were ordered to pay for such medical and hospital services as plaintiff's condition should require in the future by reason of his disability.

The plaintiff, after the accident, was awarded compensation for 16 weeks and, at a later period, on account of the serious nature of his injuries, he was awarded $14 a week additional compensation for a period beginning October 11, 1928, and ending April 18, 1929. The defendants were also ordered to pay the plaintiff $3.50 each week for six months thereafter, and to pay the sum of $357.45 for certain necessary medical and hospital bills incurred by the plaintiff as a result of his injuries.

In section 48-141, Comp. St. 1929, it is provided:

"All settlements by agreement of the parties with the approval of the compensation commissioner and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment."

Section 48-142, Comp. St. 1929, so far as material here, provides:

"All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his dependents, by lump sum payments, shall be final, but the amount of any agreement or award payable periodically for more then six months may be modified as follows: (a) At any time by agreement of the parties with the approval of the compensation commissioner. (b) If the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury."

Defendants contend that the award of compensation covering the period from October 11, 1928, to April 18, 1929, was final and not subject to modification on appeal, from the fact that the award did not provide that the compensation should be "payable periodically for more than six months," as provided in section 48-142, above cited. Under the provisions of section 48-142, the right to modification of an award of compensation does not depend alone on the future periodical payments. Such an award is subject to modification if the award covers a period of more than six months, a part of which has elapsed at the time the award is made. We do not think the modification provided for in section 48-142, as applicable to the facts in the present case, is limited to a judgment awarding compensation periodically for more than six months, but it appears to us that such section is to be construed with section 48-141, wherein provision is made for the modification of awards of compensation payable periodically for six months or more. *State v. Nye,* 136 Minn. 50. We have held that the employers' liability act should be so construed that technical refinements of interpretation will not be permitted to defeat it. *Parson v. Murphy,* 101 Neb. 542, L. R. A. 1918F, 479; *Baade v. Omaha Flour Mills Co.,* 118 Neb. 445.

Upon an examination of the evidence, we conclude that it clearly sustains the contention of the plaintiff that he has suffered increased permanent disability as an out-

growth of the injuries incurred while he was employed by the Wiese company. The evidence shows that the plaintiff, under the guidance and assistance of the social welfare society and the state department of vocational education, has unsuccessfully engaged in comparatively light occupations, but they appeared to be beyond his physical capacity to perform.

Plaintiff contends that the court erred in refusing to allow an attorney's fee. Under section 48-125, Comp. St. 1929, provision is made for the allowance of attorney's fees on appeals from awards of the compensation commissioner. We do not think the court erred in holding that the plaintiff was not entitled to attorney's fees in the modification proceeding for services in the district court. But, upon appeal to this court, the defendants not having reduced the amount of the modified award, the plaintiff is entitled to an attorney's fee of $200 for services in this court. It is therefore ordered that $200 be allowed as a reasonable attorney's fee for plaintiff's counsel. In all other respects the judgment is

AFFIRMED.

CLYDE C. VASSAR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED APRIL 24, 1931. No. 27630.

1. **Witnesses**: CROSS-EXAMINATION: BIAS. Cross-examination of a witness to show bias, hostility, or that he is actuated by a spirit of revenge, is entirely distinct from impeachment, which is governed by its own rules of evidence.
2. ———: ———: ———. "In such cases, the proper scope for the exercise of discretion by the trial court is in limiting the cross-examination to a disclosure of such facts only as may show the existence of hostility, and rejecting any matters which might be pertinent only to a justification of hostility on the part of the witness, for it is the existence of the feeling which is material, and not the right or wrong in the transaction which occasions it." *Richardson v. Gage*, 28 S. Dak. 390.

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

Byron Clark, Jesse L. Root, Crites & Crites and *J. W. Weingarten,* for appellant.

M. F. Harrington and *George M. Harrington, contra.*

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

PAINE, J.

This is an appeal from a judgment entered upon a verdict of ten jurors for $3,464.33 in a suit for damages brought in Dawes county, Nebraska, for the destruction of 1,954 bushels of stored potatoes destroyed by the burning of a potato cellar, located 198 feet from the main track, from a fire alleged to be negligently started by sparks from a freight engine passing through the village of Marsland. Liability was denied and proof was given that the engine was equipped with proper spark arresters.

Eighty-three pages of one of the briefs submitted are an excellent and helpful abstract of the testimony of each witness as found in the entire bill of exceptions of over 300 pages, carefully numbered as to pages and interrogatories, fully indexed as to witnesses as well as an alphabetical index of the 63 cases cited and relied upon by defendant.

Thirty-one errors are set out for a reversal of this judgment. Five of these errors related to the testimony of the defendant's witness, Clyde H. Poole, who testified on direct examination that he went into the potato cellar shortly before the fire with the plaintiff. "Q. What did you discover? A. There was an awful lot of smoke, and that the stove to the left of the door as we went in was burning awfully high. Q. One of the oil burners? A. Yes, sir."

The plaintiff, Vassar, denied that the sheet-iron stoves were lighted at all. On cross-examination the witness Poole admitted that on the day of the fire they were good friends. "Q. Today you are the one enemy he has in that whole country, aren't you? By Judge Root: Objected to as not proper cross-examination. Overruled. Exception.

Q. You are an enemy of his today, aren't you? A. I think so." He was also asked whether he did not say to two boys, Clarence Ball and Lyle Rising, who were working for him, that Vassar, the plaintiff, "has done me all the dirt he could, and now I have got a chance and I will swear to anything to get even with him," which statement was positively testified to by the two young men named.

1. In examining the record made, we find that every possible objection was entered to each step in this cross-examination of Poole by Judge Root, and in instruction No. 12 the court on its own motion said to the jury: "You are further instructed that evidence adduced by the plaintiff in rebuttal for the purpose of proving that the defendant's witness, Poole, made statements out of court, evidencing the intention on his part to 'testify to anything' against the plaintiff in this case, does not prove or tend to prove any of the charges of negligence made by the plaintiff in his petition against the defendant, and the same is to be considered, if at all, only as it might bear upon the question of the witness' bias or prejudice, if any." Was this a proper instruction to be given to the jury?

The appellant insists that the credibility of a witness cannot be tried by raising and trying an independent issue as to his honesty, his interest, or his motives.

Were the rulings of the trial court reversible error in admitting the above evidence and much more of the same character? The appellee cites many authorities, among them the case of *Raymond's Admx. v. Rutland R. L. & P. Co.* (90 Vt. 373) 98 Atl. 909, in which we find this statement: "A party is entitled to find out the full interest of a witness who testified against him, and all the circumstances calculated to create bias, prejudice, or zeal on the part of such witness may be inquired into." And in *Pierson v. State,* 188 Ind. 239, it was held that any fact tending to impair the credibility of a witness by showing his interest, bias, ignorance, motives, might be shown in cross-examination, but the extent to which such examination might be carried is within the sound discretion of the court. It appears that the instruction of the trial court is proper.

In *People v. Brooks,* 131 N. Y. 321, which was an arson case, it is shown that the hostility of a witness toward a party against whom he is called may be proved by any competent evidence, and that this may be done without first examining the witness as to his hostility, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him, but he is seeking to discredit him by showing his hostility and malice, which may be proved by any competent evidence.

And to the same effect is the case of *Blenkiron v. State,* 40 Neb. 11, where it was held: "In the cross-examination of a witness it is competent to interrogate him in regard to any interest, pecuniary or otherwise, and the extent of such interest he may have in the result of the trial of the case in which he is testifying, as affecting his credibility."

Cross-examination of a witness to show bias, hostility, or that he is actuated by a spirit of revenge is entirely distinct from impeachment, which is governed by its own rules of evidence.

2. A very old New York case states: "It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize, more closely and doubtingly, the evidence of a hostile than that of an indifferent or friendly witness. Hence, it is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he was called." *Starks v. People,* 5 Denio (N. Y.) 106.

"Hostility of a witness to the defendant may be proved by any competent evidence, either by the witness himself or by examination of other witnesses as to facts from which such hostility appears; it being unnecessary in such case to first examine the witness as to his hostility." *People v. Michalow* (229 N. Y. 325) 128 N. E. 228.

"Generally, on cross-examination of a witness, any fact may be elicited which tends to show bias or partiality, and if the witness denies the fact showing the bias or in-

terest, the cross-examining party may call other witnesses to contradict the witness." *Cabel v. State,* 18 Ala. App. 557.

"While rather wide latitude is allowed on cross-examination to develop witness' bias, extent of connection with case, motive, and leaning against particular defendant, court has reasonable discretion in confining examination to prevent diversion to outside issues." *Hackins v. State,* 212 Ala. 606.

It has frequently been held that it is error to deny cross-examination as to the state of feeling or bias of a witness. *State v. Kenstler,* 44 S. Dak. 446.

The power of cross-examination should not be curtailed to such an extent that it would not serve its purpose of being an "efficacious means available for the exposure of artful fabrications of falsehood by witnesses in our courts of justice." *Davis & Son v. Hays,* 89 Ala. 563.

And it is further held that considerable latitude should be allowed in eliciting from a witness, or in attempting to elicit and to establish, bias, hostility, corruption, or interest of the witness bearing upon his credibility. *Glass v. State,* 147 Ala. 50.

" 'Personal ill will on the part of a witness toward a party to the action', says the South Dakota court in a well considered opinion (*Richardson v. Gage,* 28 S. Dak. 390), 'is evidence of bias which may affect credibility, and the right to elicit the fact on cross-examination may not often be denied without an abuse of discretion which would be deemed prejudicial to the litigant. * * * In such cases, the proper scope for the exercise of discretion by the trial court is in limiting the cross-examination to a disclosure of such facts only as may show the existence of hostility, and rejecting any matters which might be pertinent only to a justification of hostility on the part of the witness, for it is the existence of the feeling which is material, and not the right or wrong in the transaction which occasions it'." 5 Jones, Evidence (2d ed.) sec. 2355.

Another error set out at some length was to the effect that Mr. M. F. Harrington in his closing argument stated

that his client was a poor man and had lost his farm, which was objected to by counsel, and that Mrs. Hollibaugh, one of the plaintiff's witnesses, while riding toward Marsland the evening of the fire stated that she saw streams of fire coming out of the locomotive in the Marsland yard, and then upon objection withdrew the statement and stated that this statement had been made by another witness, Dayton Sullenburger, which witness had testified that he saw a stream of fire coming from the engine, and upon further objection by Judge Root the court sustained the objections in the main, and Mr. Harrington told the jury to disregard such statements, that "I make no statement in this case over objection." No record was made by the court reporter of anything that occurred during this final argument. These matters are all set out in affidavits of attorneys and of two jurors, filed with the clerk and presented to the court seven months after the trial at the time of the arguments upon the motion for new trial. We hold that the defendant was not prejudiced by what occurred during the argument. The approved method to follow when objections are made to statements in an argument to the jury is for the court to stop the argument and instruct the court reporter to take down the objectionable statement, together with the objections made thereto and the ruling of the court thereon. This method was not followed, and such matters cannot be set out as satisfactorily in affidavit form as by an actual verbatim record of the official court reporter.

The errors discussed above were presented and argued with force in the briefs. Many other allegations of error of a nature similar to those passed upon by this court in other railroad fire cases are set out in the briefs. All of them have been carefully examined and considered, and we find the rulings of the court to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

SOUTHERN SURETY COMPANY, APPELLANT, V. JOHN PARMELY, APPELLEE.

FILED APRIL 24, 1931. No. 27824.

1. **Master and Servant: COMPENSATION CASES: APPEAL: TRIAL DE NOVO.** In workmen's compensation cases, the supreme court now hears the same *de novo*. Comp. St. 1929, sec. 48-137. Yet, when the testimony of the witnesses upon the vital question involved is conflicting, this court will, while trying the case *de novo*, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.
2. ———: **COMPENSATION: MODIFICATION.** Under section 48-142, Comp. St. 1929, if monthly payments for a period greater than six months have been awarded, either party may, after six months from the date of an award under the workmen's compensation law, apply, as therein provided, to increase or decrease such payments.
3. **Burden of proof** for change of such payments is upon applicant seeking modification of former order.
4. **Costs: ATTORNEY'S FEES.** In denying insurance carrier a reduction of payments heretofore ordered, attorney fee is taxed against insurance company.
5. **Affirmance.** Finding of trial court denying application to terminate monthly payments, is affirmed.

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

Dressler & Neely and *B. Ready & Son,* for appellant.

H. E. Burkett, contra.

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

PAINE, J.

This proceeding was brought under section 48-142, Comp. St. 1929, upon the application of the insurance carrier to be relieved of making any further payments to the injured employee, alleging that he has entirely overcome the effects of whatever injuries he received. Trial was had and the district court denied the application.

The Southern Surety Company of New York carried the liability insurance for the city of Hartington, Nebraska.

John Parmely, aged 64 years, weighing about 200 pounds, employed as a night watchman for said city, was in a restaurant on the night of April 17, 1926, and arrested a drunken man, and just outside the building they had a scuffle which caused Parmely to fall on the upraised knee of the man, striking his stomach a hard blow over this knee, from which he fell to the sidewalk. The night watchman was removed to his home, and the attending doctor testified that he sustained injuries to his back and spine and numerous ruptures, constituting a multiple hernia, about the stomach; that during the next few days he found considerable blood in the urine, caused by injury to the bladder or kidneys.

An award was made February 15, 1927, by the compensation commissioner, and upon appeal the district court entered a finding "that John Parmely, plaintiff, while engaged in the performance of his duties as an employee of the defendant, the city of Hartington, Cedar county, Nebraska, on the 17th day of April, 1926, sustained personal injury, and that said injury is permanent and totally disables the plaintiff, and that the nature and extent of which was such as to entitle him to compensation under the provisions of the Nebraska workmen's compensation law," and ordered "that the plaintiff shall have and recover from the defendants the sum of fifteen dollars ($15) each week from and including the 18th day of April, 1926, for three hundred (300) weeks, and after the first three hundred (300) weeks for the remainder of his life eleven dollars and twenty-five cents ($11.25) per week, or to and until disability shall have ended; the same being allowed on account of permanent total disability."

The finding and judgment was affirmed in this court by the supreme court commission, and payments had been made to said employee up to September 9, 1930, in the sum of approximately $3,500, including hospital and medical expense, when payments were discontinued and this application filed.

In the present trial medical experts for the insurance carrier testified that they could find no evidence of the

original injuries and that he could resume his former employment. However, the evidence disclosed that within a short time after the injury a diabetic condition developed, which medical testimony in behalf of the employee indicated might have resulted from a blow to the tail of the pancreas at the time of the original injury. This was denied by the other witnesses, who claimed that a blow sufficient to injure the pancreas would produce a profound collapse in the patient, which had not occurred.

The employee testified he had been examined prior to the accident and no sugar had ever been found in his urine and he had never had diabetes prior thereto. He said he was not able to work and if he stood on his feet for any length of time he became sick and vomited. His weight had gone down to 155 pounds at the present time.

1. The trial court had the advantage of seeing and hearing the injured employee upon the witness-stand and studying the medical experts under direct and cross-examination. Where testimony is conflicting, the conclusions reached by the trial court are entitled to careful consideration. *Enterprise Planing Mill Co. v. Methodist Episcopal Church*, 100 Neb. 29.

Section 3060, Comp. St. 1922, provided that the judgment should be final and conclusive unless reversed or modified on appeal, and under this section the judgment of the district court was held to be final on review when supported by sufficient evidence. *Selders v. Cornhusker Oil Co.*, 111 Neb. 300; *Young v. Johnson & Blind*, 113 Neb. 149; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121; *Miller v. Morris & Co.*, 101 Neb. 169; *Manning v. Pomerene*, 101 Neb. 127; *Tragas v. Cudahy Packing* Co., 110 Neb. 329.

But section 3060, Comp. St. 1922, was amended in 1929 (Laws 1929, ch. 81) and the section is now found as section 48-137, Comp. St. 1929, which provides that upon appeal the supreme court shall consider the case *de novo* and enter a final judgment determining all questions of law and fact. Yet, when the testimony of the witnesses upon the vital question involved is conflicting, this court will, while trying the case *de novo*, consider the fact that the trial court

observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. *Jones v. Dooley,* 107 Neb. 162.

2. The allowance awarded a workman in a lump sum is not subject to modification as in the case of periodical payments. *Bailey v. United States Fidelity & Guaranty Co.,* 99 Neb. 109. But after six months from the date of the award application may be made by either party to increase or decrease the payments. Comp. St. 1929, sec. 48-142.

Complete notes will be found in Ann. Cas. 1916E, 889, and in Ann. Cas. 1918B, 733, citing many of the English cases and decisions from California, Illinois, New Jersey, Minnesota, New York and other states upon the increase, decrease or termination of such awards. See *Updike Grain Co. v. Swanson,* 103 Neb. 872; *Hanley v. Union Stock Yards Co.,* 100 Neb. 232.

3. Appellant contends that defendant has entirely failed to support his claim of total disability, and that he simply seeks to become a life pensioner because of the development of diabetes, which is in no way connected with the original accident, and that the Southern Surety Company should be relieved of these payments.

However, this action is an application brought by the insurance carrier to terminate payments ordered for life by the district court and affirmed by this court, and the burden of proof is in this hearing upon the applicant to support its claim that such payments should now terminate.

4. The law as found in section 48-142, Comp. St. 1929, does not appear to limit the number of such applications which may be made by the insurance carrier.

Each attempt to decrease or terminate payments ordered will put the injured employee to delay in receiving his payments and to expense of employing an attorney, and, as the workmen's compensation law should be liberally construed, this court hereby taxes an attorney's fee of $100 to be paid to appellee as part of the costs in this court.

5. In the opinion of the trial court the insurance carrier failed to sustain the burden of proof on the allegations

of the application, and from an examination of the record in this case we are satisfied that the finding and order of the trial court was right and the same is hereby

AFFIRMED.

I. A. KIRK, RECEIVER, APPELLANT, V. CITY NATIONAL BANK OF LINCOLN, APPELLEE.

FILED APRIL 30, 1931. No. 27683.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Charles E. Matson and *C. M. Skiles*, for appellant.

Perry, Van Pelt & Marti, contra.

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

PER CURIAM.

Plaintiff appealed because the district court directed a verdict for defendant. The petition contained two causes of action. In the first cause it was alleged that, on or about November 5, 1926, Len J. Davis, vice-president and general manager of the Citizens State Bank of Geneva, appropriated $4,000 of the money, funds and credits of the bank and paid it without authority to defendant. The second cause of action alleges that, on or about November 15, 1926, the same party likewise appropriated $2,505.66 for the same purposes. The petition sets up in both causes of action that, on November 5, 1926, one J. A. Davis was indebted to defendant bank in the sum of $9,000 on a promissory note dated October 4, 1926, bearing 8 per cent. interest, made by Davis to Citizens State Bank, indorsed without recourse by that bank by Len J. Davis personally; that plaintiff bank was not obligated to pay the note, but Len J. Davis was personally obligated, and that defendant bank and its officers knew, or by the exercise of reasonable care, caution, diligence and inquiry should have known, the sums so received by it as aforesaid, and applied on

said note, were the moneys and property of plaintiff bank.

Defendant bank answered that some time prior to the 21st of February, 1921, the managing officers of plaintiff bank orally requested the defendant bank to advance and loan money to plaintiff bank in order to enable the latter to secure money at low rates of interest and thereby further its banking business; that until late in December, 1926, defendant bank was continuously the creditor of plaintiff bank under such oral arrangement, by which, instead of plaintiff executing its own notes to evidence its indebtedness to defendant bank, a ledger account was kept by defendant bank on which ledger account were entered the bills payable as forwarded by plaintiff bank under the agreement, and when said items matured the same were, at the request of plaintiff bank, charged to it and returned to the bank. The answer alleged that, when the original notes of J. A. Davis were received by defendant bank on or about November 9, 1923, plaintiff bank thereby became, and at all times thereafter remained, the real debtor of defendant bank; that defendant bank dealt with no other person than plaintiff bank in the transaction and permitted plaintiff bank to retain the difference between the 8 per cent. expressed in the note and 6 per cent. interest, which was agreed upon between plaintiff bank and defendant bank; that the form in which the notes of J. A. Davis and other parties whose notes were taken pursuant to the oral contract were executed and indorsed was for the convenience of plaintiff bank to assist it in maintaining its credit, and was not intended in any way to relieve plaintiff bank from its obligation to repay the money so borrowed from defendant bank; that by reason of this practice, which was acted on under said oral agreement through the years named, the plaintiff bank collected and retained said excess interest of 2 per cent. per annum on the notes of its customers so pledged to defendant bank, aggregating a total sum in excess of $10,000, and thereby induced defendant bank to change its situation to its injury and so estopped plaintiff bank to deny that it was the principal debtor in relation to the $9,000 note.

The evidence clearly shows, in substance and effect, that the arrangement was as pleaded by the defendant bank, that it never had any direct dealings with J. A. Davis, maker of the note, that the sums so paid, as shown in the petition, were derived from property owned by plaintiff bank, that the oral agreement was made between the parties as alleged, and through the years of dealing under the oral contract between the parties all notes taken by defendant bank under this arrangement were discounted and handled so there could be no other conclusion than that they were merely taken as a pledge or collateral for the oral agreement and plaintiff bank received the difference between the contract rate in the notes and the discount rate.

There was no evidence submitted to the jury to indicate that there was any conspiracy between either J. A. Davis, maker of the note, or Len J. Davis, officer of the bank, or both of them, on the one hand, and defendant bank on the other, or any of its officers, to defraud plaintiff bank in relation to this note or this plan of dealing. So far as defendant bank is concerned, it was purely a banking transaction by which in good faith it loaned money to plaintiff bank.

It is argued by plaintiff that J. A. Davis was, at the time the particular $9,000 note in question was made, or at least at the time the payments were made on it, an employee of plaintiff bank, and could not, directly or indirectly, under our statute, borrow any money of plaintiff bank. The officers of defendant bank were not informed that J. A. Davis had become an employee of the bank, unless they were charged with notice thereof by reason of the fact that his name and signature had been put on a signature card delivered to defendant bank and for some time beginning in the summer of 1926 he had signed drafts or cashier checks, shown in the evidence, drawn by plaintiff bank on defendant bank. While this authority to draw drafts and cashier checks for plaintiff bank on defendant bank may have been known to the tellers and clerks of defendant bank, the officers did not know of it.

However, even assuming the officers of defendant bank knew that J. A. Davis was an employee or even an officer of plaintiff bank, we can see no reason why such maker of a note might not lend his credit to plaintiff bank for the purpose of raising funds or helping out the credit of the plaintiff bank. Moreover, there was no evidence before the trial court to indicate that J. A. Davis was insolvent or that he was not amply able to pay his note.

We are of the opinion the district court did not err in directing a verdict for defendant bank. The judgment is therefore

AFFIRMED.

STATE, EX REL. HENRY RATERMANN, APPELLEE, V. ANNA W. MCCARTNEY, COUNTY SUPERINTENDENT OF BOYD COUNTY, ET AL., APPELLANTS.

FILED APRIL 30, 1931. No. 27694.

1. **Schools and School Districts: TRANSFER OF PUPILS.** Section 79-2101, Comp. St. 1929, authorizes a county superintendent to transfer children, of school age, for school purposes, from the district of their residence to an adjoining district, only on compliance with the conditions prescribed by said section. One of such conditions is that the application to the county superintendent for such transfer shall be attested by the signature of applicant, a legal voter and taxpayer of the district of the children's residence, and by the signatures of a majority of the school board of the district to which transfer is sought.
2. ———: ———: "ATTEST." The word "attest," as used in section 79-2101, Comp. St. 1929, signifies: To certify to or vouch for the truth or correctness of the statements in the application.

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

W. L. Brennan and *John A. Davies*, for appellants.

W. T. Wills, contra.

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

GOOD, J.

This is a mandamus proceeding brought by relator to compel the county superintendent of Boyd county to transfer the children of relator from school district No. 5 to school district No. 25, for school purposes for the next ensuing year, to see that said children are enumerated in said district No. 25, and to notify the county clerk of the transfer of lands, on which relator resides, to district No. 25 for assessment purposes.

In the alternative writ it is recited that relator resides on a certain quarter section of land in school district No. 5; that he filed with the respondent a notice that he had five children, of school age, who had not completed the eighth grade, which children resided with relator on the described land; that he resides more than one and one-half miles from the schoolhouse in district No. 5 and resides nearer to the schoolhouse in district No. 25 by two-tenths of a mile, and that neither of said districts is a consolidated district; that notice was attested by the signature of a legal voter and taxpayer in district No. 5, and that said application so filed was signed by a majority of the members of the school board of district No. 25 and by the relator; and that respondent has refused to perform the duties enjoined by statute.

Respondent filed a return in which she denied the sufficiency of the notice or application filed, and admitted that she had refused to comply with the request. School district No. 5 obtained leave and intervened, joining with respondent in opposing the writ. After hearing, a peremptory writ was issued. Respondent and intervener appeal.

The transfer of children and property for taxation purposes was sought under the provisions of section 79-2101, Comp. St. 1929. It is argued that said section is unconstitutional and void for various reasons. In view of the conclusion reached on another question, hereinafter considered, we deem it unnecessary to pass upon the question of constitutionality.

Section 79-2101, Comp. St. 1929, so far as applicable to this case, provides: "When children of school age, who have not yet completed the eighth grade, reside with their parents or guardians more than one and one-half miles from the schoolhouse in their own district, and nearer to the schoolhouse in an adjoining district, the distances to be measured by the shortest route possible upon section lines or traveled roads open to the public, such children may have school privileges in the adjoining district instead of in the district of their residence, under the following condition, to wit: The parent or guardian of such children shall, not later than the second Monday in July, notify the county superintendent of each district affected, using such form of notice as the state superintendent shall prescribe, which notice shall state the distance, as herein provided, and shall be attested by the signature of a legal voter and taxpayer of the district in which the children or wards reside, and the signature of a majority of the members of the school board of the district in which such children or wards desire school privileges, in addition to the signature of such parents or guardian; and the county superintendent shall notify the director of each district to transfer such person, together with such children or wards, to such adjoining district for school purposes for the year next ensuing and it shall be the duty of the county superintendent to see that the children or wards are enumerated in the adjoining district and not in the district of their residence. The county superintendent shall notify the county clerk of the transfer, and the county clerk shall be empowered, and it is hereby made his duty, to place the school taxes except for the payment of existing bonds or interest on the same, of the parents or guardians and of the real estate on which they reside, not exceeding a quarter section of land, for the year next ensuing, in the adjoining district instead of in the district of their residence, basing such school taxation upon the levy for school purposes in the adjoining district, and the assessed valuation of the property of such parents or guardians and the real estate as determined by the proper

officers, and the taxes shall be collected as provided by law for the other taxes."

A careful examination of the statute in question makes it clear that, upon compliance with the conditions prescribed by the statute, the duty is enjoined upon the county superintendent to make the transfer of children to an adjoining district, and to notify the county clerk of such action; that when these conditions have been complied with no discretion is vested in the superintendent. The statute provides that certain proof shall be submitted, and, when the prescribed proof is submitted, he is required to act. The statute requires that an application shall be submitted to him which shall be on a form prescribed by the state superintendent, and that this application shall state the facts, as required by the statute, and shall be attested by the signature of the relator and by the signature of a legal voter and taxpayer of the district in which applicant resides, and by the signatures of a majority of the members of the school board of the district to which transfer is desired. All of these parties must attest the truth of the statements in the notice or application. As used in the statute, the word "attest" means: To bear witness to; to affirm to be true or genuine; to vouch for.

The record is silent as to whether the form used in this case was that prescribed by the state superintendent. Moreover, it is not attested by the officers of school district No. 25. We are informed that the trial court took the view that the application need not be attested by a majority of the board of the district to which transfer was sought. The language used will not permit of this construction. Had the statute contemplated a hearing before the county superintendent, doubtless a mere application by the parent or guardian for such transfer, with notice to the districts affected, would have been required, and the county superintendent would then, upon such hearing, have determined the facts and made or refused to make the order, as the circumstances required. Instead, the statute provides for no hearing, but requires certain proofs to be furnished, and that the transfer should be made

only upon a compliance with the conditions. In the instant case, such proof was not furnished. While the application is attested by the relator and by a voter and taxpayer in district No. 5, it is not attested by any of the members of the school board of district No. 25. They do not certify, vouch for, or attest the truth of the statements in the application.

The condition which authorizes the county superintendent to make the transfer has not been complied with. Respondent was not, therefore, authorized, under the application as made, to comply with the request, and properly refused so to do.

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

REVERSED AND DISMISSED.

EDWARD WALKER ET AL., APPELLEES, V. COLLINS CONSTRUCTION COMPANY ET AL., APPELLEES: SWIFT & COMPANY, APPELLANT.

FILED APRIL 30, 1931. No. 27695.

1. **Pleading**: DEMURRER: WAIVER. A defendant waives any error in the overruling of his demurrer to a petition, based on the ground of improper joinder of causes of action, if he answers over and goes to trial on the merits of the causes pleaded.
2. **Mechanics' Liens**: SUBCONTRACTORS. A stipulation against mechanics' liens in a contract between the owner and a general contractor for the erection of a building will not deprive a subcontractor of the right to a lien, unless he assents to such stipulation. The subcontractor waives his right to a lien if he assents to and agrees to be bound by such stipulation.
3. ———: INTEREST. Where a mechanic's lien is based on a book account for materials furnished for and labor performed in the erection of a building, in the absence of other agreement, interest should be reckoned commencing six months after date of last item in the account.
4. ———: TIME FOR FILING. Time for filing mechanics' liens may not be extended by tacking two or more contracts.
5. ———. Building material furnished in good faith for an improvement upon realty may be lienable if used upon or necessarily instrumental in producing the completed structure, al-

though not incorporated therein or wholly consumed in its necessary use.

6. ———: PROOF. Where one, in good faith, furnishes and delivers on the premises material for the erection of a building, it is not essential to his right to a lien that he prove that the material so furnished and delivered was actually used in the building.

7. ———. Fuel used to heat a building in course of construction and in generating steam to operate a hoist and mixer are lienable if reasonably necessary to a proper construction of the building.

8. ———. Such items as saw files, buckets, hammer handles, brooms, shovels, mop sticks, white wash brushes, ice picks, cups and saw blades, furnished by a subcontractor to a general contractor, are not proper items in a mechanic's lien.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Johnson, Rine & Marshall, Joseph A. Vojir and *Halligan, Beatty & Halligan,* for appellant.

E. H. Evans and *Hoagland & Carr, contra.*

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

GOOD, J.

This is an action for foreclosure of mechanics' liens. Four plaintiffs, each a subcontractor claiming a lien, joined in one petition, each seeking foreclosure of his respective lien. Another lien claimant was made defendant and filed a cross-petition, seeking foreclosure of its lien. Defendant Swift & Company was the owner of the premises. Collins Construction Company was the general contractor, and, while designated in the petition as a defendant, it was not served and made no appearance in the action. Swift & Company filed a demurrer to the petition, on the ground of misjoinder of causes of action. The demurrer was overruled, and defendant answered over, joining issues with the plaintiffs and cross-petitioner. After hearing, the court found for the plaintiffs and cross-petitioner,

and awarded liens as follows: Edward Walker, $2,348.25; Waltemath Lumber & Coal Company, $20,522.36; C. H. Backers, $2,570.23; Simon Brothers, $501.52; Higbee & Keyes, cross-petitioner, $64.95. Swift & Company, owner of the premises, has appealed.

The first error assigned is that the court erred in overruling the demurrer to the petition. It is clear that there was a misjoinder of causes of action, and that the demurrer should have been sustained. Defendant did not stand upon its demurrer, but elected to answer over and joined issues with the plaintiffs and cross-petitioner. By so doing it waived any error in overruling such demurrer.

In *Genho v. Jackson,* 99 Neb. 1, it was held: "Where a party demurs to a petition because several causes of action are improperly joined, but answers over after an adverse ruling thereon, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling."

Defendant seeks to defeat all the liens on the ground that the contract between it and the general contractor contained the following provision: "Neither the contractor nor any subcontractor, materialman, nor any other person, shall file or maintain a lien, commonly called a mechanic's lien, for materials delivered for use in, or work done in the performance of this contract, and the right to maintain such lien by any or all of the above named parties is hereby expressly waived, except in the event of the failure or refusal of the owner to pay the amount called for by any certificate of the architect, within three days of the date of its tender to the owner for payment. Then, and in such case only, shall any of the above named parties have the right to file and maintain a mechanic's lien." It is the contention of the defendant that each subcontractor is required to ascertain and know the terms of the contract between the owner and the general contractor and is bound thereby.

Some jurisdictions hold to the rule contended for by defendant. We think the better rule, and the one sustained by the great weight of authority, is that a stipulation

against liens in a contract between the owner and the contractor will not deprive the subcontractor of the right to a lien, unless the latter assents or agrees to the stipulation. 40 C. J. 148.

Another objection lodged by defendant against all of the decrees is that the trial court awarded each lienor interest from the date of filing his lien to the date of the entry of judgment. It may be that where a subcontractor performs a stipulated part of the work, or furnishes a stipulated part of the material, for the erection of a building for a gross sum, as soon as he has completed the work or furnished all of the material, interest might then be computed from the date of the last item of work done or material furnished. That is not the case in any of the liens here involved. In each instance the lien represents an account for labor and materials furnished, running over a period of several weeks or months, and, in most instances, with payments or credits thereon. The rule applicable in such case is, as provided by statute, that, where a lien is claimed for an account for material and labor furnished for the construction of a building, in the absence of an agreement to the contrary, interest may be reckoned only from a date six months after the last item. Comp. St. 1929, sec. 45-104; *Platner Lumber Co. v. Theodore,* 120 Neb. 804. It appears that excessive interest was allowed on each of the claims in the instant case. Interest should have been reckoned, in each instance where the lien was properly awarded, from and after six months from the date of the last item.

From the evidence it appears that Swift & Company entered into a contract with the Collins Construction Company for the erection of a produce house in North Platte, costing upwards of $60,000, exclusive of the heating plant. Plaintiff Walker entered into a contract with Collins Construction Company to furnish sand and gravel, to be used in the construction of the building, and also for some hauling of dirt and rubbish, the latter to fill in and level the grounds, so as to bring them to grade about the structure. The last item of hauling was done on March 18, 1929. The

lien was filed May 4, 1929. It is clear that if all of the work was done and material furnished pursuant to one contract the lien was filed in time. Defendant contends that the hauling was done pursuant to a separate contract, and that the last item of sand and gravel furnished was on March 4, 1929, and that the contracts cannot be tacked.

It is a well-settled rule that a lienor may not extend the time for filing his lien by tacking two or more contracts. The question in point is whether the material was furnished and work performed pursuant to one contract or to two separate contracts. The evidence on this point is in conflict. The circumstances, we think, tend rather to support the contention of the plaintiff Walker. While cases of this character are for trial *de novo* in this court, yet, where the evidence is in conflict, the fact that the witnesses were before the trial court, that the court had a better opportunity to observe their demeanor, candor and fairness, and was in a better position to judge of their credibility, will be taken into consideration by this court. Under the circumstances, we are impelled to hold that the evidence sustains the contention of plaintiff Walker.

With reference to the claim of Waltemath Lumber & Coal Company, defendant's principal objection thereto is that the account contains certain items of lumber that were not used in and did not become an integral part of the building, but were used for the erection of sheds, latrines and for forms for concrete and was not consumed in such use; also items for coal that was used to heat the building while in the course of construction and to generate steam to operate a hoist and concrete-mixer.

It is clear that lumber was absolutely necessary in making forms for concrete, used in the construction of the building. Some was used for scaffolding. It was necessary to have a shed in which to house the material, and as an office, for keeping the plans, specifications and records of material furnished and time of employees. Latrines were also a necessary adjunct, and, while the lumber was not wholly consumed in and did not constitute

an integral part of the main structure, such lumber was necessary, in order that the main structure could be erected. Had the owner himself ordered such material and used it for these purposes, even though he had realized some salvage from the lumber not wholly consumed, we doubt if it would be contended that such items were not lienable. That such materials were furnished to the principal contractor and used by it, we think, does not change the situation. The general contractor ordered the material which was necessary to the construction of the main building. It was delivered on the premises and was used for the purpose for which ordered. The fact that it was not wholly consumed is immaterial. If, as appears in the instant case, the contractor sold the salvage and realized something therefrom, he should account to the owner therefor, and the owner had ample opportunity to protect himself by requiring the contractor to furnish bond to account for any salvage.

In *Johnson v. Starrett*, 127 Minn. 138, it was held: "Materials furnished in good faith for the improvement of realty may be lienable though not actually used in the work."

In *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, it was held, in effect, that materials used directly upon the work or structure and instrumental in producing the final results are lienable if actually consumed and used, although not physically incorporated therein.

In *Emery v. Hertig*, 60 Minn. 54, it was said (p. 57): "It is sufficient for us to say that, whatever may be the conflicting decisions of other tribunals, we are of the opinion that no narrow or limited construction of our mechanic's lien law should be indulged in by the courts, and that the labor and industry of the country should not be hampered by technicalities or harsh interpretations of what was evidently intended to be a just law for the benefit of our industrial pursuits, which tends so materially to the building of cities and towns, and is the embodiment of so much natural justice. He whose property is enhanced

in value by the labor and toil of others should be made to respond in some way by payment and full satisfaction for what he has secured. To accomplish this result is the intent of the lien law."

In the instant case the owner has had the benefit and necessary use of the lumber for the construction of its building. A lien for such lumber so used was properly awarded. With respect to the coal, we have heretofore held that fuel used to heat a building, where it was necessary for the building operation, was lienable. *Crowell Lumber & Grain Co. v. Ryan Co.*, 110 Neb. 225. We perceive no distinction between coal consumed in heating the building and consumed in operating a hoist and mixer used in the process of constructing the building. We think that coal, necessarily used and consumed either in heating the building or in operating machinery used in the construction of the building, was necessary to the completion of the building and is a lienable item.

With respect to the lien of this claimant, there is some contention that the evidence is not sufficient to show that the materials were in fact, used in the construction of the building. It is sufficient that the materials were ordered for the building and delivered to the premises. The law does not require the materialman to remain on the premises and see that every stick of lumber or every sack of cement was actually used in the construction of the building. It appears from the evidence that every load of material was delivered to the contractor upon the premises; that the owner kept an employee on the premises to check and see what materials were furnished and went into the building. There is no evidence that any of this claimant's material, delivered upon the premises for use in the building, was not so used.

In respect to the claim of plaintiff Backers, the petition avers that the materials were furnished and the labor performed pursuant to an oral contract. The evidence, however, shows that there was a written contract between plaintiff and the general contractor which contained the following provision: "The subcontractor agrees—

"(a) To be bound to the contractor by the terms of the agreement, general conditions, drawings and specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner. * * *

"Nothing in this article shall create any obligation on the part of the owner to pay to or to see to the payment of any sums to any subcontractor."

The provision of the contract between the owner and the general contractor has been heretofore quoted. Defendant argues that such a provision is not binding upon the subcontractor, since the right to a lien is created by statute. It cites a number of authorities, but none of them is strictly in point. Some of them hold that a provision in a contract between an owner and a general contractor is not binding upon a subcontractor who has not agreed to be bound thereby or who has no knowledge of the provisions of that contract. The weight of authority, and supported by the better reason, is that where a subcontractor agrees to be bound by the provisions of a contract between the owner and the general contractor, and where such contract contains a provision against any lien, either by the principal contractor or the subcontractor, the latter has thereby waived his right to a lien. In such case he is remitted to his remedy against the general contractor for compensation.

In *Early v. Atchison, T. & S. F. R. Co.*, 167 Mo. App. 252, the court of appeals of Missouri held: "The right to enforce a mechanic's lien may be waived by contract, and hence a subcontractor, whose contract with the principal contractor adopted a provision of the latter's contract with the owner by which he waived his right to a mechanic's lien, waived his right to such a lien."

In *Baldwin Locomotive Works v. Edward Hines Lumber Co.*, 189 Ind. 189, the supreme court of that state, in holding a waiver, contained in a building contract, to a right to maintain a lien valid against subcontractors, in the opinion (p. 193) said: "That no public policy is involved is shown by the fact that courts of last resort in four states

have declared statutes void which attempted to nullify stipulations against liens"—citing *Palmer & Crawford v. Tingle,* 55 Ohio St. 423; *Waters v. Wolf,* 162 Pa. St. 153; *Kelly v. Johnson,* 251 Ill. 135, 36 L. R. A. n. s. 573; *John Spry Lumber Co. v. Sault Savings Bank, Loan & Trust Co.,* 77 Mich. 199.

Under the facts and law applicable thereto, we conclude that this plaintiff has waived his right to a mechanic's lien. The judgment of the trial court, awarding him a lien, was erroneous.

With respect to the lien of Simon Brothers, from the record it appears that this claimant agreed with the contractor for the furnishing of material for and putting in place the roof over the main building and on the canopy over the dock. The price agreed upon was $1,300. In the account for which the lien was filed the $1,300 was charged as of date March 1, 1929. The lien was filed May 15, 1929. The evidence shows that the work under the principal contract for $1,300 was not completed until March 18 or March 20. There were some items, subsequent to this, for extra work or labor, over which there is no controversy. From an examination of the record, we reach the conclusion, as did the trial court, that the work on the $1,300 contract was not completed until March 18, and that the lien was filed within the time.

The objection made to the lien of Higbee & Keyes is that it contains items consisting of stove pipe, saw files, buckets, hammer handles, brooms, shovels, mop sticks, white wash brushes, ice picks, cups, saw blades, push brooms, totaling $31.45, which were no part of and did not enter into the construction of the building, and which were not properly lienable.

The rule is laid down by this court in *Crowell Lumber & Grain Co. v. Ryan Co., supra,* wherein it was said in the opinion at page 229: "On the other hand, the following items in the account of J. C. Nitz, to wit, shovel handles, pair gloves, tape, rope, one dozen files, legal cap, box matches, pulley with hook, hammer, brush, sand-screen, lamp chimney, one saw file, in a total amount of $17.40,

should be disallowed." The items complained of in the instant case are of the same general character. They represent tools furnished to the contractor and were not properly consumed in the building. The lien of cross-petitioner seems to be excessive in the amount of $31.45, because of such items included therein.

We find the several lienors entitled to liens as follows: Plaintiff Walker, $2,188.80, with interest thereon at 7 per cent. from September 18, 1929; Waltemath Lumber & Coal Company, $19,086.23, with interest thereon at 7 per cent. from October 3, 1929; Simon Brothers, $497.42, with interest thereon at 7 per cent. from October 15, 1929; Higbee & Keyes, $27.38, with interest thereon at 7 per cent. from September 15, 1929. Interest on all liens should be calculated to the date of the original decree, to wit, April 24, 1930.

The judgment of the district court, awarding a lien to plaintiff Backers, is reversed, and the cause remanded to the trial court, with directions to modify its judgment, in other respects, so as to award liens to the respective parties in accordance with the findings in this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

JAMES H. WELSH, APPELLEE, V. JEFFERSON COUNTY AGRICULTURAL SOCIETY, APPELLANT.

FILED APRIL 30, 1931. No. 27707.

1. **Public Places of Amusement: DUTY OF PROPRIETORS.** One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally; he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care.
2. **Agricultural Societies: CONDUCT OF FAIRS: CARE REQUIRED.** In the conduct of a fair, for amusement and entertainment, a county agricultural society owes its patrons the duty to use ordinary and reasonable care under the particular circumstances, but is not the insurer of their safety.
3. ———: ———: ———. Where an agricultural society places temporary wooden benches for the comfort and conven-

iences of its patrons, it is required to exercise ordinary and reasonable care to construct them in a manner to be safe, not only for ordinary seating purposes, but also to withstand any rough usage to which experience showed was customary from people moving about and standing on the seats.

4. ———: ———: ORDINARY CARE: QUESTION FOR JURY. In such a case, what is ordinary and reasonable care under the particular circumstances is ordinarily a question for the jury.

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

Chambers & Holland and *John C. Hartigan,* for appellant.

Heasty, Barnes & Rain, contra.

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

DAY, J.

This is an action for damages for personal injuries arising out of an accident on the grounds of the Jefferson County Agricultural Society. Plaintiff was injured when a bench broke and injured his leg. From a verdict and judgment in favor of plaintiff, the defendant appeals.

The defendant contends that there is not sufficient evidence of negligence to sustain the verdict of the jury. The plaintiff bases his claim for damages on his allegation that the society was negligent in the construction and maintenance of the bench. It was a temporary affair, erected for the comfort and convenience of its patrons during the four days of the fair, after which it was taken down. It was built by unskilled carpenters, of 2 by 4's or 2 by 6's driven into the ground with pieces across them and 2 by 12's about 16 feet long on top. Just before the accident the plaintiff had been sitting on the bench. When the fireworks started, the crowd came from a previous attraction, and in order to see better some of them stood upon the bench. While the plaintiff was in the act of getting up, the bench broke,injuring the calf of his leg and his heel. The evidence does not indicate the stampede of an uncon-

trollable and unwieldy crowd, but rather the usual and average movement of an orderly crowd at a fair following the various attractions. The plaintiff had paid admission into the grounds.

It is the general rule that, while one who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally, he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care. In conformity to this general rule the great weight of authority supports the view that in the conduct of a fair, for amusement and entertainment, a county agricultural society owes its patrons the duty to use ordinary and reasonable care under the particular circumstances, but is not the insurer of their safety. *Clark v. Munroe County Fair Ass'n*, 203 Ia. 1107; *Smith v. Cumberland County Agricultural Society*, 163 N. Car. 346; *Williams v. Mineral City Park Ass'n*, 128 Ia. 32; *Logan v. Agricultural Society of Lenawee County*, 156 Mich. 537; *Le Cato v. Eastern Shore of Virginia Agricultural Ass'n*, 147 Va. 885. This view is supported in a measure, though not analogous, by *Lyman v. Hall*, 117 Neb. 140, and *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579.

The only question remaining in this case is whether the bench which broke, injuring the plaintiff, was properly constructed for the purpose for which it was intended, or was the defendant negligent in its construction. Where an agricultural society places temporary wooden benches for the comfort and convenience of its patrons, it is required to exercise ordinary and reasonable care to construct them in a manner to be safe, not only for ordinary seating purposes, but also to withstand rough usage which experience showed was customary from people moving about and standing on the seats. *Gallin v. Polo Grounds Athletic Club*, 214 N. Y. Supp. 182; *Scott v. University of Michigan Athletic Ass'n*, 152 Mich. 684; *Phillips v. Butte Jockey Club & Fair Ass'n*, 46 Mont. 338; *Dunn v. Agricultural Society*, 46 Ohio St. 93.

In such a case, what is ordinary and reasonable care under the particular circumstances is ordinarily a question for the jury. *Clark v. Munroe County Fair Ass'n*, 203 Ia. 1107. Applied to the record in this case, there was evidence of the construction of the bench and of the circumstances under which it broke sufficient to require that the question of ordinary and reasonable care be submitted to the jury. The fact that the bench broke under the circumstances was evidence to be considered by the jury upon this question. This is not to say, however, that the doctrine of *res ipsa loquitur* applied. The jury having found from the evidence that this defendant failed to use ordinary and reasonable care, this court will not disturb its finding.

AFFIRMED.

HANS HANSEN V. STATE OF NEBRASKA.

FILED APRIL 30, 1931. No. 27799.

1. **Indictment and Information: SUFFICIENCY: HOMICIDE.** A properly verified information may be held sufficient if it states the name and authority of a qualified informer and sets out the facts constituting the elements of murder in the first degree in simple, concise and direct language.
2. ———: ———. Where an information follows the statute and form heretofore approved in this court, it is sufficient.
3. **Criminal Law: CIRCUMSTANTIAL EVIDENCE.** "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt." *Morgan v. State*, 51 Neb. 672.
4. **Evidence** in case examined and *held* sufficient to sustain verdict.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Lloyd Crocker, Gray & Brumbaugh and *Frank V. Lawson*, for plaintiff in error.

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

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

DAY, J.

This is a criminal action in which Hansen is charged with murder in the first degree. He was convicted of murder in the second degree and sentenced to 25 years in the penitentiary. He prosecutes proceedings in error to this court.

It is urged that the information does not state facts sufficient to constitute a charge of murder in the second degree and therefore the court was without jurisdiction. This is a question of first concern to this court. That part of the information which charges the crime of murder in the first degree is as nearly in the identical language suggested by this court in *Nichols v. State,* 109 Neb. 335, as the facts would permit. In the *Nichols* case, the court adopted a form of information in criminal cases and under statutory and constitutional provisions promulgated it as a rule of practice for inferior courts. Comp. St. 1929, sec. 29-1501; Const. art. V, sec. 25. The technical rules of the common law as to informations were relaxed by the said court rule. *Morris v. State,* 109 Neb. 412. In *Phegley v. State,* 113 Neb. 138, it was said: "As to overruling the motion to quash the information, and the plea in abatement, it is sufficient to say that this court in *Nichols v. State,* 109 Neb. 335, considered the statutes and our previous decisions with a view to harmonizing them and outlining the form and allegations necessary to be set forth in an information charging murder in the first degree, so that such a pleading might be stripped of verbiage and brought more closely within the modern rules of procedure."

In *Ringer v. State,* 114 Neb. 404, we said: "The form of the information in the present case was, no doubt, drawn in response to a suggestion of this court in *Nichols v. State,* 109 Neb. 335, in which it was stated that the long and

complicated form of an information for murder, generally in use is not necessary to meet the requirements of the statute, and a short form set out in the opinion was suggested. The question now raised was before the court in *Phegley v. State,* 113 Neb. 138, in which it was held: 'An information charging murder in the first degree in language bringing it within the rule announced in *Nichols v. State,* 109 Neb. 335, is sufficient.' Measured by these standards, the information charged the offense of murder in the first degree."

The defendant contends that intent or purpose to kill is an essential charge in the information and is omitted herein. He cites *Schaffer v. State,* 22 Neb. 557, in support of his contention. A similar question was presented in *Davis v. State,* 116 Neb. 90, also cited by the defendant, and we said: "The case of *Schaffer v. State,* 22 Neb. 557, * * * is not in point. The information which was condemned in that case did not contain an allegation with reference to intent, similar to the one herein set out." In the *Davis* case it was also said: "It may be observed in this case that the information is needlessly involved and teems with unnecessary verbiage and repetition. As heretofore pointed out by this court, an information should charge the offense in simple, concise, direct language. A suitable form is prepared and set out in *Nichols v. State,* 109 Neb. 335. * * * Attention is called specifically to the form of information contained in the opinion in *Nichols v. State, supra,* in the hope that those charged with the prosecution of criminal offenses will hereafter draw indictments and informations conformable to the suggestions therein contained."

In *Pembrook v. State,* 117 Neb. 759, it was said: "The unbroken holdings of this court have been that, in charging these crimes, the pleader must follow the words of the above statutes, or use their equivalent. In harmony with this rule and in furtherance of uniformity and dispatch, in *Nichols v. State,* 109 Neb. 335, under a statute authorizing this court to establish rules, we promulgated a plain, succinct form charging murder in the first degree, as a

guide to bench and bar. This form was not followed in the instant case."

Again, in *Sherman v. State,* 118 Neb. 84, it is said: "The information was drawn in the old-fashioned and involved way much in vogue prior to *Nichols v. State,* 109 Neb. 335, in which a brief form of information for murder in the first degree was set out. We commend its adoption and use." To the same effect, in *Bourne v. State,* 118 Neb. 862, we said: "Prosecutors will find it helpful to use it as a model."

The defendant also cites *Smith v. State,* 21 Neb. 552, which is not applicable to this case. This was a *habeas corpus* case brought to discharge one held upon a fugitive from justice complaint. The complaint set out that the one to be held was a fugitive from the territory of Dakota, where he was charged with the commission of a criminal offense against the law of said territory, which, if committed in this state, would have been a crime. The nature of the crime was not set out. It was held that it was necessary to set out the facts constituting the crime. A properly verified information may be held sufficient, if it states the name and authority of a qualified informer and sets out the facts constituting the elements of murder in the first degree in simple, concise, and direct language. Where an information follows the statute and form heretofore approved in this court, it is sufficient. *Northey v. State,* 114 Neb. 543.

It is also suggested that the evidence is insufficient to sustain the verdict. The evidence is entirely circumstantial. Stephens, a train dispatcher for the Union Pacific railroad, was found lying in a blood soaked bed in his home. The left side of his face and head had been beaten and crushed and the left eye torn out so that it hung by the optic nerve. An examination disclosed four puncture wounds, three of which penetrated the skull, lacerating the brain tissue and producing hemorrhages which caused his death. The wounds had evidently been made by some semi-sharp or blunt instrument. There was no evidence of a struggle, indicating that he was killed while sleeping.

Several loaded guns were in the room or about the house, but they were not used. Neither the money in the deceased's pockets nor anything else was stolen. Stephens was about 50 years of age and his wife was 48. At the time she was visiting her sister in Illinois, where she had gone, contemplating a separation from her husband. Upon the fatal day, he was living alone in his home, which was on an 8½ acre tract, where he raised fruit and vegetables in addition to his employment with the railroad company.

The defendant began to work for Stephens about four months previous to the tragedy. He cultivated, hoed, cut asparagus and helped generally with the garden. During this time he became infatuated with Mrs. Stephens. He told the daughter of Mrs. Stephens about this and stated that he was essential to her happiness. At the time Mrs. Stephens left her husband, defendant told her daughter that he hated Stephens and wished somebody would kill him; that shooting was too good for him. Later, at a time not long prior to the killing, he told the daughter that he would be back on the place (deceased's) in the next six months, repeating that he was essential to her mother's happiness. Shortly after his arrest, he admitted in the presence of witnesses that he knew about the trouble between Mrs. and Mr. Stephens; that he disliked Stephens; that he had trouble with him several times about his work, and when he was discharged, shortly before, he had an argument with Stephens about the amount due him and struck him; that he had told the daughter that he wanted to see Mrs. Stephens happy, and that he was essential to her happiness; that he had a strong infatuation for her and wanted her to be happy; that he did not know whether she could be happy under existing conditions, but that he thought she could after Stephens was away from there.

At the time of the arrest he stated that, on the night before the body of Stephens was found, he started out for a walk around 10 o'clock to get some cigarettes at a hamburger "joint" on Twentieth street, and then walked out on Twenty-fourth; that he did not know how far he went,

but noticed it was getting late and came back to his room about 2 o'clock in the morning; that no one saw him come in; that he got up at 5 o'clock, and that nobody saw him leave the house; that he got his breakfast around 7 o'clock and went to work.

The defendant corresponded with Mrs. Stephens while she was separated from her husband, and the purpose, as explained by Mrs. Stephens, was that she might keep in touch with him as he was her only witness in case of a divorce action. When the deceased was found in his bedroom, the shades of the windows were down except that of the north window, which was open and the screen unhooked. Footprints were found beside a bush a short distance from this window. The measurements of defendant's shoes corresponded exactly with the footprints and when one of them was placed in the tracks it fitted exactly. The defendant did not testify and no evidence was offered in his behalf.

Is the evidence as above outlined sufficient to sustain the verdict? Circumstantial evidence is sufficient to support a verdict if the jury believe beyond a reasonable doubt from such evidence that the accused is guilty. *Bradshaw v. State,* 17 Neb. 147; *Kaiser v. State,* 35 Neb. 704; *Dreessen v. State,* 38 Neb. 375. "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt." *Morgan v. State,* 51 Neb. 672. See *Kastner v. State,* 58 Neb. 767; *Smith v. State,* 61 Neb. 296; *Lamb v. State,* 69 Neb. 212; *Taylor v. State,* 86 Neb. 795; *Lowe v. State,* 110 Neb. 325. The great weight of authority supports this rule. *State v. Guffy,* 50 S. Dak. 548; *Scott v. State,* 190 Wis. 238; *State v. Hester,* 205 Ia. 1047; *State v. Hentschel,* 173 Minn. 368; *State v. Bowman,* 294 Mo. 245; *State v. Riggs,* 61 Mont. 25; *Asher v. State,* 90 Fla. 75; *Gardner v. State,* 27 Wyo. 316.

Considered in the light of the rule, the evidence in this case, if believed by the jury, as it was, is sufficient to sustain a verdict of guilty.

AFFIRMED.

GEORGE E. TOWLE, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 8, 1931. No. 27716.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

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

Allen & Requartte and *O. C. Wood, contra.*

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

PER CURIAM.

Action at law on a policy of life insurance. Trial to a jury. Verdict for plaintiff. From judgment on the verdict, the defendant appeals.

The execution and issuance of the policy in suit, on July 20, 1929, and the execution of the application for the same on that date, the payment of all premiums falling due thereon, the death of the assured February 21, 1930, and the furnishing of due proof thereof, are all expressly admitted by the terms of defendant's answer.

So far as triable issues are concerned, the insurance company's defense is based on the alleged fact that at the time of her medical examination, and in her application for insurance, the assured "denied that she had consulted a physician for or suffered from any of the various ailments or diseases inquired about, including disease of the heart and syphilis, and specifically denied consultation with or treatment by any physician at all within five years prior thereto." And, the company further, in appropriate language, alleged that the statements thus referred to were false and fraudulent, and that the same were relied upon by it, and the policy in suit issued thereon.

On the truth of the allegations thus made the plaintiff took issue by a reply.

This court is, by both statute and precedent, committed to the view that the language in applications, medical examinations, and in the policy, upon which defendant relies, amounts to no more than representations, and does not constitute warranties.

This court has also frequently declared that, where an insurance company claims that untrue answers were given in an application for insurance, to constitute a defense, it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false; that they were false in some particular material to the risk; that they were made by the assured knowingly with the intent to deceive; that the company relied upon said representations and was deceived by them to its injury. *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842; *Beeler v. Supreme Tribe of Ben Hur*, 106 Neb. 853; *Aetna Life Ins. Co. v. Rehlaender*, 68 Neb. 284; *Bankers Union of the World v. Mixon*, 74 Neb. 36; *Goff v. Supreme Lodge Royal Achates*, 90 Neb. 578.

It may be conceded, for the purposes of this case, that the defendant insurance company, so far as the matter of pleading is concerned, has brought itself within the requirements of the rule thus stated. However, an examination of the bill of exceptions discloses that the evidence adduced at the trial is certainly conflicting and must be considered such to the extent to necessitate the submission of the matter to the determination of a jury. It is also patent that the evidence so conflicting is ample to sustain the verdict rendered in this case. To enter into a detailed discussion of the proof would serve no good purpose, and unnecessarily extend this opinion.

The action of the trial court is in all respects correct, and its judgment is, therefore,

AFFIRMED.

ROBERT FENSKE, APPELLANT, V. ERNEST A. STRAIT ET AL., APPELLEES.

FILED MAY 8, 1931. No. 27728.

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

M. F. Harrington and *Fred S. Berry,* for appellant.

C. H. Hendrickson and *H. E. Siman, contra.*

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

PER CURIAM.

Robert Fenske appeals from a judgment of the district court denying his petition to be discharged from guardianship over his person and property. The record is meager, but it indicates that the county court had denied his petition and he had appealed.

The petitioner was put under guardianship on April 29, 1924, under the provisions of article 3, ch. 38, Comp. St. 1929. The basis for the guardianship was his excessive drinking, under the terms of section 38-302, Comp. St. 1929. In his petition, filed in the district court on July 1, 1929, Fenske set out that he had not used any intoxicating liquors since February 12, 1929, and only a nominal amount prior to that date, and that he "is an absolutely sober, temperate man, and * * * is entirely thru with the use of intoxicating liquors for all time, * * * is a man of sound mind and memory and is entitled to manage his own property and to be discharged from all management or control herein." The prayer was that the guardian be removed and the property in the hands of the guardian be turned over to petitioner.

The trial to the district court was had on June 27, 1930. Twenty-two witnesses testified. At the close of the evidence the court found for the guardian, denied the application and dismissed the action.

It is elementary that the burden is on one who pleads the existence of a material fact as the basis of his action

to prove that fact. The petitioner was under guardianship by virtue of the judgment of a competent court. That judgment had never been appealed from. To avoid the continuance of its operation the petitioner alleged that he now had complete dominion over his appetite for intoxicating liquor and could safely be restored to legal dominion over his person and property of which the judgment of guardianship deprived him. This was a question of fact and the burden was on the petitioner, who alleged it, to prove it.

We have read the evidence. To abstract it and set it forth here would do no good. We are of the opinion that it falls far short of proof, by a preponderence of the evidence, that the ward has permanently ceased to use intoxicating liquor to excess. We doubt that it would be a wise and proper use of judicial discretion to release him from the guardianship. The district court saw and heard the applicant and all the other witnesses and came to the same conclusion on this question of fact. The judgment of the district court is right and is

AFFIRMED.

ALBERT STAFRIN, APPELLEE, V. EMMET L. MALSTER, APPELLANT.

FILED MAY 8, 1931. No. 27733.

Quo Warranto. Record and evidence examined in action in *quo warranto*. *Held*, not sufficient to sustain a judgment against defendant. Cause reversed and ordered dismissed.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Reversed and dismissed.*

Flansburg & Lee, for appellant.

George F. Corcoran and *Thomas & Vail, contra.*

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

GOSS, C. J.

This is a *quo warranto* action brought by plaintiff to oust defendant as president and general manager of the York Water Company and for a judgment that plaintiff is entitled to these offices. From a judgment for plaintiff the defendant appeals.

The York Water Company is incorporated under the laws of this state and furnishes water to the city of York and its inhabitants. It is capitalized at $100,000, having 1,000 shares at $100 each. Prior to April 24, 1928, Albert Stafrin and his wife owned 500 shares and Emmet L. Malster and his mother-in-law, Elizabeth Pfeffer, owned 500 shares. The amended articles in force provided for a board of not less than three directors, to be elected by and from the stockholders at the annual meeting on the last Monday in January each year, and for a president, vice-president, secretary and treasurer, to be elected by the board of directors, of which officers the secretary and treasurer may or may not be stockholders. No formal by-laws were ever adopted, but by general understanding or agreement the corporation had been conducted as a two-family affair on an equality as to ownership of stock, offices and emoluments, with two directors from each family. At the stockholders' annual meeting on January 30, 1928, the minutes show that Albert Stafrin, Emma K. Stafrin, Elizabeth Pfeffer and Emmet L. Malster were elected directors. At the meeting of these directors on the same day, Stafrin was chosen as president and Malster as vice-president, both to serve until the next annual meeting. The directors also adopted a resolution appointing Stafrin general manager and Malster assistant general manager and plant superintendent. Each was to get $200 a month and 70 cents an hour for overtime, the salaries and compensations to date from January 1, 1928. On February 13, 1928, the parties in interest also attested in writing an agreement by all of these stockholders, in the form of a resolution, to the effect that Stafrin should be general manager and Malster assistant general manager, each to retain such position so long as he performs his duties

in an efficient manner, the salaries to be paid by the two equal stockholdings, the compensation for services of Stafrin to be deducted from his dividend earned account and that of Malster to be deducted from the dividend earned account of Elizabeth Pfeffer; in case of sickness, or any occasion for necessary absence of either, a competent substitute might be hired, if deemed necessary, to be paid by the one whose absence required the hiring; and, lastly, that Stafrin and Malster should retain their positions just so long as the two equal stockholdings of the company see fit to retain their services, but if they should see fit to end the services of either or both men it would be necessary for the two equal stockholding groups to replace them with competent men.

April 21, 1928, Stafrin and wife entered into a written contract with Joe R. Furman of York to sell, convey and assign their half interest in the company, consisting of 500 shares of stock, for $30,000, in exchange for Furman's café, valued at $10,000, for $5,000 additional to be paid by Furman in cash, and the balance, $15,000, to be evidenced by Furman's note for $15,000, due on or before seven years from May 1, 1928, bearing 5 per cent. semiannual interest. Three hundred shares of the stock were to be pledged to secure the note. All the stock was to be placed in escrow at the American State Bank in York and the deal was to be closed at that bank on or before May 1, 1928. The contract recites that the stock was subject to a present bonded indebtedness of $65,000.

On April 24, 1928, the Stafrins surrendered their stock certificates and had the water company issue new certificates in Furman's name. The evidence seems to indicate that the stock, note and papers relating to the Furman deal with Stafrin were left with the bank, though there is some confusion as to just how much stock was understood to be pledged to secure the note and how much was otherwise to be in escrow, but that is not material in view of what happened. Stafrin took over the Furman restaurant, operated it for 14 days, and sold it for $7,500, for which he received a note from the purchaser. Though the mat-

ter was not in any written agreement, among misrepresentations later alleged by Furman in a suit to rescind, it seems to have been represented by Stafrin, and so understood by Furman, that the latter and his wife would, as the owners of the stock, step into the places occupied by the Stafrins as directors, officers and employees in the water company. But the Malster group refused to allow the Furmans to assume those positions. On or about September 26, 1928, Furman brought suit against the Stafrins in the district court, setting up the agreement and alleging misrepresentations as to values of the stock, as to the financial condition of the corporation, and as to the positions to be enjoyed by plaintiff in the water company, and praying for rescission. Issues were joined, trial was had, and by a decree, signed September 16, 1929, rescission was adjudged. The stock was turned back to Stafrin about October 15, 1929. It may be concluded that, from April 21, 1928, to the end of the litigation with Furman, Stafrin was claiming that Furman owned the stock and therefore Stafrin assumed and exercised no functions as a stockholder, director, officer or employee of the water company. During this interim of about 18 months when Stafrin was acting for the company in no capacity, the time arrived, in January, 1929, for the annual meetings of the stockholders and directors. The stockholders' meeting was held on January 28, 1929. It was stipulated that all stockholders had notice. Neither Stafrin nor Furman appeared. They were in the midst of their litigation, each claiming the other owned the stock. Only the 500 shares of the Malster group was represented and so the stockholders' meeting was adjourned without day. The directors met on January 30, 1929. Mr. Malster and Mrs. Pfeffer were the only directors present. These two elected the following officers of the corporation: President, Emmet L. Malster, vice-president, Elizabeth Pfeffer. By resolution they appointed Emmet L. Malster general manager at a salary of $225 a month and to receive compensation of $75 a month additional for overtime necessary to care for the plant.

Under article 11 of the articles of incorporation a majority of the stock issued must be present and voting for any proposition in order to carry it. So the stockholders' meeting did quite right to adjourn without electing any directors. Article 7 provides that the directors and officers shall hold their respective offices for a period of one year from the time of their election and until their successors are duly elected and qualified.

Stafrin testified that, after the decree in the Furman case (which became effective October 15, 1929), he went to the office of the company and had a conversation with Mr. Malster. Stafrin offered his services and told him he thought the decision set everything back where it was when he sold to Furman. Malster said Stafrin was out and "had no right there any more;" that then and on several later occasions in the next few weeks, Malster refused to let him function either as "manager or director;" that he did not consent to Malster's increased salary.

This suit was begun November 15, 1929. Its purpose was to oust Malster from the "offices" of president and general manager of the company. The judgment was entered July 30, 1930, and the motion for new trial was overruled August 7, 1930. The court found Stafrin entitled to these "offices" and ordered Malster ousted. In a memorandum opinion the district court stated: "The meeting of January 30, 1929, at which Emmet L. Malster was chosen president and general manager was illegal and all of the proceedings had there invalid and of no binding effect on the corporation."

We have made this full statement of the facts in order to present a rather complete picture. The briefs discuss many interesting propositions of law relating to private corporations. We are asked to decide, among other things, whether a general manager is an officer. But, in our view of the situation, the matter can be decided on the question as to whether, on the merits, the evidence sustains the judgment, irrespective of whether a general manager of this particular company is an officer. So we do not pass upon that question.

It must be borne in mind that the water company is required to give constant public service. No controversy as to officers or employees, no disputes as to internal management, can abate for an instant the continuing duty to furnish water to the community for domestic and for public use. The health and welfare of the people and the safety of property from conflagration place this imperative demand above private quarrels of stockholders and officers. So, when Stafrin had his stock transferred to another and, for 18 months, refused to function as a stockholder, as director, president or general manager, his abandonment of the exercise of these functions amounted to an abandonment, at least for this period, of his offices and emoluments. Under the articles of incorporation the directors and officers held their offices for one year and until their successors are elected and qualified. This proceeding in quo warranto related only to the office of president and to the position of manager, whether that be an office or not, so we are not concerned here with Stafrin's status as a stockholder or director. The agreement of February 13, 1928, expressly contemplated that Stafrin, who was therein appointed, should "retain this position just so long as he performs his duties as general manager in an efficient manner." When the next annual meeting of the directors was held on January 30, 1929, the Stafrin group remained away, just as they had from the stockholders' meeting. The necessity to carry on was exigent. The articles provided for not less than three directors. By conduct and agreement, but without conventional by-laws so fixing the number, the company had been operating with four directors, so that each family group could have two. The Stafrin group remained away. The other two attended and selected Malster as president and as general manager. In the circumstances, and under the spirit of the articles of incorporation, we think the two directors constituted a quorum and had the power to take such action.

When Stafrin lost his suit and he was reinvested with legal title to his stock, he was not, at that instant and by

that token, reinvested with the office of president or with the position of general manager, which he had abandoned 18 months earlier. His remedy was to seek restoration to office and to the title and salary of general manager through election by the directors of the company and not through the courts. We are of the opinion that the evidence did not justify relief in *quo warranto* and that the trial court erred in granting the prayer of the plaintiff. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ELIZABETH IDEN, APPELLEE, V. EVANS MODEL LAUNDRY, APPELLANT.

FILED MAY 8, 1931. No. 27484.

1. **Libel and Slander.** An oral charge, directed by the manager of a laundry to an employee in the presence and hearing of other employees, that the person addressed is a thief, is of itself slanderous.
2. ———: MALICE: PRESUMPTION. In an action for slander, malice is presumed from an oral published charge that plaintiff is a thief.
3. ———: PROOF. Evidence that defendant, in the presence and hearing of others, falsely called plaintiff a thief under circumstances tending to prove express malice may be sufficient to prove slander and resulting damages, notwithstanding there was occasion for privileged communications.
4. ———: EXPRESS MALICE. Express malice creating liability for a false, published, oral accusation of crime, notwithstanding the occasion for qualified privilege, does not mean hatred or ill will, but want of legal excuse for the false and defamatory utterance.
5. **Trial:** INSTRUCTIONS. On appeal, instructions to a jury should be construed as a whole, and when, so construed, they fully and fairly state the law applicable to the issues and the evidence, harmless errors in instructions considered separately do not require the reversal of the judgment below.

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

B. N. Robertson, for appellant.

Gerald E. La Violette and *Gray & Brumbaugh, contra.*

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

ROSE, J.

This is an action to recover $2,000 in damages for slander. Plaintiff was an employee in defendant's laundry in Omaha and with other female employees was thus engaged May 21, 1929. She called at the office of defendant in the laundry building for her wages. The petition contains the plea, in substance, that defendant's manager, addressing plaintiff in the presence of others, and referring to another employee named Josephine Connor as "this girl" and "this little girl," then and there said: "Seems as though this girl has had some difficulty concerning her pay envelope and it seems as though you took it," and "the best thing we can do is to take out of your money what this little girl has lost and give you the difference and dismiss you, because you are a thief;" thus charging plaintiff with larceny and with having stolen the money of Josephine Connor. It is further alleged that these charges were false and damaged plaintiff in her reputation for honesty and uprightness—qualities essential to her employment in laundries, the means by which she supports herself and two children.

Defendant denied that its manager called plaintiff a thief, admitted he stated to her in a conversation relating to the pay envelope of Josephine Connor that "the best thing we can do is to take out of your money what this little girl has lost and give you the difference," or words to that effect, and pleaded that the communication and occasion were privileged, plaintiff and other employees only being present; that reported disappearance of the pay envelope came to the notice of defendant's manager through Josephine Connor, Della Gooddell, and Nora Neubauer, employees in the laundry; that the manager acted in good faith, without malice or intention to cause plaintiff loss or injury, in the honest belief that what he said was essential to the safety and welfare of employees and the

best interests of defendant; that plaintiff became huffy and left the office, saying she would see her attorney; that defendant thereupon paid plaintiff her wages in full, and that she was no longer an employee of defendant.

In a reply to the answer, plaintiff specifically denied that defendant paid her wages in full May 21, 1929, and alleged that the amount due her, including costs, was paid by defendant to the clerk of the municipal court June 13, 1929, in an action therein pending. Other unadmitted allegations of the answer were also denied.

Upon a trial of the issues, the jury returned a verdict in favor of plaintiff for $1,500. From a judgment therefor, defendant appealed.

It is argued on appeal that the evidence is insufficient to sustain the verdict. As pleaded in the petition, the oral expressions addressed by defendant's manager to plaintiff were of themselves slanderous. An examination of the entire record leads to the conclusion that evidence, believed by the jury, as it was, proved the following facts: Defendant's manager called plaintiff a thief at the time and place and under the circumstances alleged by her; that the charge was false and that it was published by defendant; that plaintiff was dismissed from defendant's employ with infamy on her name; that defendant's manager in uttering the slander was prompted by actual or express malice, independently of privilege which was pleaded as a defense; that there was no sufficient inquiry into the facts or legal excuse for the false and defamatory utterance. In addition to the evidence of facts summarized, defendant admitted in its answer what amounts to an implication that plaintiff stole Josephine Conner's pay envelope. The admission is that the manager said: "The best thing we can do is to take out of your money what this little girl has lost and give you the difference"— an admission implying that defendant accused plaintiff of being a thief. Malice is presumed from the false, oral, published charge that plaintiff was a thief. Circumstances tend to show express malice. Express "malice" creating liability for a false, published accusation of crime, notwith-

standing the occasion for a qualified privilege, does not mean hatred or ill will, but want of legal excuse for the false and defamatory utterance. In 1909 the law was announced as follows:

"Malice in law will be presumed from the publication of an article libelous *per se*, and that presumption will become conclusive unless the truth of the libel is established. Such malice does not mean hatred or ill will, but the want of legal excuse for the publication. Damages will also be presumed from the publication of an article libelous *per se*." *Sheibley v. Nelson*, 84 Neb. 393. See, also, *Estelle v. Daily News Publishing Co.*, 99 Neb. 397; *Peterson v. Cleaver*, 105 Neb. 438; *Hall v. Rice*, 117 Neb. 813.

The evidence, in view of the law applicable thereto, fully sustains the verdict of the jury and the judgment of the district court.

Instructions on the law applicable to privileged communications are criticised as inconsistent and as prejudicial to defendant. Construed as a whole, as they should be, they do not contain prejudicial error. So construed, they fully and fairly stated the law applicable to the issues of fact and the evidence. Any errors in instructions considered separately were not prejudicial to defendant. By the charge as a whole the jury were not permitted to return a verdict in favor of plaintiff without finding actual or express malice on the part of defendant. The recovery does not seem to be excessive. The entire record has been examined without finding a reversible error.

AFFIRMED.

GOSS, C. J., and GOOD, J., dissenting.

We dissent from the majority opinion for the following reasons: We think it clearly appears that, if defendant's officer and manager uttered the words, charged as slanderous by plaintiff, they were uttered under a condition which rendered them absolutely privileged. Some one of defendant's employees had taken the pay envelope of a coemployee. Four employees were interested and under possible suspicion. These persons only were present when the alleged slanderous charge was made. Defendant owed a

duty to these employees to ascertain which ones were innocent and which one guilty. The evidence and circumstances before defendant's manager were sufficient to reasonably warrant him in believing that plaintiff was the guilty person. Acting upon this information, he performed a duty which defendant owed to the other employees—to exonerate them from any suspicion. There is no evidence that would justify an inference or finding that defendant's manager acted with express malice.

We think the fifth paragraph of the court's instructions was prejudicially erroneous. It is in part as follows: "The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence of the speaking of the words, *or some of them,* by an officer of the defendant, charged in the petition as slanderous, and if you find from the testimony that such slanderous words, *or some of them,* were spoken by the officer of the defendant, you will next inquire whether or not they were spoken under such circumstances as rendered them privileged." (Italics ours.)

Of the five or six persons who were present, including plaintiff and defendant's manager, only one testified that plaintiff was called a thief, or words of like import. All the others testified that the word "thief," or any word of that import, was not used. Under the instruction given, if the jury found that some of the words, even though they were not slanderous, were used, it would permit them to return a verdict for the plaintiff.

Because the communication was privileged and there was no proof of express malice, and because of the error in the instruction, the judgment should be reversed.

PAINE, J., dissenting.

I find that I am unable to agree with the opinion rendered in this case by a bare majority of this court.

In the opinion rendered will be found a statement of the allegations of the pleadings, but I prefer to state at some length the evidence as found in the bill of exceptions.

Elizabeth Iden, the appellee, who will hereafter be called the plaintiff, had been employed in the laundry under her maiden name of Elizabeth Heisel, and had worked for a few weeks.

The appellant is the Evans Model Laundry, a corporation, of which M. M. Robertson is the president, treasurer, manager, and practically the sole owner, and said laundry corporation will hereafter be called the defendant.

At the close of work on Tuesday night, May 14, 1929, the plaintiff, who was learning to be a shirt finisher, went from her machine on the second floor to the dressing room on the third floor to get her street clothing. Many girls used this small dressing room, which was about 12 by 14 feet. Four persons were present in the room at that time, an Italian girl named Lena, Della Gooddell, the plaintiff, and Josephine Connor. The plaintiff testified that she sat down on a bench just a moment to tie her shoes, then put on her hat and coat, and hurried out to get her pay envelope from Nora Neubauer, the forelady, whose office was on the second floor, to overtake Annis Plaster, another employee. She punched the time clock card and went out to the street, but Annis had already gone, so she waited for Della Gooddell. All employees, including the forelady, are called by their first names only in the evidence.

While she was waiting there, Della came running out, without hat or coat, and said: "Elizabeth, you come right upstairs, right now, and clear yourself. * * * There is a girl upstairs that says she lost her money and the one with the red coat and hat on, she thinks, took it." She took the plaintiff up to Nora, the forelady, and plaintiff asked, "What is the matter, Nora?" Nora answered: "Elizabeth, this little girl standing here, Josephine, lost her pay check and she says you took it. Would you mind letting me look and see?" Plaintiff answered, "Surely." Nora searched one pocket at least, and felt of others to see if she could feel the lost pay envelope, and examined the plaintiff's own envelope in the plaintiff's hand and found it was her own.

Della testified she found Elizabeth on the street corner; that she was standing with her back to her; "and I said, 'Elizabeth, go upstairs.' And she said, 'I don't have to.' But I said, 'Elizabeth, there is a girl that lost her money and she says you took it,' and I says, 'Go and clear your-

self.' And she said, 'Well, I can go,' * * * and I took her by the arm and led her upstairs." Della testified that on the way up the plaintiff threw down a yellow ten-dollar bill at the stairway entrance, but picked it up again; that after that she held one hand clinched; that when the forelady spoke of making a search Della expected the missing money would be found, but it was not; that Della and the plaintiff at once took a street car to Council Bluffs, where they lived; that on the way over the plaintiff tore open her own pay envelope and took out a green ten-dollar bill and $2.85 in silver; that they stopped at a market and that Della saw the plaintiff had two ten-dollar bills and over $5 in silver; that the night before the plaintiff had borrowed money of her, but on this particular evening she bought Della a little present, a thing she had never done before; that Della objected, but finally took it, and that Della reported all of these facts to the forelady, Nora, the next morning. Nora testified that the plaintiff was as white as snow when Della brought her in, and that she reported all of these facts to Mr. Robertson during the week while he was making the investigation.

The facts disclosed in the evidence show that Mr. Robertson did not personally know the plaintiff, who had worked at the laundry for less than two months, while Josephine had worked there for two years. Josephine, Della, and Elizabeth, while they are called girls in the evidence, are all married women; the plaintiff having two children.

The following Tuesday night, when plaintiff asked the forelady for her pay envelope, Nora told her she would have to go to the first floor to Mr. Robertson's private office, which she did.

The testimony shows that Mr. Robertson had no reason to hold any malice against the appellee, for he did not know her, as she had been employed by Nora; that the facts which were reported to him by Nora, Della and Josephine would fairly justify a belief on his part that the appellee was guilty of taking the money; that the only persons present in his closed private office at the time the

plaintiff went down there were Nora, the forelady, and Della and Josephine, whose money had been taken. Mr. Robertson asked Josephine to tell about it. She said that she had laid her pay envelope on the bench, that she went over to put on her other dress, that Elizabeth was the only person sitting on the bench, and that when she turned around her pay envelope and Elizabeth were gone. The plaintiff testified that Mr. Robertson twisted his thumbs for a moment, reached over to the middle drawer of his desk, pulled out two envelopes, and said: "Well, the only thing I can do about this is to pay you for what you worked, for Monday and Tuesday, deducting the pay I had to repay Josephine Connor, and will have to dismiss you, by your being a thief." And the plaintiff answered: "No, sir; I will not touch a dime of that; I will go see a lawyer tomorrow morning," and walked out. Suit was at once brought in the municipal court for the wages due, and plaintiff received them.

Under the most rigid cross-examination on this point, Nora, the forelady, Della, the old employee, Josephine, who had lost the money, and Mr. Robertson, each and all positively denied that the words testified to by the plaintiff, "your being a thief," were used, either in that language or any other by Mr. Robertson on that occasion. So the use of the word "thief," as set out in the first three syllabi in the opinion, is based, so far as direct evidence is concerned, upon the uncorroborated testimony of the plaintiff alone, and absolutely denied by every other person present in the little office at that time.

Edwin J. Connor testified that on May 14, about 4:30 or 5:00 p. m., he stood across the street from the Evans Laundry, waiting for his wife to come from work, and he saw a girl come out of the laundry, and in response to a question he answered: "I saw her. She had something in her hand, and it looked to me like an envelope, and she took something out of it, whatever it was, I couldn't see, I was too far away, but she took the envelope, tore it up and threw it in the street. Q. Did you see her do anything with anything that came out of it? A. It looked

like she put it in her side pocket or something; she lifted it out and headed to the side of the street and tore the envelope up and threw it in the street. Q. What did she do with the contents? A. It looked like she put it in her pocket. * * * Q. Let's get this—she walked along slow, tore the envelope open, and, after she tore it open, she put it in her pocket, or what seemed to be her pocket, and then started to run after the car, or what you thought was a car? A. Yes. Q. But she didn't get the car? A. No; the girl came out. Q. And she didn't keep on running after the girl called her? A. No; she shook her head like she didn't want to go back. Q. But she did go back? A. Yes. Q. And you saw them go back into the entrance together? A. Yes."

Upon the question of any damages suffered by the plaintiff we find but little evidence. "Q. Mrs. Iden, as the result of the statements of Mr. Robertson in that room, did you suffer any humiliation? A. Yes; I did. * * * Q. Mrs. Iden, as a result of this experience, I want you to describe to the jury, in just what way you experienced a feeling of humiliation. A. Well, I just feel this way—I don't know what to do, I just feel so humiliated; and I knew I had to work and I was afraid to go and give the reference of where I had worked for fear it would come back and cause me to lose my job, and I have two children to support. Q. Go ahead and explain your sense of humiliation. A. And I just feel if they call back there and get that report I won't have no work, and I feel humiliated and terrible, and if I meet any of the girls that worked down there, they will look at me so funny and think she did that—(interrupted). * * * Q. Have you met the three girls that were in the office when Mr. Robertson made the statement that you have given? have you met them since? A. No; I haven't. Q. You haven't met them? A. No. Q. Until in the courtroom today? A. Until today."

In other words, none of the girls present in the office when she was discharged had ever met her from that day until they met in the courtroom at the trial.

On this evidence it is asked that a verdict of $1,500 for such damages be sustained.

1. With this rather lengthy review of the facts in the case, we will discuss the law involved. The manager of the defendant plant was responsible for the successful operation of his laundry. It was his duty to at once examine into every charge made of property being stolen; for, if an employee was found who would steal from another, he could as easily steal small articles sent to the laundry by its customers. The steps taken by Mr. Robertson were slow, deliberate and careful. He got all the information that he could obtain from the three principal actors. He then waited one week, called in the girl who had been accused of taking the pay envelope, and in her presence discussed the matter. Her conduct on this occasion doubtless confirmed him in the decision he had already reached, for he had taken out from her envelope the amount of money that Josephine had lost and tendered the balance to plaintiff and dismissed her from his employ. Do not these facts bring this case clearly within the privileged communication rule?

"A privileged communication is one made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable or probable cause." *Hartman v. Hyman & Lieberman,* 287 Pa. St. 78, 48 A. L. R. 567.

It is made by one in the discharge of a private duty, as in the conduct of his own affairs, and if made to one who has a corresponding interest to receive such communication, the occasion is privileged. *International & G. N. R. Co. v. Edmundson,* 222 S. W. (Tex.) 181; *Baker v. Clark,* 186 Ky. 816.

A privileged communication is one containing matter which but for the occasion on which it is made would be defamatory and actionable, and may be divided into two classes—the absolutely privileged and the conditionally or qualifiedly privileged. *Grantham v. Wilkes,* 135 Miss. 777.

What is qualified privilege? Newell, Slander and Libel (4th ed.) sec. 389, defines it thus: "In the less important matters, however, the interests and welfare of the public

do not demand that the speaker should be freed from all responsibility, but merely require that he should be protected so far as he is speaking honestly for the common good. In these cases the privilege is said not to be absolute but qualified; and a party defamed may recover damages notwithstanding the privilege if he can prove that the words were not used in good faith, but that the party availed himself of the occasion wilfully and knowingly for the purpose of defaming the plaintiff. In this class of cases it will be convenient to divide the occasions into four classes: (1) Where the circumstances of the occasion cast upon the defendant the duty of making a communication to a certain other person to whom he makes such communication in the *bona fide* performance of such duty. (2) Statements made for protection of private interests. (3) Where the defendant has an interest in the subject-matter of the communication and the person to whom he communicates it has a corresponding interest. (4) Reports of the proceedings of courts of justice and legislative bodies."

In *Southern Ice Co. v. Black,* 136 Tenn. 391, a judgment for plaintiff was reversed and the case dismissed when a foreman, in discharging an employee, said: "You are a damned thief." The court there cites many cases, and says: "We think the words spoken by the foreman were qualified privilege. It was not full privilege. By this is not meant that the words are not slanderous *per se,* and therefore actionable; but what is meant is that such a communication is not actionable unless malice is proved. Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. Newell on Slander and Libel (3d ed.) sec. 493; Odgers (5th ed.) p. 227; Townshend (4th ed.) 299; *Chambers v. Leiser,* 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270. The rule announced is

necessary in order that full and unrestricted communication concerning a matter in which the parties have an interest or a duty may be had. It is grounded upon public policy as well as reason."

In *Peterson v. Cleaver,* 105 Neb. 438, 15 A. L. R. 447, Mrs. Cleaver, as chief executive officer of the Degree of Honor, published an article in the official journal of that society, sent only to its members, charging that the plaintiff was short in her accounts as financier of her lodge, and that, although she had promised to make good her shortage, she had refused to do so. This court held that, although the article was libelous *per se,* yet it was qualifiedly privileged, and that such privilege was a complete defense, unless the plaintiff established by a preponderance of the evidence that the publication was made with express malice.

In the opinion of the majority of this court is found cited, as supporting a recovery in this case, *Hall v. Rice,* 117 Neb. 813, in which Judith Hall, a clerk, charged that she was called to the office in a drug store of the Liggett company in Omaha, and accused of stealing money, and intimidated into signing a confession to that effect, in consequence of which she claimed she had been blacklisted and unable to obtain work, yet, in an opinion which reviews many cases, the judgment for plaintiff was reversed on the ground that the communication was one of qualified privilege and the jury should have been instructed upon that theory.

In a well-written article upon qualified privilege in making accusation of employee's dishonesty, based upon this case of *Hall v. Rice, supra,* found in 8 Neb. Law Bulletin, 193, a large number of cases on this question are considered. Among them are: *Denver Public Warehouse Co. v. Holloway,* 34 Colo. 432, 114 Am. St. Rep. 171, 3 L. R. A. n. s. 696; *Bolton v. Walker,* 197 Mich. 699; *Peterson v. Cleaver, supra.*

Near the close of this article in the Nebraska Law Bulletin, I find this language referring to the case of *Hall v. Rice, supra*: "It is evident from a comparison of the fore-

going cases with the case in hand that the court's failure to refer to the defense of qualified privilege in its instructions was error. In an action for slander, if the court finds quasi or qualified privilege, questions of slander or no slander, malice or no malice, are usually for the jury, but the court must instruct as to the nature and effect of qualified privilege and its bearing on the jury's consideration of facts in issue."

2. Many cases are found reviewed in an article in 13 Virginia Law Review, 241, which concludes: "Virginia, holding with the weight of authority, does not require reasonable grounds for belief in the truth of the statements made under a qualified privilege, provided actual belief on the part of defendant existed."

Gatley, Libel and Slander, 627, adds: " 'But honest belief must be founded on some sort of reasonable basis,' and therefore, in determining whether such honest belief did in fact exist, the jury are entitled to take into consideration the character of the grounds on which it is founded."

In my opinion, if we should admit that the president of the defendant company spoke the words complained of, with honesty of purpose, to a person who had a legitimate interest in their subject-matter, or some duty in connection therewith, the mere fact that one or even several persons happened to be present and heard what was said will not necessarily destroy the privilege which the law would otherwise afford. It is often impossible, in the conduct of a large business, to handle all such matters in strict privacy. See, also, *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813.

"The fact that the words in question are strong is no evidence of malice, if on defendant's view of the facts strong words were justified; or that the statement was volunteered is no evidence of malice, if it was defendant's duty to volunteer it. The fact that the statement is admitted or proved to be untrue is no evidence that it was made maliciously; though proof that defendant knew it

was untrue when he made it would be evidence of malice." Newell, Slander and Libel (4th ed.) sec. 282.

Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.

"The state of mind, then, of a person who publishes a libel or slander is wholly immaterial in determining his liability except where the occasion is privileged, in which case the plaintiff has to prove malice in the popular and ordinary sense of the term." Gatley, Libel and Slander, 6. See 18 R. C. L. 1.

"The legal presumption of malice * * * is not rebutted by proof that defendant had reason to and did believe the charge to be true; but evidence of knowledge by defendant of facts sufficient reasonably to induce a fair-minded man to believe that plaintiff was guilty of the charge is sufficient to disprove express malice." 37 C. J. 84. See *Donahoe v. Star Publishing Co.*, 20 Del. 166.

As a practical question, jurymen never deal with express malice. There is rarely any direct evidence of express malice given them. Malice is an intent of the mind and heart of a man, and he is the only possible direct witness to that. Express malice is hate, spite or ill will. Blackstone defined it for us in 4 Bl. Com. 199, as: "Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm."

If the term "express malice" is to be used, it should be defined; but many courts hold that the old distinctions are done away with and that the word "express" is not needed. 18 R. C. L. 5; *United States v. King*, 34 Fed. 302; *Wrege v. Jones*, 13 N. Dak. 267, 112 Am. St. Rep. 679. In *Raley v. State*, 47 Tex. Civ. App. 426, it says that, if the court does undertake to define a word, it should be defined correctly as applying to the case on trial.

If a statement made is libelous *per se* and is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief in its truth. But generally a defendant is not liable for publishing a communication of qualified privilege unless there is actual malice on his part.

Let us now examine some of the instructions given by the trial judge. No. 5 reads as follows: "The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence of the speaking of the words, or some of them, by an officer of the defendant, charged in the petition as slanderous, and if you find from the testimony that such slanderous words, or some of them, were spoken by the officer of the defendant, you will next inquire whether or not they were spoken under such circumstances as rendered them privileged, within the designation given by the law to privileged communications."

No. 6 reads: "You are instructed that the communication between the plaintiff and the defendant's officer, M. M. Robertson, on the 21st day of May, 1929, in his private office, was what the law terms privileged. Before the plaintiff can recover in this action, the burden of proof is upon her to prove, by a preponderance of the evidence, * * * that Robertson in such conversation did charge the plaintiff with being a thief, and that the charge was false."

In No. 5 the jury were told to ascertain whether the words spoken were privileged, while in No. 6 they were positively instructed that the communication was what the law terms privileged. The court should have clearly defined the term "qualified privilege" for the jury under the evidence in this case.

In the last part of instruction No. 10, the jury were instructed as follows: "And if you believe from a preponderance of all the evidence and circumstances in evidence in this case that M. M. Robertson did speak such words to the plaintiff at such time maliciously and with a desire and intent to injure the plaintiff, then and in that case your verdict should be in favor of the plaintiff, pro-

vided you shall further find from a preponderance of the evidence that such words were untrue, and that M. M. Robertson had not reasonable and probable cause to believe them to be true."

This court has held that, where there are two conflicting instructions, which are confusing to the jury and leave them in doubt and uncertainty as to which is correct, this will be held prejudicially erroneous. *Town of Denver v. Myers,* 63 Neb. 107; *Faulkner v. Gilbert,* 62 Neb. 126; *Parkins v. Missouri P. R. Co.,* 72 Neb. 831.

In my opinion the evidence in this case and the rules of law quoted herein from the leading text writers, and supported by abundant authorities, from Nebraska as well as other states, would sustain the following statements as determinative of the points of law involved, and require a reversal of this case:

(1) Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces not only cases where the duty is a legal one, but also where it is of a moral or social character.

(2) The rule of qualified privilege in the law of slander relates usually to private interests. The time, place and circumstances attending upon the use of the alleged slanderous words are important considerations. If the occasion casts upon the defendant a duty or right to communicate to another some matter of special concern to one or both, or even to others for the protection of other employees or interests which he represents, then the court should instruct the jury clearly as to the nature and effect of qualified privilege.

(3) The fact that the words in question are strong is no evidence of malice, if on defendant's view of the facts strong words were justified; or that the statement was volunteered is no evidence of malice, if it was defendant's

duty to volunteer it. The fact that the statement is admitted or proved to be untrue is no evidence that it was made maliciously; though proof that defendant knew it was untrue when he made it would be evidence of malice.

(4) The state of mind, then, of a person who publishes a libel or slander is wholly immaterial in determining his liability except where the occasion is privileged, in which case the plaintiff has to prove malice in the popular and ordinary sense of the term.

(5) If a statement made is libelous *per se* and is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief in its truth. But generally a defendant is not liable for publishing a communication of qualified privilege unless there is actual malice on his part.

(6) The trial court should not give an instruction which, as applied to the facts of the particular case, is misleading or well calculated to mislead, or which, when considered with other instructions, will tend to confuse the jury in the consideration of the issues of the case, or where it will tend to lead them to a wrong conclusion of the facts.

C. LAWRENCE STULL, APPELLANT, V. U. S. TAYLOR, APPELLEE.

FILED MAY 8, 1931. No. 27463.

1. **Replevin**: SET-OFF. In a replevin action, evidence of a set-off is permissible under a general denial.
2. ———: DAMAGES. In an action for replevin where the property in suit is returned, damages for its detention, in the absence of special damages shown, are limited to the extent of lawful interest on the value of the property during the time it was wrongfully detained.

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

Grant G. Martin and *Bartos, Bartos & Placek,* for appellant.

Hastings & Hastings, contra.

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

DEAN, J.

This replevin action was begun in the district court for Perkins county by C. Lawrence Stull, plaintiff, against U. S. Taylor, defendant, to recover possession of certain personal property described in two chattel mortgages which were made and executed by Taylor, in favor of Stull, to secure the payment of two certain promissory notes in the several sums of $900 and $225.24, respectively. Both notes are dated August 25, 1928, and both, by their respective terms, became due and payable September 1, 1929. Plaintiff began this action on March 27, 1929, five months before the due date of the notes, alleging that he had sufficient cause to feel unsafe and insecure in respect of the payment by the defendant of the respective sums due upon the notes.

Upon submission, the jury found against the plaintiff and for the defendant. Thereupon the court decreed that, pursuant to the verdict, the defendant was the owner of and entitled to the immediate possession of the property named in the mortgages. In respect of the $900 note and mortgage, the court assessed defendant's damages in the sum of $855, for the detention of the property under the writ of replevin, namely, a tractor, a disc, a harrow, and a drill. And, in case a return of such property could not be had, the court decreed that defendant should recover $880 for the value thereof. In respect of the property given by the defendant as security for the $225.24 note and mortgage, namely, a hay rake, a mower, a hay rack, a plow, and a gas engine, the court ordered that plaintiff pay defendant $75 as damages for the detention thereof

and, in case a return of such property could not be had, it was ordered that defendant recover $95 for the value thereof. Plaintiff has appealed.

The plaintiff is the step-father of the defendant and is the owner of certain tracts of land in Perkins county. He entered into an agreement with the defendant wherein defendant was to perform certain farming operations for plaintiff on his land and for which defendant was to be paid a certain amount of money for discing, harrowing, and drilling the land. It was also agreed between the parties that plaintiff was to pay for the oil and gas used in the machines while engaged in the farming operations.

Plaintiff testified that defendant paid nothing on the $225.24 note, nor had he paid anything on the $900 note. And he also testified that the defendant sold part of the mortgaged property and informed the plaintiff after the sale. The plaintiff testified that he demanded of the defendant that he give up the remainder of the personal property in his possession but that the defendant refused to do so. Thereupon the property was then replevied by the sheriff in behalf of the plaintiff. The record discloses that the plaintiff agreed to credit the defendant for certain labor performed for him by defendant and, on the rebuttal, the plaintiff admitted that he was indebted to the defendant in the sum of $196.35 for discing and that he also owed the defendant $498.38 for other labor which he had performed for him.

The defendant testified that he disced and harrowed the plaintiff's land and that he had not received any remuneration therefor nor did he receive any credit on his notes. A letter written by the defendant is in the record wherein it appears that he requested the plaintiff to credit him for his labor. And in an itemized statement that was inclosed with the letter the defendant points out that the plaintiff owed him $646.33 for labor in discing and harrowing plaintiff's land and for gas and oil that he used while so engaged in such labor.

The record does not disclose that any of the property that was scheduled as security by the defendant for the payment of the $900 note was sold by him. But, as above pointed out, the plaintiff was indebted to the defendant for labor performed in discing, seeding, and drilling on the plaintiff's farm land. And in certain letters which were submitted to the jury, it is disclosed that the defendant therein demanded that plaintiff credit him in full for the payment of the $225.24 note. That the defendant was well within his rights, in view of the foregoing facts, is elementary. Clearly he had a right to demand that the amount due him from the plaintiff for labor be credited upon his $225.24 note. In a like situation the rule has been stated:

"Payment will be applied as the debtor directs. If he does not apply at the time he makes his payment, the creditor has the same right if he exercises it within certain limitations of time. If the creditor does not, then the court makes an application according to rules of law hereinafter stated." 48 C. J. 642. See, also, *Murray v. Schneider,* 64 Neb. 484; *Murdock v. Clarke,* 88 Cal. 384.

We do not think error can be assigned in the fact that the defendant retained for his own use the balance remaining from the sale of the property named in the $225.24 mortgage over the amount of the $225.24 note and mortgage. Inasmuch as the notes and mortgages had not then matured, and the plaintiff was indebted to him for labor, the defendant was within his rights in retaining the surplus of the sale.

Plaintiff contends that the court erred in permitting evidence of a set-off when the set-off was not specifically pleaded. Under our former decisions, however, the defendant had a right, under his general denial, to show that the plaintiff was indebted to him for labor in an amount equal to that due on the notes. *Davis v. Culver,* 58 Neb. 265.

It clearly appears that the damages awarded herein for

the detention of the property are excessive. If the property is returned to the defendant, he not only obtains the property but damages for its detention in an amount almost equal to the value thereof. If the property is returned, in the absence of special damages shown, defendant is entitled only to compensation or damages to the extent of 7 per cent. interest on the value of the property during the time it was wrongfully detained. Upon this basis, damages for the wrongful detention amount to only $55, while $930 was the amount awarded in the judgment. See *Oak Creek Valley Bank v. Hudkins*, 115 Neb. 628.

We conclude that if the defendant shall, within 20 days, remit from the judgment for wrongful detention the sum of $875 the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

MARY ALICE CHIPPERFIELD, APPELLANT, V WALTER H. CHIPPERFIELD, APPELLEE.

FILED MAY 8, 1931. No. 27711.

Divorce: EXTREME CRUELTY. Extreme cruelty, to justify a decree of divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or to seriously impair the bodily health of the unoffending party, or such as destroys the legitimate ends and objects of matrimony.

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

Stewart, Stewart & Whitworth and *Charles B. Paine*, for appellant.

A. Gaylord, contra.

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

GOOD, J.

Plaintiff sued for a divorce on the ground of extreme cruelty, and also prayed for custody and control of the minor children of the parties. In his answer defendant denied any cruelty on his part. A trial of the issues resulted in a finding and decree for defendant. Plaintiff appeals.

Plaintiff urges that the court erred in denying her a divorce and in dismissing her cause of action.

We have read the entire record. A detailed review of the evidence in this opinion would serve no useful purpose and might militate against the parties becoming reconciled and resuming the marital relation. We deem it sufficient to say that there is no evidence of any physical injury or violence on the part of defendant. There is some evidence tending to show a lack of that courtesy, affectionate treatment and consideration on the part of each of the parties for the other that should characterize the conjugal relation.

Extreme cruelty, to justify a decree of divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or seriously impair the bodily health of the unoffending party, or such as destroys the legitimate ends and objects of matrimony. *Myers v. Myers,* 88 Neb. 656; *Ellison v. Ellison,* 65 Neb. 412.

The parties to this action are young people, apparently of good reputation and character. Their language and demeanor as witnesses indicate that each possesses a good education and a high degree of culture. The record indicates that these young people got along nicely, except that they had difficulty in living within the income of defendant. As a clerk in a drug store, he received a salary of $100 a month, and for a time also received from his father the use of a house in which to live, upon his paying the taxes, insurance and upkeep of the property. The record indicates also that plaintiff was an only child, and it tends to show that she was reared with as much luxury as her

fond parents could lavish upon her; that she had not been required to perform household duties until her marriage, and that household duties were, to some extent, distasteful to her. The record also tends to show that she desired more things than the meager salary of the defendant could supply. Notwithstanding this situation, they seemed to get along fairly well until some months before the twin children were born. A little more than a year before the birth of the twins, another child was born which died at or soon after its birth. During the few months before birth of the twins, plaintiff seems to have been despondent and, perhaps, somewhat exacting, and defendant did not make due allowance for her delicate condition. They indulged in some disputes and some acrimonious statements. We think that plaintiff, owing to her depressed condition, unduly magnified any shortcomings of the defendant, and that, in view of his wife's delicate condition, he was not as considerate as he should have been. On the whole, we agree with the findings of the district court that the evidence is insufficient to establish extreme cruelty, within the meaning of the rule above announced.

It appears that the twin children of the parties were born on the 4th of October, 1929. The action for divorce was filed 12 days later, and before the plaintiff had yet recovered from her illness, incident to the birth of the children.

We feel that plaintiff made a mistake in bringing this action. Defendant is desirous of resuming the marital relation and acknowledged that he had not been at all times as generous and indulgent in his treatment of his wife as he should have been, and insists that he has a genuine affection for her and for his children. The children need the loving care, guidance and protection of both a mother and a father. It is earnestly hoped that the plaintiff may see that, for the good of these children, she owes a duty to be forgiving and to make some sacrifice in their behalf, to the end that they may have the care to which they are entitled.

It may be observed that, in the event of the failure of the parties to become reconciled to each other, the defendant owes a duty to provide for the support of his children, and, in affirming the judgment, it is without prejudice to the right to enforce this obligation on the part of the defendant, should occasion require it.

AFFIRMED.

Dean, J., not participating in the decision.

DEWITT K. ELLINGWOOD, APPELLEE AND CROSS-APPELLANT, V. GEORGE D. SCHELLBERG ET AL., APPELLANTS: SCHELLBERG SAND & GRAVEL COMPANY, CROSS-APPELLEE.

FILED MAY 8, 1931. No. 27741.

1. Appeal. In weighing conflicting testimony in equity cases, this court will consider the fact that the trial court saw the witnesses, observed their demeanor while testifying, and reached a conclusion as to which were the more credible.
2. Evidence examined and *held* to sustain the findings of the trial court.
3. Appeal. 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.

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

Swarr, May & Royce and *Fradenburg, Stalmaster & Beber,* for appellants.

Saxton & Hammes and *John E. Eidam, contra.*

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

GOOD, J.

This is an action in equity, seeking specific performance of an oral contract respecting issue of capital stock of the Schellberg Fremont Sand & Gravel Company, and for an

accounting by the defendant Schellberg Sand & Gravel Company for commissions alleged to have been earned in the sale of sand and gravel. Defendants admit that there was an oral contract, but allege that its terms were quite different from those claimed by plaintiff, and deny any agreement for commissions. The trial court found for plaintiff, as to the specific performance of the oral contract, and for defendants on the issue of an accounting for commissions. Defendants Schellberg and Schellberg Fremont Sand & Gravel Company have appealed, and plaintiff has attempted a cross-appeal as against the Schellberg Sand & Gravel Company.

The record discloses that in March, 1929, plaintiff had secured an option for a 10-year lease on 290 acres of land, adjacent to the Platte river, in Saunders county, Nebraska, for the mining of sand and gravel. The land was on a line of the Northwestern railroad. Defendant Schellberg was the principal owner of the Schellberg Sand & Gravel Company, engaged in the mining and sale of sand and gravel, with its plant located near Louisville, Nebraska. This plant was on lines of the Missouri Pacific and Burlington railroads. Plaintiff and Schellberg entered into an oral agreement, whereby they were to form a corporation, erect a plant for the mining and sale of sand and gravel from the Saunders county land; and, pursuant to the option, a lease on the said land for 10 years was taken in the name of Schellberg Sand & Gravel Company, but for the use of the new corporation to be organized. Later, the corporation, Schellberg Fremont Sand & Gravel Company, was organized, with Schellberg as president. The contemplated plant was erected on the land and ready for operation about the 1st of August, 1929, and was operated for the remainder of that season. After the organization of the new corporation, Schellberg, as president, caused to be issued to himself stock of the par value of $22,500. No stock was issued to plaintiff at the time. In December following plaintiff demanded to have 50 per cent. of the

stock issued to himself. Thereupon, a certificate for 72 shares, or $7,200 in face value, was issued in his name, which he refused to accept, and this action was then instituted. It appears that plaintiff paid into the corporation $7,291.73, and that Schellberg had advanced, for the purpose of erecting the plant, something like $22,500, in addition to some funds which he loaned to the corporation.

The principal controversy is over the terms of the oral contract. Plaintiff claims that his option was to be turned into the corporation at a value of $15,000; that the plant was to cost about $30,000, and that he was to turn into the corporation somewhere from $7,500 to $8,500; that Schellberg was to furnish the remaining capital; that each was to have one-half of the stock in the new corporation, and that plaintiff was to be employed as sales manager at a salary of $350 a month, and, in addition to the salary, was to be paid $2 a car for all sand and gravel sold by him for the Schellberg Sand & Gravel Company.

Defendant Schellberg admits that there was an oral contract, but claims that the option was to be turned into the new company without any consideration to be paid therefor, and that each of the parties to the oral contract was to contribute one-half of the cost of erecting the plant. He claims to have paid into the corporation $22,500, and that plaintiff has paid in but $7,200. The evidence shows that, in addition to his option, plaintiff paid in $7,291.73. The trial court decreed that, upon the payment of $208.27, plaintiff would be entitled to, and there should be issued to him, stock of the Schellberg Fremont Sand & Gravel Company, of the face value of $22,500, thus making plaintiff and Schellberg each the owner of one-half of the capital stock, and enjoined any further issue of stock except as might be ordered by the directors of the corporation.

Whether specific performance of the contract was properly awarded is a question of fact. The evidence on this question is irreconcilable. The trial court had the advantage of seeing the witnesses and observing their manner

of testifying, and this fact will be considered by this court. Plaintiff and his wife each testified, as to the terms of the contract, substantially as alleged by plaintiff, while defendant Schellberg flatly contradicted their testimony. The evidence as to the value of the option is in direct conflict. Witnesses on behalf of plaintiff testified that it was worth from $15,000 to $30,000, while those on behalf of defendants indicated that it had no value. There is some evidence tending to show that defendant Schellberg, in a written statement made by him, placed a value of $15,000 on the lease.

After careful consideration of all the evidence, we are impelled to hold that the weight thereof favors the contention of the plaintiff with respect to the contract for the formation of the corporation and issuance of capital stock.

Defendants argue that, since the evidence of plaintiff and his wife was to the effect that plaintiff should receive a commission of $2 a car for sand and gravel sold for Schellberg Sand & Gravel Company, and since the court found against plaintiff's claim for commission, it must have found that they testified falsely in this respect, and that, therefore, the whole of the testimony of plaintiff and his wife should be disregarded.

The rule of *falsus in uno, falsus in omnibus* is only applicable when it is found that a witness has wilfully testified falsely concerning a material fact, and the testimony of such witness may be disregarded, unless corroborated by credible evidence. In the instant case plaintiff's claim with respect to the formation of the corporation and issuance of stock is, to some extent, corroborated by other circumstances proved, while some circumstances proved tend to corroborate defendant Schellberg with respect to the contract for commission. Under the record, neither the trial court nor this court is required to disregard the testimony of plaintiff and his wife.

While plaintiff has attempted a cross-appeal, it was not perfected within the time prescribed by the rules of this

court and cannot, therefore, be considered. Paragraph 2 of rule 7 provides: "Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal by filing with the clerk of this court, on or before the day originally fixed for the filing of appellant's brief, a præcipe which shall designate the name of each party as cross-appellant and the names of all adverse parties as cross-appellees." The præcipe was not filed until after the time originally fixed for the filing of appellants' brief. Plaintiff contends that time for filing præcipe for cross-appeal was automatically extended because appellants were granted an extension of time in which to file briefs. The time for filing præcipe for cross-appeal is not dependent upon the extension of time for filing briefs. The language of the rule will not permit of the construction contended for by plaintiff. The præcipe for cross-appeal must be filed "on or before the day *originally* fixed for the filing of appellant's brief." Plaintiff's contention would require us to entirely disregard the word "originally" contained in the rule.

No reversible error has been found. The judgment of the district court is in all things

AFFIRMED.

Day, J., dissents.

KATE E. GRAHAM, APPELLEE, V. CORA E. HIGGINS, APPELLANT.

FILED MAY 15, 1931. No. 27687.

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

Frederick J. Patz, for appellant.

Baylor & Tou Velle and *George A. Healey, contra.*

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

PER CURIAM.

This is an action for damages for personal injuries sustained in an automobile accident which took place on August 11, 1929, about ten miles from Denison, Iowa.

There was a trial to a jury, a verdict for the plaintiff, and defendant appeals.

The evidence in the record, in brief, discloses that defendant was driving an automobile which she had obtained from her mother, and in which plaintiff was a passenger; that defendant was proceeding over a newly graveled road in which a ridge of gravel had been piled up in the center. Ahead of the defendant's automobile was a Ford proceeding in the same direction. This automobile the defendant attempted to pass. About this time others in the party warned the defendant of the high speed at which she was traveling. Notwithstanding the warning, she increased her speed, crossed the ridge to the left side of the road, proceeded some distance on that side, till she passed the Ford, and then recrossed the highway to the right side thereof. At this point her car, due to the high rate of speed at which it was traveling, became unmanageable, swerved from one side of the road to the other, and finally into and across a ditch, breaking down and overrunning a wire fence and colliding with a telephone pole, and finally coming to a stop in a field beside the highway. The telephone pole was broken off at its junction with the earth, and the automobile overturned, which resulted in the injuries from which the plaintiff now suffers, the nature and character of which are not a matter of dispute in this record.

A careful examination of the pleadings, evidence, and instructions of the court convinces us that the conclusion that the defendant's reckless operation of the car in a grossly negligent manner occasioned the injuries in question is correct, and that the case was properly submitted to the jury, and their verdict finds ample support in the proof.

We have also carefully examined the assignments of error as made by the appellant, and the authorities cited in support of her contentions contained in her brief, but find nothing which in view of the record as an entirety would justify a reversal of the case.

It follows that the judgment of the trial court is right, and it is

AFFIRMED.

CITY NATIONAL BANK OF LINCOLN, APPELLANT, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN, APPELLEE.

FILED MAY 15, 1931. No. 27727.

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

Perry, Van Pelt & Marti, for appellant.

R. O. Williams, contra.

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

PER CURIAM.

This is an action to recover taxes paid by the bank for the years 1925 and 1926, which subsequent to the payment thereof were declared and determined to be unconstitutional and void. The trial court held that the demand made for a refund of taxes was insufficient and dismissed the case. This action was brought under section 77-1923, Comp. St. 1929. That section provides that, as a condition precedent to bringing suit to recover an invalid tax, it is necessary that a demand in writing be made upon the treasurer of the district.

For convenience, the legislature has by statute made the county treasurer *ex officio* collector of taxes for the school districts within the county. Comp. St. 1929, sec. 77-1901. He shall report and pay all of the amount of said taxes

upon demand. If he fails to report and pay within 5 days after demand by the proper authority of the district, he may be sued on his bond. To collect and pay over within 5 days to the district is his only duty. Comp. St. 1929, secs. 77-1944, 77-1945. There was an attempt made in this case to give the notice required by section 77-1923, Comp. St. 1929, by notifying the county treasurer. Such notice is not the notice to the treasurer of the district as contemplated by the statute. *Burlington & M. R. R. Co. v. Buffalo County,* 14 Neb. 51; *Darr v. Dawson County,* 93 Neb. 93.

It is argued that at common law an unlawful tax could be recovered unless it was voluntarily paid. The evidence in this case is that the taxes in question were voluntarily paid. At the close of plaintiff's testimony, defendant moved for a judgment and dismissal for that the evidence was not sufficient to sustain the cause of action. The appellant contends that this motion amounts to a demurrer, and since it alleged in its petition that these payments were made under compulsion, the demurrer admits this allegation. If this motion were considered as a demurrer, it was a demurrer to the evidence and not to the pleadings. In any event, a demurrer to the pleadings admits only facts and not conclusions of law. Consequently, plaintiff is not entitled to recover under the common-law rule.

Having reached this conclusion, a discussion of other assignments of error is not essential to a decision. The judgment of the district court is

AFFIRMED.

MARIE GUTZMER ET AL., APPELLANTS, V. DEWEY NELSEN, APPELLEE.

FILED MAY 15, 1931. No. 27650.

1. **Evidence.** A party pleading a material fact assumes the burden of proving it.
2. **Judgment: RES JUDICATA.** *Res judicata* does not exist where

there is no identity in the thing sued for or in the cause of action.

3. ———: ———: PLEADING. "Where a former judgment is relied on as an estoppel in another action, it must be pleaded." *Gregory v. Kenyon*, 34 Neb. 640.

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

Lawrence Fredericksen and *John A. McKenzie* for appellants.

Gaines, McGilton, Van Orsdel & Gaines, contra.

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

GOSS, C. J.

This is a suit in equity to set aside a deed on the ground that it was procured by undue influence. It was brought by three of the children of the grantor, who died intestate November 29, 1927, against their brother, who is the grantee. From a decree finding the allegations are not sustained by the proof and ordering the petition dismissed for want of equity, plaintiffs appeal.

While we said that (Ane) Marie Nelsen (Nielsen) died intestate, it is true she left a will. But that will, executed July 14, 1926, was adjudged by the district court for Douglas county not to have been established, after a verdict of a jury thereon to that effect. The will was contested on the grounds that it was executed while the testatrix was mentally incompetent and because of alleged undue influence of Dewey Nelsen. Neither the verdict of the jury nor the judgment shows the particular ground or grounds on which it was based. On appeal to this court the judgment of the district court was affirmed. *In re Estate of Ane Marie Nielsen*, 119 Neb. 862.

The deed was executed April 14, 1927, by Marie Nelsen a widow, in favor of Dewey Nelsen. The grantor was also known as Ane Marie Nielsen. The property consisted

of a house and irregular shaped lot in Brookline addition in the city of Omaha. Some of the calls in the deed mention Center street, Cedar street and the Missouri Pacific Railroad. The evidence shows the lot was valued for tax purposes at $1,705. The three plaintiffs and defendant are the only heirs of Marie Nelsen.

The first assignment of error is that the court held the burden of proof was upon plaintiffs to show that Marie Nelsen was of unsound mind at the time the deed was made. Plaintiffs had pleaded the mother's lack of "sufficient mental capacity to execute a deed or to understand the nature and character of the same" as one of the elements of the case, along with the undue influence of the son, by which it was alleged that the latter obtained from her the deed in his favor. If plaintiffs relied upon either or both of these elements so pleaded, it was their duty to furnish the proof. It is a fundamental rule of pleading and evidence that a party pleading a material fact assumes the burden of proving it. *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726; *Pierce v. Miller*, 107 Neb. 851.

The second assignment of error is: "In not holding, as a matter of law, that there was no evidence to show any change in the mental condition of Ane Marie Nielsen after the will was drawn." The meaning of the assignment is not clear. Apparently the position of appellants is that, in the controversy over the will, between the same parties, the jury had found, and the court had adjudged, the mother was not of sound mind when the will was executed and therefore, they argue, it must be taken for granted she was not of sufficient mental capacity to make the deed involved in this case; or, that it was adjudicated between the parties in the will case that, by reason of his mother's mental incapacity, she was a victim of his undue influence in the making of the will. The argument therefore is that his dominion over her in the matter of the deed must be considered, as a matter of law, to exist in this case. In other words, it is claimed these matters are *res judicata*.

The will was made July 14, 1926. The deed was made April 14, 1927. They are entirely different instruments, shown by the evidence to be executed in the presence of different witnesses, nine months apart. Though the parties in the two cases are identical, there is no identity in the things sued for or in the causes of action in the will case and in this case to set aside the deed. *Res judicata* does not exist where there is no identity in the thing sued for or in the cause of action. Bouvier's Law Dictionary (Rawle's Third Revision), 2910; *LeRoy v. Collins*, 165 Mich. 380; *Murphy Chair Co. v. American Radiator Co.*, 172 Mich. 14.

Moreover, no estoppel by reason of the former judgment has been pleaded. There is nothing whatever in the petition of plaintiffs relating to the contest of the will or to the adjudication thereof. "Where a former judgment is relied on as an estoppel in another action, it must be pleaded." *Gregory v. Kenyon*, 34 Neb. 640.

The third and last assignment of error is, in effect, that the evidence shows as a matter of law that, in obtaining the deed, appellee perpetrated such a fraud upon his mother and appellants as a court of equity will not overlook. To detail or to analyze the testimony of the many witnesses would not be of value. We think plaintiffs failed to sustain the burden that was on them. The trial court did not err when it found that the allegations "are not sustained by the proof." The judgment of the district court is

AFFIRMED.

VIVIEN I. MAYFIELD ET AL., APPELLEES, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLANT: BELLE MARION, APPELLEE.

FILED MAY 15, 1931. No. 27678.

1. **Deeds: DELIVERY: TITLE.** Where a deed is delivered to a prospective purchaser of real estate by the owners thereof without

the performance by such owners of certain conditions required as a precedent to its acceptance, and the deed is immediately returned to the owners, *held*, that the title to such property does not pass to the purchaser.

2. Mortgages: RELEASE: FRAUD. Where real estate is sold subject to an existing mortgage thereon, and the mortgagee was induced to release the original mortgage upon a fraudulent representation that a mortgage clause would be inserted in certain insurance policies to protect her interest as such mortgagee, the release will be set aside and the former mortgage reinstated, provided there are no intervening equities of innocent third parties.

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

George E. Hager and *Wiltse & Wiltse*, for appellant.

John C. Mullen, *F. A. Hebenstreit* and *Jean B. Cain*, *contra.*

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

DEAN, J.

This action was begun in the district court for Richardson county by Vivien I. Mayfield and George Goldsmith, plaintiffs, against the Dwelling House Mutual Insurance Company, hereinafter called the company, to recover $4,000 for the total loss by fire of a certain business property known as the Richardson County Hatchery, which was owned by plaintiffs and insured under two fire insurance policies issued by the company.

For some years before June 20, 1929, Mrs. Belle Marion was the owner of the insured property, but on that date she sold the property to plaintiffs, for which they executed their promissory note for $2,500, payable to Mrs. Marion, and secured by a first mortgage on the premises. When the plaintiffs bought the property Mrs. Marion assigned both insurance policies to them and the assignments were regularly approved by the insurance company. A mort-

gage clause was inserted in the policies to protect Mrs. Marion's interest as mortgagee.

On or about November 15, 1929, the plaintiffs negotiated for the sale of the property to Bennett E. Cook. Mrs. Marion testified that she executed a release of her mortgage against plaintiffs and accepted a mortgage from Cook under a representation that the insurance policies would be assigned to him with a mortgage clause inserted therein for her protection. But she now contends that plaintiffs did not sell the property to Cook nor was the insurance transferred to him.

The company admitted that the assignment of the policies from Mrs. Marion to plaintiffs was made with the consent of the company. But the company contends that neither Mrs. Marion nor the plaintiffs have any beneficial interest in the policies from the fact that the plaintiffs conveyed the title to the property to Cook. The company also argues that the mortgage held by Mrs. Marion against the plaintiffs was satisfied by the payment of $300 in cash to her by plaintiffs and also by the execution of a mortgage from Cook to her for the unpaid remainder of the $2,500 mortgage.

The court found that the plaintiffs Mayfield and Goldsmith are now and on the date of the fire were the owners of the property in suit and that the deed executed by them to Cook is a void instrument. The court also found that $4,097.21 is due the plaintiffs from the insurance company under the provisions of the insurance policies. In respect of the money owing by the plaintiffs to Mrs. Marion the court found that $2,157.16 was due her pursuant to the terms of the mortgage executed by the plaintiffs, and that this amount should be deducted from the sum to be paid to the plaintiffs by the insurance company. The court further ordered that Mrs. Marion's mortgage be reinstated and that the release executed by her, in favor of plaintiffs, at the time of the transactions between plaintiffs and Cook, be annulled and held for naught. The insurance company has appealed.

In whom was the title to the insured property vested before and at the time it was destroyed by fire and to whom should the insurance, if any, be paid is the question before us. That the title to the property was and now is in the defendant Cook is the argument of the insurance company. But Cook makes no claim to the property whatever nor does he claim any insurance. He contends that no title to the property passed to him. The plaintiffs contend that the property belonged to them from the fact that the sale of the property to Cook had not yet been consummated at the time of the fire. And Mrs. Marion also contends that plaintiffs owned the property and that she is therefore entitled to recover from them the amount due on her mortgage.

During the time in question here the plaintiffs were engaged in business in Falls City and, in respect of Cook's interest in the transaction, Mayfield testified that Cook refused to accept the deed until certain incumbrances outstanding against the property were paid. And Goldsmith testified that it was understood at the time that Mrs. Marion's interest should be protected in the transfer of the property by the insertion of a mortgage clause in her favor in the insurance policies.

The company's agent, Mr. Lichty, testified that the transfer of the policies to plaintiffs by Mrs. Marion was approved by the company at the time the property was sold to them and that the premiums thereon had then been paid. From Lichty's evidence it appears that, some time before the fire, he was informed by the plaintiffs that they contemplated selling the property to Cook and that he, Lichty, then urged that the insurance should be transferred to Cook. He testified that he did not then know that the details of the transaction had not been closed.

Cook testified that he received a deed from the plaintiffs by mail, but that he returned it to them and informed plaintiffs that he refused to accept the deed until certain bills outstanding against the business had been paid. Cook

also testified that he signed a mortgage in favor of Mrs. Marion, but that he did not authorize the filing of the mortgage and that he instructed the plaintiffs to hold it until they had paid certain debts against the property.

It is elementary that, to effect a sale and conveyance of a valid title to real estate, there must be a delivery of a deed of conveyance to the purchaser, and an understanding between the parties thereto that the title to the property would thereby pass. No particular act or form of words is necessary to constitute such delivery, and delivery may be presumed from the facts and circumstances of each particular case, provided an intention to deliver is shown. *Brown v. Westerfield,* 47 Neb. 399; *Flannery v. Flannery,* 99 Neb. 557; *Brooks v. Brooks,* 105 Neb. 235. But a recognized authority has said: "An estate cannot be thrust upon a person against his will. * * * The rule as to the necessity of acceptance is sometimes declared in the terms of a definition of a complete delivery, as that delivery must be the concurrent act of two parties; which, of course, is tantamount to saying that the deed must be accepted." 8 R. C. L. 975, sec. 46. Clearly the title to the property herein did not pass to Cook, from the fact that the deed was not accepted by him but was immediately returned to the plaintiffs. Where a deed is delivered to a prospective purchaser of real estate by the owners thereof without the performance by such owners of certain conditions required as a precedent to its acceptance by the purchaser, and the deed is immediately returned to the owners unaccepted, the title to such property does not pass to the purchaser.

We think that the $300 paid to Mrs. Marion by plaintiffs at the time of the alleged sale of the property to Cook was due on the note under the terms thereof, and that the money she received from Cook was likewise due as a payment on the original note, and that Mrs. Marion therefore received no consideration for releasing her mortgage against plaintiffs. Where real estate is sold sub-

ject to an existing mortgage thereon, and the mortgagee was induced to release the original mortgage upon a fraudulent representation that a mortgage clause would be inserted in certain insurance policies to protect her interest as such mortgagee, the release will be set aside and the former mortgage reinstated, provided there are no intervening equities of innocent third parties. "If the release is made through inadvertence or mistake, the lien of the mortgage may be reinstated by proper proceedings taken therefor." *Gadsden v. Johnson*, 65 Neb. 447. See *Frerking v. Thomas*, 64 Neb. 193.

Other assignments of alleged error have been pointed out, but we do not find it necessary to discuss them. The insurance policies were in full force and effect at the time of the destruction of the property by fire, and it is incumbent on the insurance company to respond in damages for the full amounts named in the policies, with lawful interest thereon.

The judgment is in all things

AFFIRMED.

PAINE, J., dissenting.

I am not in accord with the judgment of the majority of the court and feel bound to file a dissent in this case, and respectfully submit that the simple statement of the evidence in the case leaves little foundation in my opinion upon which to base the allegations of fraud upon which the title is returned to the former owners after a fire occurred and the parties find that a change in the mortgage clause had not accompanied the change of ownership and that the insurance cannot be collected.

The bill of exceptions shows that Belle Marion owned a hatchery business in Falls City, Nebraska, which she sold to Mayfield and Goldsmith, a copartnership, which thereafter did business in the name of the Richardson County Hatchery. It does not appear that the business had been making money, and she sold the real estate to the new owners for $2,500, and took back a mortgage

for $2,500, being the entire purchase price.

On February 25, 1929, Belle Marion had purchased a policy of fire insurance upon the frame building on the real estate in question in the sum of $2,500, and upon the sale of the property she had assigned this policy to the "Richardson County Hatchery Co.," and a mortgage clause had been given back to her at the time she sold the property on June 20, 1929. On June 22, 1929, the new purchasers had taken out for Belle Marion a second fire policy in her name in the same Dwelling House Mutual Insurance Company of Lincoln for $1,500 on the two-story frame building in which the hatchery was located, and upon the same day Belle Marion assigned this policy to the "Richardson County Hatchery Co.," and upon the same day Frank S. Lichty, agent of the insurance company, attached a mortgage clause to Mrs. Belle Marion, so two policies of insurance against fire, totaling $4,000, were now upon the property, and each of these policies was left with the agent of the company, who advanced the premium due upon the new policy to the insurance company and was trying to collect the same from the new purchasers. The policies both remained with the agent until after the fire occurred.

Upon October 16, 1929, Mayfield and Goldsmith sold the property to Bennett E. Cook by a written contract of purchase duly acknowledged before a notary public and which was recorded in the office of the register of deeds on November 1, 1929. In accordance with his contract of purchase and upon the same date, October 16, 1929, Bennett E. Cook and Leura Z. Cook, his wife, made, executed and acknowledged to Belle Marion a real estate mortgage upon the property which Cook had just purchased, securing a new note made by them payable to her for $2,200.

Mr. Goldsmith came to Mrs. Marion's place, according to her testimony, and paid her $300 upon the $2,500 mortgage which had been given her when she sold them the property, and told her that they had sold the property

to Mr. Cook, and that Cook had made her a new real estate mortgage for the balance of $2,200, and thereupon she gave up the old mortgage papers for $2,500.

She received the Cook mortgage upon November 14 and took it down to record it on the morning of November 15, and found on record a mechanic's lien of $150 which would be ahead of the new mortgage she had in her hand. She said this made her mad, and Mr. Goldsmith, coming into the office at that moment, promised her if she would give him until noon he would have the $150 mechanic's lien released. She returned after dinner and it had been released, and she thereupon released of record the mortgage given her by Mayfield and Goldsmith of $2,500, dated June 20, 1929, and recorded the new mortgage which had just been executed in her favor by the Cooks. Mayfield and Goldsmith with their wives executed a warranty deed of the property, which was mailed to Bennett E. Cook at Dawson, Nebraska. Everything was complete with two exceptions. The two insurance policies were still held in the office of Frank S. Lichty, the agent for the insurance company, because of the fact that he had advanced the premium to the company upon the second policy. Upon December 24, 1929, Mr. Lichty went to Goldsmith's office to collect the premium due upon the second policy. "Q. Tell what you said to him and he said to you as near as you can. A. I said I wanted him to pay me that premium, and he replied that they had no money on hand with which to pay it and that they had sold the property. Q. Is this what Goldsmith said to you? A. Yes, sir. Q. All right, go ahead and tell us all he said about that. A. I told him I must have my money, that I had at their request advanced the premium due the insurance company and that I must insist on collecting the amount due me. He replied that they would pay me $10 on that now, that was that date, and that they couldn't pay me any more at that time but that they had sold the property, and I asked who to. Q. Go ahead, tell us all that was said. A. When

I was informed that the property had been sold I asked who they had sold it to and Mr. Goldsmith says to Mr. Bennett Cook. I asked him if the transaction had been completed and he replied that it had been and that their mortgage was released and that they had nothing to do with the building any more, was entirely out of the picture. Then I informed Mr. Goldsmith that, that being true, the insurance was of no value to him as insurance and that it should be transferred to Mr. Cook, but he said inasmuch as there was some time for this policy to run before its expiration that they would transfer this policy to Mr. Cook * * * provided he would pay them the unearned premium, and that unless he and Cook could agree on that he asked if he could not turn those policies into the company and have the unearned premium returned to him. I told him not the unearned premium but the short rate unearned premium would be returned to him, and he informed me that he would see Mr. Cook within the next few days and complete the arrangements one way or the other."

Upon the 4th of January, in a pool hall, Mr. Lichty found Mr. Cook, and testifies as follows: "Q. What did he say in reply to that when you told him Goldsmith had said to you that they had turned this property or sold this property to him? What, if anything, did he say? A. He said when he bought it they told him there was a year's insurance paid up on it." Mr. Lichty testified the next time that he talked to Mr. Cook was on the 6th day of January, the day before the fire, in his office, when Mr. Cook asked him to write on a slip of paper the amount of the unearned premium on the policy and he would see Mr. Goldsmith about it. This was the situation at the time the fire occurred, and the morning after the fire Mr. Cook and Mr. Goldsmith were in the office of Mr. Lichty and he was asked what did they say, and his answer to the question by the court was: "We talked the matter over yesterday for three-quarters of an hour and we agreed

that I was going to pay the unearned premium and they was going to transfer the insurance to me." So that the morning after the fire the first statement of the then owner of the property was that the day before he had intended to pay at least the unearned portion of the premium on the second policy, which premium the insurance agent had advanced, and that it would be transferred to him, and if no fire had occurred doubtless that is what would have happened and there would have been no question whatever of any fraud in the case.

The situation at that time was that two policies of insurance were both made out to Mrs. Belle Marion and assigned by her to "Richardson County Hatchery Co.," the firm name of Mayfield and Goldsmith, who had parted with the title to the property by a warranty deed delivered to the purchaser, and the mortgage clause upon the two policies was payable to Belle Marion to secure the payment of a $2,500 mortgage made by Mayfield and Goldsmith, which mortgage had been paid, canceled and released of record. A little difference of opinion as to what payments should have been made upon an incubator and upon certain outstanding bills is then magnified into a mountain of fraud, and the decree of the district court orders the release executed by Belle Marion upon November 15, 1929, be canceled and set aside; the new mortgage given to her by Cook, and recorded by her upon the same date, is ordered canceled and released, and it is decreed that the Dwelling House Mutual Insurance Company shall pay a total of $4,097.21 upon the policy of $2,500 taken out by Belle Marion on February 25, 1929, and the policy taken out by Mayfield and Cook upon June 22, 1929, for $1,500, upon which the agent had never been paid but $10 of the premium due thereon of $24.76, and in addition thereto that the insurance company should pay an attorney's fee of $375.

The writer of this opinion is well aware, as the appellee suggests, that a contract of insurance is construed most

strongly against the insurer (*Haas v. Mutual Life Ins. Co.*, 84 Neb. 682), yet the surrender by Cook of an unrecorded deed to property upon which he has given a real estate mortgage does not reinvest the title in the grantor. *Brown v. Hartman*, 57 Neb. 341. The proof in this case lacks much of proving fraud by a preponderance of the evidence. See *Stetson v. Riggs*, 37 Neb. 797; also *Peterson v. Schaberg*, 116 Neb. 346, where Goss, C. J., sets out that to maintain an action for false representations the following elements must be proved: "(1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied on and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages."

"An actionable representation must relate to past or existing facts and cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events." 26 C. J. 1087. See *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 10 L. R. A. n. s. 640; Note, 51 A. L. R. 55; *Pollard v. McKenney*, 69 Neb. 742; *Cohn v. Broadhead*, 51 Neb. 834.

Appellant insists that, "not only must one seeking to rescind tender back whatever he has received, but, in order to maintain an action in rescission, this must be done before the suit is started, and he must allege in his petition the fact that he has made such a tender."

"One who rescinds for fraud must act promptly upon discovery of the facts, announcing his intention to his adversary and returning what he has received. This should be done before he begins his action, nor should he fail to allege in his petition that he has so rescinded." *Rasmussen v. Hungerford Potato Growers Ass'n*, 111 Neb. 58. This decision is cited with approval by Circuit Judge Kenyon in *Albert Lea Foundry Co. v. Iowa Savings Bank*, 21 Fed. (2d) 515.

The writer submits that the evidence falls far short of being sufficient to sustain the charge of fraud, and fails to show rescission as required by the decisions of our court, and that the judgment of the district court should be reversed.

HARLEY H. FETTY V. STATE OF NEBRASKA.

FILED MAY 15, 1931. No. 27724.

1. **Criminal Law**: CHANGE OF VENUE. Applications for change of venue and for extension of time to furnish showing for the change are addressed to the sound discretion of the trial court. Rulings on such applications will not be disturbed unless an abuse of discretion is shown.
2. ———: CAUTION TO JURY. In cautioning the jury prior to their separation, it is not error for the court to refer to the fact that misconduct of a juror on a previous trial had necessitated a new trial, such statement not appearing to have been prejudicial to defendant's rights.
3. **Blackmail.** To constitute the offense of blackmail by means of sending threatening letters, it is immaterial who actually wrote or printed the letters. The offense consists in sending such letters to the one sought to be blackmailed.
4. **Criminal Law**: VERDICT: CONFLICT OF EVIDENCE. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.
5. ———: CIRCUMSTANTIAL EVIDENCE: CAUTIONARY INSTRUCTION. In the absence of a request therefor the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence.
6. ———: JURY: RECOMMENDATION OF LENIENCY. It is not error for the trial court to refuse a defendant's request to examine the jurors before they have been discharged, relative to a recommendation by the jury for leniency.

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

J. E. Willits, for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter designated defendant, was convicted of the offense of blackmail and sentenced to imprisonment in the state penitentiary for a term of one year. He prosecutes error, to review the record of his conviction.

This is the third appearance of this cause in this court. Judgments on former verdicts of guilty were reversed. See *Fetty v. State*, 118 Neb. 169, and *Fetty v. State*, 119 Neb. 619. In the information defendant was charged with attempting, by means of threatening letters, to extort the sum of $2,000 from one Hunter.

It is contended that the trial court erred in refusing defendant a change of venue, and in refusing to allow him additional time in which to make a further showing for such a change. The record discloses that the mandate of this court was filed in the office of the clerk of the district court on May 31, 1930. The case was set for trial September 9, 1930. Application for change of venue was not made until the day previous to the time set for trial.

Applications for change of venue and for additional time to make showing in support thereof are addressed to the sound discretion of the trial court. Rulings of the trial court on such applications will not be disturbed unless the record discloses that there was an abuse of discretion. The record fails to show any such abuse. Defendant had from the 31st of May until the 8th of September in which to prepare and make showing for a change of venue. Long prior to the day set for trial defendant, by proper diligence, should have known if ground existed for the granting of a change of venue, and such showing should have been made in ample time.

In 16 C. J. 210, it is said: "As a general rule, a change of venue ought to be applied for as soon after issue joined

as possible, after the grounds for the change become known to the applicant; or at least within a reasonable time thereafter; and the application may be denied for lack of diligence, although it is made some time before trial."

Not only does the record fail to show diligence on the part of defendant, but it fails to disclose that any of the jurors called were biased or prejudiced, or that any difficulty was had in obtaining a fair and impartial jury. Error in the rulings of the court on these questions is not shown.

During the progress of the trial and just previous to a recess, the court duly cautioned the jury about talking with any one, or permitting any one to talk with them, about the cause then pending, and adverted to the fact that in a former trial of the case a juror had been guilty of misconduct which had necessitated a new trial. It is argued that this statement of the trial court was prejudicial to defendant. The statement evidently was made to especially impress upon the jury the necessity of strictly observing the caution given by the court, and was proper to insure the defendant a fair trial. We fail to perceive wherein defendant could have been in any wise prejudiced by the statement.

It is contended that the court should have instructed the jury that it was incumbent upon the state to prove that the threatening letter sent to Mr. Hunter was written or printed by defendant, and that neglect or omission to so instruct was error. It is immaterial who wrote or printed the letter. The offense consisted, not in the writing of the letter, but in the sending thereof to Mr. Hunter and thereby conveying to him a threat, with intent to extort money from him.

Complaint is made because the court failed to give a cautionary instruction relative to the weighing of circumstantial evidence. It is a rule, well established in this jurisdiction, that error may not be predicated upon the omission of the trial court to give an instruction relative to

the weight of a certain class of evidence, unless a proper instruction upon the subject is requested.

In *Johnson v. State,* 53 Neb. 103, it is held: "Mere nondirection by the trial court will not work a reversal where proper instructions covering the point were not requested." In the body of the opinion (p. 107) it is said: "Objection is made because the jury were not instructed upon the law of circumstantial evidence. As no proper request to charge upon that point was submitted to the court below by the prisoner he cannot urge the nondirection of the court as a ground for reversal. *Hill v. State,* 42 Neb. 503; *Housh v. State,* 43 Neb. 163; *Pjarrou v. State,* 47 Neb. 294."

In *Georgis v. State,* 110 Neb. 352, it is held: "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." This general principle has been approved in the following cases: *Kerr v. State,* 63 Neb. 115; *Welter v. State,* 112 Neb. 22; *Mauer v. State,* 113 Neb. 418; *Hynes v. State,* 115 Neb. 391; *Marshall v. State,* 116 Neb. 45. See, also, 16 C. J. 1058, 1059.

It is contended that the verdict is not sustained by the evidence. The argument on this point is based upon the proposition that the handwriting of defendant on a number of exhibits introduced in evidence was not established. There was evidence of competent experts, duly qualified to express an opinion, that the exhibits were in the handwriting of defendant. The questioned exhibits and the genuine handwriting were also before the jury for comparison. There was a conflict in the evidence. The question was for the jury. In our opinion, the evidence is ample to support the verdict. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.

When the jury returned their verdict it was accompanied by a recommendation for leniency in the following language: "We, the jury, wish to see the defendant granted leniency on account of his age and family." This request was signed by the foreman of the jury. When this request was presented and read, counsel for defendant requested leave to examine the jury with reference to the recommendation. The request was denied. Defendant did not ask that the jury be polled, to ascertain if each juror adhered to the verdict. Why defendant should have been permitted to interrogate the jurors with reference to their recommendation for leniency is not obvious. We perceive no error in the refusal to grant the request.

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

AFFIRMED.

JACK SCOTT V. STATE OF NEBRASKA.

FILED MAY 15, 1931. No. 27541.

1. **Robbery**: PROOF: POSSESSION OF STOLEN PROPERTY. Mere presence of recently stolen property on the premises occupied by a third person, with whom defendant was living, though unexplained, is insufficient to establish defendant's guilt as to theft or robbery of such property.
2. ———: ———: ———: CONSPIRACY. Where, however, the evidence has connected the defendant and another person as participants in the theft or burglary, the fact that the property stolen was found in the possession of such other person is admissible against the defendant. But, in order to render such evidence competent, there must be evidence of conspiracy, which may be direct or circumstantial.
3. **Criminal Law**: NONPREJUDICIAL ERRORS. The scope and effect of the provisions of section 29-2308, Comp. St. 1929, can be determined only in connection with constitutional provisions, and with other sections of the statutes *in pari materia*.
4. ———: PREJUDICIAL ERRORS. Section 29-2308, Comp. St. 1929, so construed, and *held* (a) to effect no change in the requirements previously existing as to the manner of the proper

preservation of the record of errors for review in criminal proceedings, nor in the proper presentation thereof to this court; (b) it does not authorize this court to declare that there has been no substantial miscarriage of justice in a criminal case, merely because the court from an examination of the evidence may believe the defendant guilty of the crime charged; (c) that, in questions involving misconduct of prosecuting attorneys, the constitutional right of defendant, charged with a felony, to have a fair determination of the facts involved in a criminal prosecution adversely to the accused, by a constitutional jury, as a prerequisite to lawful infliction of punishment, is vitally impaired if the effects of material errors occurring at his trial (intrinsically and substantially prejudicial, and otherwise reversible in character) are made to depend, when presented for review, on the conclusion of this court as to his guilt; (d) in such case, it is the imperative duty of this tribunal to require and exact for the accused a fair and impartial jury trial wholly uninfluenced by, and irrespective of, his condition or the opinion of the reviewing judges as to his guilt.

5. ———: REVERSAL. Evidence examined in the instant case, and *held*, that the accused was not accorded a fair and impartial trial, and that it appears that a substantial miscarriage of justice occurred therein.
6. **Decision Approved.** *Cooper v. State*, 120 Neb. 598, so far as applicable to misconduct of prosecuting attorneys, approved.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

M. L. Poteet and *G. E. Price*, for plaintiff in error.

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

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

EBERLY, J.

This is an appeal by Jack Scott, hereinafter called the defendant, from a conviction on a charge of burglarizing the Denton State Bank with explosives on the night of January 29/30, 1930. The evidence is wholly circumstantial.

The state relies for conviction on evidence that in a house, garage and curtilage rented by one Holtzclaw and occupied by him, his wife, and little child, as a home, on the day ensuing the commission of the burglary, there was found, concealed, burglar tools, dynamite, caps and fuses for same, two bottles of nitroglycerine, a syringe for use therewith, two revolvers, one with a touch of soap thereon similar to soap used by the burglars at the bank, and $755.42 in currency; that in a stolen automobile, abandoned at a schoolhouse a mile distant from the Holtzclaw home, but on the public road between it and Denton, there was found $10 in dimes and a silver quarter.

The Denton State Bank coin wrappers in which some of the money was found, the peculiarly marked ten-dollar gold piece, and the watch fairly identified the property thus discovered as the proceeds of the Denton State Bank burglary. It also appears that on the night of the burglary Scott did not return to his lodgings until 2 a. m.

On the part of the defendant it may be said that none of the property thus identified was found on his person, or in his possession, or in any containers owned or controlled by him, or in a room exclusively occupied by him; that, when he was arrested and searched, in his billfold was found $16.56 in money bearing no identifying marks. There was concealed on his person two ten-dollar bills. In view, however, of the fact that the Denton State Bank, according to the evidence, lost but twenty-nine ten-dollar bills, and in the money thus found and identified as the proceeds of the burglary was included forty-one ten-dollar bills, it is obvious that no presumption of guilt can arise from the possession by Scott of the two concealed ten-dollar bills.

The evidence, however, fairly connects Holtzclaw with the commission of the crime. For three weeks prior to the burglary, Scott was admittedly a boarder and lodger in Holtzclaw's home, and paid a weekly stipend for this service. Still it may be said there is no evidence which

directly associates Scott with Holtzclaw during the night of January 29/30, 1930. Even the evidence as to his return at 2 a. m. is given in connection with a statement that at the time of his return he was in company with two men, neither of whom was Holtzclaw, and neither of whom, so far as disclosed by the information in this case and the evidence in the record, is charged by the state with participation in this offense. There is, in the record, no direct evidence of conspiracy between Holtzclaw and this defendant.

Appellant presents numerous assignments of error, including a challenge to the sufficiency of the evidence, but stresses in his argument the alleged misconduct of the county attorney.

As to the sufficiency of the evidence, it may be said that this court seems committed to the view that the mere presence of stolen property in a house leased and occupied by a third party, with whom the accused was living, and thus an occupant of the house, does not make the lessee's possession of the stolen articles in question that of the accused, to the extent of holding the latter accountable in law for the possession of stolen property. *Graeme v. State,* 118 Neb. 113. See, also, *People v. Wilson,* 7 App. Div. (N. Y.) 326; *State v. Castor,* 93 Mo. 242; *Turbeville v. State,* 42 Ind. 490; *Conkwright v. People,* 35 Ill. 204; *State v. Drew,* 179 Mo. 315.

It must be remembered in this connection, however, that, where the evidence has connected the defendant and another person as participants in the theft or burglary, evidence of the fact that the property stolen was found in the possession of such other person is admissible against the defendant. But in order to render such evidence competent there must be evidence of conspiracy, which may be direct or circumstantial. *State v. Drew,* 179 Mo. 315.

It being deemed necessary to reverse this conviction on other grounds, and to award a new trial, at which the evidence may be materially different, the question of the suffi-

ciency of the evidence in the present case is not determined.

As we are, in reviewing a conviction by a proceeding in error by statute, required to determine the effect of errors "after an examination of the entire cause," the evidence outlined will be considered, whether required or not, in the light of its proper legal weight and effect, in connection with the assignments of error based on the alleged "misconduct of the prosecuting attorney." The charge was burglary, a felony, and the defendant elected not to be sworn or appear as a witness in his own behalf.

The following unquestioned principles of law and statutory provisions thereupon became operative and controlling:

(1) "As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution." *Fricke v. State*, 112 Neb. 767.

(2) "In the trial of all indictments * * * against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal." Comp. St. 1929, sec. 29-2011.

(3) "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1929, sec. 20-1214.

From a careful examination of the bill of exceptions we determine that, in view of the rule announced in *Zediker v. State*, 114 Neb. 292, and sections 20-1139, 20-1140, 20-1919, 29-2020, Comp. St. 1929, sufficient exceptions were taken on behalf of accused, and that it thus reflects the following facts for our consideration:

(1) That in his opening statement to the jury in this case the county attorney said: "The state will prove that the defendant has served numerous sentences in numerous

penitentiaries on previous occasions, one for attempted manslaughter."

(2) That later, during the progress of the trial, in his argument to the jury, the county attorney said, in substance: "According to the law of Nebraska, the defendant had a right to take the stand and the state had no right to put him on the stand, but he could have taken the stand if he had wished to, and if he is innocent, why didn't he take the stand?"

(3) Referring to a statement claimed to have been made by the defendant Scott to the county attorney prior to the trial, and no competent evidence thereof appearing in the record, the following remark was made by the county attorney to the jury: "He (Scott) said, 'I will tell it down at the time of the trial who he had been shooting craps with.' Do you know? Have you been told? Do we know yet?" These statements, in view of their context in the record, were operative to challenge the special attention of the jury that Scott had not taken the witness-stand and made the promised explanation.

(4) The county attorney repeatedly referred to defendant Scott as an "ex-convict."

(5) The county attorney in his concluding address to the jury said, in substance: "Now, I told you at the opening of the trial what I thought the facts were going to be. I told you what the state expected to prove. I told you what the situation was and what the evidence would be. * * * And the only thing I failed to prove, I told you this man (Scott) had been convicted of two or three other crimes. * * * I am sorry; I tried to prove that, but the court wouldn't permit me to. It happens to be the law unless a man takes the stand, then you can ask him."

(6) The county attorney remarked further: "And I will tell you another point, although they may interrupt me. * * * Do you know that when you render a verdict of not guilty that ends the lawsuit and the state's hands

are tied? * * * On the other hand * * * if you find a man guilty and your verdict isn't supported by the evidence the court stands between that man and the penal institution."

We are convinced that there are no new legal principles involved in this record. The defendant has not had a fair trial, particularly as guaranteed by the Constitution. *Cooper v. State,* 120 Neb. 598; 16 C. J. 890; *State v. Lapage,* 57 N. H. 245; *Call v. State,* 39 Okla. Cr. Rep. 264; *Jones v. State,* 88 Ark. 579; *State v. Moon,* 167 Ia. 26; *Hunt v. State,* 28 Tex. App. 149; *Curtis v. State,* 89 Ark. 394; *Crow v. State,* 33 Tex. Cr. Rep. 264; *State v. Biggerstaff,* 17 Mont. 510.

It may be said that at consultation the judges were tentatively of the opinion that this case was ruled by *Cooper v. State, supra,* and on authority of that case were for reversal. A minority, however, expressed the view that in that case due consideration had not been given section 29-2308, Comp. St. 1929, and expressed a dissent on that ground. In view of this situation, it was thought advisable to reexamine the statute referred to, the history of the enactment thereof, the principles of interpretation involved, as well as the constitutional provisions applicable to the controlling questions presented.

In 1921 there was duly enacted chapter 157, Laws 1921, which appears in our present compilation as section 29-2308. It, in terms, incorporates in our statute law, as applicable to the review of criminal cases, the following provisions: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, *shall consider that no substantial miscarriage of justice has actually occurred.*" Thus it may be said that, so far as this enactment is applicable, the real question presented here, as in

all cases of criminal review, is: Had a "substantial miscarriage of justice actually occurred?"

It will be noted that this statute does not in terms declare that the determination by the reviewing court, "after an examination of the entire cause," that the accused was guilty as charged shall operate to change the essential character of errors appearing in the record before it, which otherwise would amount to a "substantial miscarriage of justice," and render the same unavailing for the purpose of review. Indeed, the statute does not in terms require an examination of the entire evidence upon which any criminal prosecution was determined.

The principles embodied in this enactment, as applied to criminal procedure, if new in this jurisdiction at the time of its passage and approval, were, however, in their essentials, far from novel in the history of modern jurisprudence. Particularly is this true when the legislation of the English speaking peoples of the world is considered. Indeed, due to the construction of similar statutory provisions by the courts of last resort of the various British jurisdictions, even the phraseology employed in our act had been, substantially, judicially considered and interpreted in connection with the fundamental principles of English common law, and its true meaning settled and application indicated, prior to its adoption here, to such an extent that it had in England acquired a definiteness and certainty almost technical in character.

The following contains the pertinent portions of statutes and rules which, in this connection, the British courts have been called upon to consider and construe, which in a proper sense may be considered as the original source of American legislation, and also following each paragraph the leading English cases relating thereto are noted, viz.:

(1) The proviso of section 423 of the Criminal Law Amendment Act of 1888 (46 Vict. No. 17) is: "Provided that no conviction or judgment thereon shall be reversed, arrested, or avoided on any case so stated, unless for some

substantial wrong or other miscarriage of justice." *Makin and Wife v. The Attorney General for New South Wales,* 17 Cox Cr. Cas. 704, 711 (1893).

(2) Order XXXIX, rule 6 of the supreme court (of England), adopted pursuant to Judicature Act of 1875, provided: "A new trial shall not be granted on the ground of misdirection, or of improper admission or rejection of evidence, * * * unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial." *Bray v. Ford,* L. R. App. Cas. 44 (1896).

(3) S. 4, sub. s.1, of the Criminal Appeals Act of 1907 (England) provided: "The court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal *if they consider that no substantial miscarriage of justice has actually occurred.*" *The King v. Dyson,* L. R. 2 K. B. Div. 454 (1908); *The King v. Norton,* L. R. 2 K. B. Div. 496 (1910).

(4) Section 1019 of the Canada Criminal Code provides: "No conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial." *Allen v. The King,* 44 Can. Sup. Ct. 331 (1911); *Brunet v. The King,* Can. L. R. 375 (1928); *Stein v. The King,* Can. L. R. 553 (1928); *Sankey v. The King,* Can. L. R. 436 (1927).

All of these statutory provisions evidence the regular exercise of unlimited and paramount legislative authority vested in the English parliament. All of the cases cited thereunder proceed on the theory that, while obvious verbal distinctions can be made between the sections above quoted, the underlying principles of law evidenced by each are quite similar, if not identical, and each vest the court

of review with discretion to exercise in cases where improper evidence has been admitted, or proper evidence rejected, or something not according to law was done at the trial. Such discretion must be exercised, however, in such a way as to do the prisoner no substantial wrong or to occasion no miscarriage of justice, as no greater wrong can be done a prisoner than to deprive him of the privilege of a trial by a jury of his peers on a question of fact material to the actual issue to be determined, and to substitute therefor the decision of the judges who have not heard the evidence and who have never seen the prisoner. The fact must not be overlooked that it is the free, unbiased verdict of the jury that the accused is entitled to have. Further, a substantial wrong and a substantial miscarriage of justice "is occasioned thereby in the trial" when the counsel for the Crown improperly places before the jury inadmissible evidence which may improperly influence them adversely to the accused on a material issue or cause improper procedure at the trial obviously in prejudice of the rights of the accused even though other evidence properly received is ample to sustain the verdict rendered.

The pioneer as well as leading case on the subject, the doctrine of which is now universally accepted by British and Colonial jurists, is *Makin and Wife v. The Attorney General for New South Wales, supra.* It involved the construction of the proviso in the Criminal Law Amendment Act of 1888, heretofore set out. The following excerpt from the opinion by Lord Chancellor Herschell, who delivered the opinion of the court, clearly sets forth the reasoning on which the case proceeds, and which won for it universal acceptance by the British and colonial bench and bar, viz.: "It was said that, if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to show that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers

from the jury to the court the determination of the question whether the evidence, that is to say, what the law regards as evidence, establishes the guilt of the accused; the result is that, in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury but on the decision of the court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords. It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the court might under such circumstances be justified or even consider themselves bound to let the judgment and sentence stand. These are startling consequences. * * * Their Lordships do not think that it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them. In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence."

The true foundation of the doctrine of *Makin and Wife*

v. The Attorney General for New South Wales, supra, is well expressed by Chief Justice Fitzpatrick in *Allen v. The King, supra,* in the following words: "Despite all the changes made in recent years in the procedure in criminal and quasi-criminal cases, the classic saying of Lord Hardwicke still holds that: 'It is the greatest consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct, that the judge determines the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England.'"

Thus it is that such terms as "substantial miscarriage of justice," and those of similar import, as applied to questions involved in criminal appeals, had acquired in English jurisprudence a definite meaning long prior to the adoption by our state of the act of 1921.

Whether, in view of the similarity in phrasing, the Nebraska criminal statute of 1921 is to be deemed the enactment here of the British legislation, in whole or in part, sufficient to render the adoption of the rule of construction such a situation would require in view of the changed conditions here prevailing, we need not determine. In the precise terms of our fundamental law we find defined and safeguarded the principle to which Lord Hardwicke in his observations heretofore quoted referred as persuasive when applied in the proper interpretation of the English statutes. These principles, in England admittedly subject to the supreme authority of parliament, have here attained an unquestioned supremacy and controlling force. This is evidenced by the following sections which constitute a part of those embraced in article I of the Nebraska Constitution:

Section 11. "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance

of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Section 6. "The right of trial by jury shall remain inviolate."

Section 3. "No person shall be deprived of life, liberty, or property, without due process of law."

Section 23. "The writ of error shall be a writ of right in all cases of felony."

In this connection it is to be remembered that "Accusations of criminal conduct are tried at the common law by jury; and wherever the right to this trial is guaranteed by the Constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused." 1 Cooley, Constitutional Limitations (8th ed.) 668.

A constitutional provision that "the right of trial by jury shall remain inviolate" guarantees the continuance of that right as it existed at the time of the adoption of the Constitution. *La Bowe v. Balthazor,* 180 Wis. 419.

"This constitutional guaranty to persons accused of crime, that they shall have a fair trial by an impartial jury, inures to the benefit of every accused, irrespective of his guilt or condition in life." *Priestly v. State,* 19 Ariz. 371.

"Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth. * * * The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence

against him. * * * And the jurors must be left free to act in accordance with the dictates of their judgment." 1 Cooley, Constitutional Limitations (8th ed.) 676.

Giving due consideration to the terms in which the Nebraska Act of 1921 is couched, in connection with the constitutional provisions quoted, and the authorities, British and American, heretofore cited, we find the conclusion inevitable that, unless the terms of this legislation under consideration be deemed wholly repugnant to, and in violation of, our fundamental law, it requires, in order that its validity be sustained, a construction even more favorable to the accused than that accorded similar legislation by the British courts.

This issue is inescapable. The makers of our Constitution have addressed two important mandates to this court, which we are directed to implicitly enforce: (1) That the right of trial by jury shall remain inviolate. (2) In all criminal prosecutions, the accused shall have the right to a fair and speedy trial by an impartial jury. Controlling authorities agree that this language fairly guarantees to the citizen the right of "jury trial" without conditions, qualifications or restrictions. It must, therefore, be understood as including all common-law incidents to a jury trial, so far at least as they can be regarded as tending to the protection of the accused, and as they existed at the time of the original adoption thereof by the people of this state. One of these safeguards was that a fair determination of the facts involved in a criminal prosecution adversely to the accused, by a constitutional jury, was a prerequisite to the infliction of punishment. So, too, the duties enjoined thereby on the reviewing court are plain. They are not subject to legislative diminution or limitation, either expressly or by implication. They are imperative directions, and can be performed by a full compliance with the requirements expressed which necessitate according in full measure to the accused "a fair and impartial jury trial," wholly uninfluenced by and irrespective of his con-

dition or the opinion of the reviewing judges as to his guilt.

But other substantial reasons impelling a similar conclusion are to be found in our own legislation. A well-established principle of statutory construction is that all statutes *in pari materia* must be taken together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates. *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111; *Chappell v. Lancaster County*, 84 Neb. 301; *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93.

Sections 29–2020, 29–2101, 29–2102, 29–2103, 29–2306, 29–2308, Comp. St. 1929, are statutory provisions relating to criminal procedure, and provide for the review of errors of trial courts.

These sections respectively provide (1) for the perpetuation of records of trial errors to be available on review, and indicate the extent that evidence adduced at the trial shall be preserved for that purpose; (2) for redress by trial court, and review by supreme court, of trial errors challenged by a motion for new trial based on one or more of six distinct statutory grounds (of which the second includes "misconduct of the * * * prosecuting attorney," and the fourth is: "That the verdict is not sustained by sufficient evidence or is contrary to law"); that motions for new trial shall be prepared, presented and heard as therein prescribed; (3) define the prerequisites by which the powers of the reviewing court may be invoked; (4) regulate the administration of relief in such error proceedings by this tribunal in cases where the errors in the trial have been preserved in the record and presented in strict accord with the preceding sections.

A careful examination will disclose that none of these sections in any manner attempts to, or does, modify or change the import of any other. Being *in pari materia*, they must be construed as correlated and harmonious.

Section 29-2020, Comp. St. 1929, provides that the taking and preparing of bills of exceptions shall be governed by the rules in civil cases, but prescribes as applicable alone to cases involving the fourth ground of a motion for new trial: "Where the ground of exception is that the verdict is not sustained by sufficient evidence, or is contrary to law, and the court has overruled a motion for a new trial made on that ground, the bill of exceptions shall set out the evidence." As to other cases no requirement is prescribed save as may be required in civil cases, which is: "A bill of exceptions is sufficient if it contains all of the record of the proceedings to be reviewed necessary to explain the exception taken." *Sanford v. Modine,* 51 Neb. 728. See *Dietrichs v. Lincoln & N. W. R. Co.,* 12 Neb. 225.

Legislative intent could not be more clearly expressed than that, when a record prepared in strict compliance with the provisions referred to as governing the preparation of the record preserving and making available the errors of the trial court for the purposes of review is presented to this court for its action under section 29-2308, Comp. St. 1929, such bill of exceptions must be deemed ample and sufficient "upon an examination of the entire cause" presented thereby for us to judicially determine whether a "substantial miscarriage of justice has actually occurred." There is, therefore, no statutory requirement that directs the preservation and presentation of all the evidence adduced on the trial of the merits in a criminal case where misconduct of the prosecuting attorney is relied on for reversal. Indeed, the facts involved may be such as to require the entire record to be limited to affidavits as provided by section 29-2102, Comp. St. 1929. Thus the thought that, in order to determine whether "substantial miscarriage of justice" has occurred in cases involving misconduct of the prosecuting attorney, there must be an examination of all the evidence relating to the merits and a substantial trial *de novo* to ascertain the guilt or innocence of the accused by the reviewing court, is not

only unjustified by the language of section 29-2308 but involves an express violation of the mandatory provision of the previous sections above referred to, in effect denies the accused the benefits of a fair jury trial and violates the safeguards established by the Constitution. The majority opinion and the action of this court in *Cooper v. State*, 120 Neb. 598, strictly and properly respond to the constitutional and statutory obligations imposed on this tribunal, and upon reexamination the doctrine of that case is approved.

It follows that in the present case, it plainly appearing that the accused has not been accorded a fair trial and that a substantial miscarriage of justice has occurred therein, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

Rose, J., dissents.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF, V. AK-SAR-BEN EXPOSITION COMPANY, DEFENDANT.

AK-SAR-BEN EXPOSITION COMPANY, APPELLEE, V. C. A. SORENSEN, ATTORNEY GENERAL, ET AL., APPELLANTS.

FILED MAY 22, 1931. NOS. 27083, 27172.

1. Injunction: REPEATED VIOLATIONS OF PENAL STATUTES. "A wrong arising out of repeated violations of a penal statute and harmfully affecting the rights and interests of people generally throughout the state, when committed by a corporation engaged in the public service, is a public wrong which may be enjoined by the supreme court in an original suit in equity wherein the state is plaintiff." *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851.
2. Gaming. "The statute creating the state racing commission does not authorize the *pari-mutuel* system of betting in connection with horse races." *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851.
3. ———. "The *pari-mutuel* system of betting on horse races,

when in actual operation, is a game of chance, a lottery, likewise gambling, and is unlawful." *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851.

Original action by the state to enjoin defendant from operating gambling. *Injunction allowed.*

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

C. A. Sorensen, Attorney General, E. B. Perry and *Irvin Stalmaster,* for plaintiff and appellants.

Mullen & Morrissey, Herman Aye and *Gaines, McGilton, Van Orsdel & Gaines, contra.*

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

PER CURIAM.

Case No. 27083 is an action originally brought in this court, seeking to enjoin the respondent in that action from operating a lottery and gambling scheme and device. A restraining order was issued. Motion to vacate the same was overruled, and a temporary injunction allowed. See *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851.

Case No. 27172 originated in the district court for Douglas county and is an action to enjoin the county attorney of Douglas county and the attorney general of Nebraska from instituting criminal prosecutions to suppress gambling in connection with horse racing conducted by the Ak-Sar-Ben Exposition Company. There was a default decree entered for plaintiff, as prayed, which the trial court later refused to vacate. On appeal to this court this judgment was reversed, and the cause retained and consolidated with Case No. 27083. See *Ak-Sar-Ben Exposition Co. v. Sorensen,* 119 Neb. 358. Later a demurrer to the petition in Case No. 27083 was overruled, and thereafter the respondent answered, raising an issue of fact. Honorable W. T. Thompson was appointed referee to take evidence, make and report findings of fact and conclusions

of law, which duties he has performed. The causes are now before us on motion to confirm his report, which contains the following findings and conclusions:

"Findings of Facts.

"From the testimony given, which is attached to and made a part of this report and marked Exhibit 'A', it is found that all the material issues raised by the pleadings should be and are resolved in favor of the plaintiff and against the defendant, and that the *pari-mutuel* system of raising money at and from its race meets was sanctioned and carried on by the defendant, through its officers, managers, agents and servants, with the apparent approval of the state racing commission from and after the year 1921 down to the year 1929, and that defendant, by and through its officers, managers, agents and servants, was threatening and intending to continue the operation of said *pari-mutuel* system in connection with its race meets at the time of the commencement of this action, and would have continued to operate the same unless enjoined by this court from so doing.

"Conclusions of Law.

"I. That the attorney general, upon his own initiative as the principal law officer of the state of Nebraska, and the head of the department of justice of the state, had and has full right and lawful authority to bring and prosecute this action in the name of the state of Nebraska, without authorization of the governor or other state officer.

"Article II, chapter 53, Comp. St. 1922; *State v. Pacific Express Co.*, 80 Neb. 823; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52; *Attorney General v. Delaware & B. B. R. Co.*, 12 C. E. Green (N. J.) 631; Pomeroy, Equity Jurisprudence (3d ed.) sec. 1093; *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361; *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425; *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851.

"II. It is urged by defendant that the petition does not state facts sufficient to state a cause of action because it

seeks to restrain the commission of a crime. The petition of the plaintiff states a good and sufficient cause of action against the defendant, entitling plaintiff to the injunctive relief prayed for, when proved. *State v. Ak-Sar-Ben Exposition* Co., 118 Neb. 851; *In re Debs,* 158 U. S. 564, 584, wherein it is held and said, *inter alia:* 'Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. *The obligations which it is under to promote the interest of all, and to prevent the wrong-doing of one resulting in injury to the general welfare, is of itself sufficient to give it a standing in court.*' This principle was sanctioned and approved by this court in *State v. Pacific Express Co.,* 80 Neb. 823. By the overruling of the demurrer to the petition in the instant case, one of the grounds of which was that the petition did not state facts sufficient to constitute a cause of action, and in the denial of the motion to vacate the temporary restraining order issued therein, this court has, in effect, ruled that the petition of plaintiff states a cause of action entitling it to injunctive relief. *State v. Ak-Sar-Ben Exposition Co.,* 118 Neb. 851. By such ruling and opinion by Judge Rose in the case at bar, it appears that the majority opinion of the court in *State v. Maltby,* 108 Neb. 578, upon which counsel for defendant base their contention that the petition does not state a cause of action, has been either overruled, or the principle announced therein is inapplicable to the facts in the present case.

"In one respect, moreover, the ruling in the *Maltby* case is consistent with the claimed right of the state to injunctive relief in this case, wherein it held: 'A court of equity may, at the instance of properly constituted authority, issue an injunction in the case of a public nui-

sance, when its issuance will give more complete relief than can be afforded in a court of law.' As above found, plaintiff has alleged and proved that defendant has established and maintained a gaming device which rises to the rank of a public nuisance. Many public nuisances and the maintenance thereof are punishable as misdemeanors. Nevertheless, the books are full of instances where courts of equity have abated by injunction such nuisances, because the relief was more adequate and complete than that afforded in prosecutions under penal statutes. *In re Debs, supra,* it was said: '"The jurisdiction of the court of chancery with regard to public nuisances is founded on irreparable damage to individuals, or the great public injury which is likely to ensue." * * * Indeed, it may be affirmed that in no well-considered case has the power of the court of equity to interfere by injunction in cases of public nuisance been denied, *the only denial ever being that of necessity for the exercise of that jurisdiction under the circumstances of the particular case.*'

"There are many public nuisances besides those named in the statute. This court has recognized the right of courts of equity to abate those named in the statute, even though the maintenance thereof constituted the bases for criminal prosecutions. *Donovan v. Union P. R. Co.,* 104 Neb. 364, was a suit in equity to abate a public nuisance which consisted in fencing up and otherwise obstructing a public highway, acts declared by section 8845, Rev. St. 1913, to be penal in character. Nevertheless, the nuisance was abated therein. This was done, manifestly, because equity afforded a more adequate remedy than actions at law would afford in the nature of penal prosecutions. Equity has recognized that penal prosecutions for the maintenance of public nuisances are not necessary precedent conditions for invoking the equity powers of the court in such cases. In *Chicago, B. & Q. R. Co. v. Davis,* 111 Neb. 737, this court held, *in hæc verba,* that 'an injunction may issue * * * even though the effect be to restrain the commission of a crime.'

"III. The *pari-mutuel* system pleaded and proved by the plaintiff as having been set up and maintained by the defendant in connection with its racing meets was and is inhibited by the Constitution (section 24, art. III) and the statutes of the state (sections 13, 9819, 9821, Comp. St. 1922) and constituted a public nuisance.

"IV. That neither in the issuance, nor in the keeping in force and effect, of the restraining order issued by this court, June 10, 1929, has this court violated the comity existing between it and the district court (courts of concurrent jurisdiction in this class of cases), nor has this court thereby deprived defendant of any of its rights either under the Constitution of this state, or under the Fourteenth Amendment to the Constitution of the United States.

"V. Finally, it is concluded that the temporary injunction granted by this court, June 17, 1929, should be made perpetual."

From an examination of the record, we are satisfied that each finding of fact is supported by the evidence and each conclusion of law is sound. The report is, in all respects, approved and confirmed.

The referee is hereby allowed the sum of $500 for his services, to be taxed as part of the costs.

The temporary injunction heretofore issued by this court in Case No. 27083 is hereby made perpetual, and, since the conclusions reached disclose that plaintiff in Case No. 27172 was not entitled to any relief sought therein, that action is hereby dismissed.

JUDGMENT ACCORDINGLY.

KATIE PFEIFER, APPELLEE, V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT.

FILED MAY 22, 1931. No. 27767.

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

Frederick L. Allen, Brown, Fitch & West and *Wills & Wills*, for appellant.

William Schenk, W. L. Brennan and *J. A. Donohoe, contra.*

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

PER CURIAM.

This is an action on a life insurance policy by the beneficiary named therein. The defense was that the insured had committed suicide and, under the provisions of the policy, no liability existed. The trial resulted in a verdict and judgment thereon for plaintiff. Defendant has appealed.

Insured lost his life by reason of being run over on the highway by an automobile. Defendant contends that insured threw himself in front of the automobile, with intent to commit suicide. The evidence with respect to the manner in which the injury occurred, resulting in insured's death, is such that reasonable minds might, in the view of this court, draw different conclusions therefrom. The jury might, we think, have reasonably drawn the inference that insured was intending to flag or stop the automobile. Whether that was his intention, or it was his intention to commit suicide, was a question of fact to be drawn from the facts proved. The jury were the triers of fact. It was for them to determine which inference should be drawn from the facts proved. Their finding is conclusive on this court.

We find no error in the record. Judgment

AFFIRMED.

E. C. COLE, RECEIVER, APPELLEE, V. ELISHA C. SWIGERT, APPELLANT.

FILED MAY 22, 1931. No. 27773.

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

M. F. Harrington and *George M. Harrington* for appellant.

James C. Quigley, I. D. Beynon and *W. A. Crossland, contra.*

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

PER CURIAM.

This is an action brought by the plaintiff as receiver of the American State Bank of Merriman, Nebraska, to recover an alleged double liability of defendant as a stockholder in the insolvent bank. The defendant objected in the district court to trial of the case as an equity cause. By stipulation a jury was waived, and trial was had to the court as an action at law. Judgment for the plaintiff as prayed. Defendant appeals.

No assignments of error appear in appellant's brief as required by rules of this court. Appellant, therefore, is not entitled to review in this case as a matter of right, but only as a matter of grace. It may be said, however, that we have carefully examined the record and find the same to be without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

FRED LISKE, APPELLANT, V. E. C. KAVANAUGH, SHERIFF, APPELLEE.

FILED MAY 22, 1931. No. 27774.

Habeas corpus is not a proper remedy for the review of errors in criminal proceedings.

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

M. O. Cunningham, for appellant.

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

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

PER CURIAM.

To an information charging him with unlawful and felonious possession of intoxicating liquor, and that he had been previously twice convicted of violation of the state liquor law, Fred Liske entered a plea of guilty. The court sentenced him to imprisonment in the state penitentiary for a period of one year. He prosecuted error to this court. The judgment was affirmed. *Liske v. State,* 119 Neb. 640. Mandate was issued by this court, and judgment entered thereon in the trial court. Mittimus was issued to the sheriff, and by him Liske was taken into custody, but before he could be conveyed to the state penitentiary he instituted this proceeding. After hearing, the trial court denied a discharge, and he has appealed to this court.

Applicant contends that the information on which he was convicted did not charge an offense against the law. That question was necessarily involved in the former error proceeding, and was determined adversely to his contention. Every question concerning the legality of his conviction could and should have been raised and presented in the error proceeding. The former judgment of this court precludes any further inquiry into that question.

Habeas corpus is not a proper remedy for the review of errors in criminal proceedings. Under the facts disclosed by this record, the institution of habeas corpus proceedings was wholly unjustified. It was an unwarranted interference with the due administration of justice, and tends to improperly obstruct the carrying out of the judgments of the court duly pronounced.

The judgment of the district court is right.

AFFIRMED.

KNUTE C. ENGEN, APPELLEE, V. UNION STATE BANK OF HARVARD ET AL., APPELLEES: FIRST TRUST COMPANY OF LINCOLN, APPELLANT.

FILED MAY 22, 1931. No. 26236.

1. **Treaties**: HOMESTEAD: ALIENATION. That part of the treaty between the United States and Norway, providing that "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects either by testament, donation, or otherwise, in favor of such persons as they think proper," applies to real estate, but does not override the law of Nebraska as to the disposition of homestead property acquired by a resident alien of Norway subject to restrictions imposed by the homestead law of the state. *Todok v. Union State Bank*, 281 U. S. 449, reversing in part *Engen v. Union State Bank*, 118 Neb. 105.
2. **Courts**: CERTIORARI. A writ of certiorari from the supreme court of the United States to the supreme court of the state calls for a record of the proceedings and judgment in the cause for the purpose of determining federal questions only, when not mingled with other questions arising exclusively under state law.
3. ———: MANDATE FROM FEDERAL SUPREME COURT. A mandate remanding a cause to a state supreme court for further proceedings not inconsistent with the opinion of the supreme court of the United States leaves open for further consideration undetermined issues arising exclusively under state law, if not mingled with any federal question considered or determined by either court.
4. **Homestead.** A rural homestead, "exempt from judgment liens,

and from execution or forced sale," is defined by statute as "A homestead not exceeding in value two thousand dollars, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land." Comp. St. 1929, sec. 40-101.

5. Aliens: TITLE TO REALTY. The legislature has placed restrictions on the right of nonresident aliens to acquire and hold title to or interests in land in Nebraska. Comp. St. 1929, sec. 76-502.
6. Dower. Before the estate of dower was abolished by statute, it was the policy of the law in Nebraska to confine such estate to lands of which the husband died seised.
7. Aliens: PROPERTY RIGHTS. Prior to the amendment of the state Constitution in 1920, it contained the provision that "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property," but this provision did not apply to nonresident aliens. Const. art. I, sec. 25.
8. Homestead. Within the meaning of the homestead law, a "homestead" is the place where the home is and where members of the family reside.
9. ———: NONRESIDENT ALIENS. The homestead law was enacted for the benefit of resident citizens and resident aliens and in furtherance of the public welfare, nonresident aliens not being within its terms.
10. ———: CONVEYANCE. The statutory provision requiring the conveyance of a married person's homestead to be executed and acknowledged by both husband and wife was not intended by the legislature to apply to an instance where the wife was always a nonresident alien without any intention of ever making the homestead her dwelling place or home and who was never in this country.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Reversed, with directions.*

Hall, Cline & Williams, for appellant.

Hainer, Craft, Edgerton & Fraizer, H. G. Wellensiek, J. H. Grosvenor, Butler & James and *Brown, Baxter, Van Dusen & Ryan, contra.*

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

ROSE, J.

This action was begun by Knute C. Engen to cancel two deeds, each for 80 acres of land in Hamilton county. Both deeds were executed by plaintiff's father, Christian Knudson, sometimes called "Christian Engen." In one of the deeds Anna S. Brown, a niece of grantor, and her husband were named as grantees, and in the other deed Bertha M. Megrue, another niece of grantor, and her husband were named as grantees. Fraud in procuring the deeds was the ground of equitable relief sought by plaintiff. Grantees in each deed transferred their title to the Union State Bank of Harvard and the latter deeded both tracts to its president, Theodore Griess, who afterward procured from the First Trust Company of Lincoln two loans, securing one loan by a mortgage for $4,500 on the 80-acre tract deeded by Knudson to the Browns and the other loan by a mortgage for $5,000 on the 80-acre tract deeded by Knudson to the Megrues. Knudson died intestate, leaving surviving him his wife, Mari Tollefsen Todok, and his son, Knute C. Engen, plaintiff. The defendants named in the petition were Union State Bank of Harvard, Leroy A. Megrue and Bertha M. Megrue, his wife, Robert E. Brown and Anna S. Brown, his wife, and H. G. Thomas, administrator of the estate of Christian Knudson, deceased, Theodore Griess, First Trust Company of Lincoln and Mari Tollefsen Todok.

The fraud charged by plaintiff and the alleged invalidity of the deeds were put in issue by formal pleadings of grantees and mortgagee. Mari Tollefsen Todok, widow of Knudson, presented an answer, likewise attacking the deeds and mortgages as fraudulent and void. She also filed a cross-petition alleging that the land described in the deeds was the homestead of herself and her husband at the time of the latter's death and praying for a decree establishing her homestead rights and her title to an undivided one-half interest in the real estate.

The validity of the deeds and the mortgages and the

existence of the widow's homestead were well defined issues on which the parties to the litigation went to trial in the district court.

Knudson and wife were natives of Norway. Neither of them ever became a naturalized citizen of the United States. The wife was never in this country. After their marriage they lived in Norway for a time. Knudson left his native land in 1868 and never returned. He settled on the land in controversy in 1878, where he continuously resided until his death, August 6, 1923. Plaintiff, the son, left his home and mother in Norway in 1893, when he was 23 years of age, and joined his father in Nebraska. A year later he permanently left his father's residence. After 1887 the father and mother of Knudson resided with him in his home on the land described in the petition, the date of his father's death being January 31, 1900, and that of the mother April 8, 1906. Knudson lost his sight. His nieces and their husbands cared for him and in consideration for their services and care he executed the deeds in controversy, July 17, 1923.

Upon a trial of the cause the district court found that the charges of fraud in the procuring of the deeds executed by Knudson were unfounded but entered a decree canceling them on the ground that they purported to convey the homestead of Knudson and wife by means of an instrument in which the wife did not join, thus violating the statute containing the following provision:

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Comp. St. 1929, sec. 40-104.

From the decree of the district court, the First Trust Company of Lincoln and Van E. Peterson, receiver of the Union State Bank of Harvard, appealed to the state supreme court. The latter, upon a trial *de novo*, found that Knudson had never been naturalized as a citizen of the United States; that he acquired the land as a resident

alien; that he was a subject of Norway at the time he executed the deeds; that he had a legal right to make the conveyances under the existing treaty between the United States and Norway, notwithstanding the statutes of Nebraska and the failure of his wife to join him as a grantor. The judgment below was accordingly reversed, with instructions to the district court to enter a decree dismissing the petition of plaintiff and the cross-petition of Mari Tollefsen Todok and adjudging the deeds and mortgages valid and enforceable. *Engen v. Union State Bank,* 118 Neb. 105.

Upon application of Mari Tollefsen Todok and plaintiff, the supreme court of the United States issued a writ of certiorari to the supreme court of Nebraska to certify and transmit for the purposes of review the proceedings and judgment in *Engen v. Union State Bank,* 118 Neb. 105. See *Todok v. Union State Bank,* 280 U. S. 546. That part of the treaty involved contains the following provision:

"The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper." 8 U. S. St. at Large, p. 64, art. VI.

The original instrument was written in French. The term "goods and effects" is a translation of the words *"fonds et biens."* In the French text, which controls the interpretation, the word *"biens"* includes real estate. Both courts so held, but the supreme court of the United States ruled that the treaty, thus construed, did not override the law of Nebraska as to the disposition of homestead property, acquired by Knudson subject to the restrictions of the homestead law of the state, reversed the judgment of the state supreme court and remanded the cause for further proceedings not inconsistent with the opinion containing those rulings. *Todok v. Union State Bank,* 281 U. S. 449.

In view of the opinion of the supreme court of the United States, is the state supreme court still at liberty,

in the further proceedings ordered, to determine the question as to the right and authority of Knudson, under the law of Nebraska, to dispose of the lands in controversy independently of his alien, nonresident wife? This question was ably argued by counsel on both sides after the cause reappeared in the supreme court of the state. Though the district court held that the deeds executed by Knudson were void under the homestead law of Nebraska, the supreme court of the state did not directly pass on that question, but based its decision on the sole ground that the treaty, notwithstanding any Nebraska statute, gave Knudson, an alien, the right to dispose of his land in favor of such persons as he thought proper. If his individual right to do so was not inhibited by the homestead law of the state, that question is still open for determination, unless it was foreclosed by the opinion of the supreme court of the United States.

The appeal from the district court presented a federal question and also a different question depending entirely on state law. The determining factors involved in the two questions were not mingled in the sense that the adjudication of the federal question necessarily determined the question arising under the state law. The writ of certiorari called for the record for the purpose of determining the federal question only. Jurisdiction for that purpose was limited to the interpretation of the treaty and to the resulting judgment. These fundamental principles have often been stated by the highest court in the land. It is sufficient to cite *Sauer v. City of New York*, 206 U. S. 536, 546, and *Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129. The limitations of federal jurisdiction were obviously in mind when the chief justice of the supreme court of the United States made the following observations in his opinion (281 U. S. 449):

"We are not called upon to decide as to the validity under the homestead law of Nebraska of a deed of the homestead by the husband when the wife is an alien who

has never come to this country and made the homestead her home. * * * The only question before us is as to the construction of the treaty."

Respecting to the fullest extent the opinion and judgment of the supreme court of the United States, it seems clear that the homestead question was left open for further proceedings under state law.

Are the Knudson deeds void because they were not executed by both husband and wife? The answer depends on the meaning and purpose of homestead rights and on the statutes relating to or affecting the legislation on this subject. The act providing that "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife" must be construed with other provisions of the homestead law and with the statutes imposing restrictions on the right of nonresident aliens to acquire and hold title to or interests in real estate in Nebraska. Comp. St. 1929, secs. 40-104, 40-101, 76-502. A rural homestead, "exempt from judgment liens, and from execution or forced sale," is "A homestead not exceeding in value two thousand dollars, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land." Comp. St. 1929, sec. 40-101. By another act the legislature placed restrictions on the right of nonresident aliens to acquire and hold title to or interests in land. Comp. St. 1929, sec. 76-502. Before the estate of dower was abolished by statute, it was the policy of the law in Nebraska to confine such estate to lands of which the husband died seised. A wife had no dower interest in Nebraska land conveyed by her husband alone, while she was a nonresident. *Atkins v. Atkins*, 18 Neb. 474; *Miner v. Morgan*, 83 Neb. 400. Prior to the amendment of the state Constitution in 1920, it contained the provision that "No distinction shall ever be made by law between resi-

dent aliens and citizens in reference to the possession, enjoyment or descent of property." Const. art. I, sec. 25. This provision did not thus protect nonresident aliens. The two classes of aliens are not on the same footing in respect to homestead rights. Legislative restrictions on the right of nonresident aliens to acquire interests in Nebraska lands point to the public policy of the state and to the intent of the lawmakers in regard to this subject. Related provisions of homestead and other laws should be construed together with a view to harmonizing and giving effect to all within the rule of reason. When Knudson acquired title to the land conveyed by him he was a resident alien. He was permitted to do so under the constitutional provision quoted. He held the land in his own name until he executed the deeds therefor. A homestead within the meaning of the statute is the place where the home is and where the members of the family reside. It consists of "the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated," says the statute. Comp. St. 1929, sec. 40-101. The meaning of the word "homestead" is indicated by the following excerpts from former adjudications:

"Our statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells." *Meisner v. Hill,* 92 Neb. 435.

"As our statute uses the term 'homestead,' it means the house and parcel of land where the family reside and which is to them a home." *Anderson v. Schertz,* 94 Neb. 390.

The homestead law was enacted for the benefit of resident citizens and resident aliens and, in furtherance of the public welfare, nonresident aliens not being within its terms. Invited by the Constitution of the state, Knudson settled on the Hamilton county farm and acquired for himself in his own name the title thereto. In doing so he suffered the privations and hardships of a pioneer in a strange land. His wife did not aid or comfort him in the work of this enterprise. She did not renounce her alle-

giance to Norway. For fifty years she was separated from her husband in her home beyond the sea. She never saw the real estate she now claims as her homestead. When her husband was old and blind she was not present to minister to him as a wife. After his death she challenged his right to dispose of his land, even to purchase care for himself during the unending night of darkness into which he had entered. Under the circumstances her residence did not follow that of her husband. She never made her home in his dwelling-house or on his land. The place was never her homestead, nor the homestead of her husband and herself, within the meaning of the homestead law, and she was not, therefore, a necessary party to the deeds. The statutory provision requiring the conveyance of a homestead to be executed by both husband and wife applies to a homestead in which both have a homestead interest, and was not intended by the legislature to apply to an instance like the present, where the wife was always a nonresident alien without any intention of ever making the homestead her dwelling-place or home and who was never in this country. When executing the deeds, Knudson was the only person having any legal interest in or title to the land thus conveyed. He never thereafter claimed it as his homestead. His deeds were valid and conveyed the entire estate. This conclusion is not without precedent. *Cunningham v. Marshall,* 94 Neb. 302; *Tromsdahl v. Nass,* 27 N. Dak. 441.

For the reasons stated, the judgment of the district court is reversed, the petition of plaintiff and the cross-petition of Mari Tollefsen Todok dismissed at their costs in both courts, and the cause is remanded for a decree adjudging all deeds and mortgages, to which reference herein has been made, valid and enforceable.

REVERSED.

NEBRASKA CENTRAL BUILDING & LOAN ASSOCIATION, APPELLANT, V. H. J. HUGHES & COMPANY: H. A. MARR GROCERY COMPANY, APPELLEE: WILLIAM H. PITZER, CROSS-PETITIONER, APPELLANT.

FILED MAY 22, 1931. No. 27761.

1. **Mortgages: MERGER.** Where one acquires, at the same time, two unequal estates in realty, no merger occurs, 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.
2. **Building and Loan Associations: ASSIGNMENTS.** The provision in section 8-309, Comp. St. 1929, against assigning or transferring evidence of debt in favor of building and loan associations, was inserted for the protection of the borrowing member and does not prevent an equitable transfer of such evidence of debt by the association.
3. **Bills and Notes: TRANSFERS.** The holder of nonnegotiable paper may transfer an equitable title thereto to another, but the transferee takes such paper subject to any defense that could have been urged against it in the hands of the original payee.

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

Pitzer & Tyler and *Lloyd E. Peterson,* for appellants.

Thomas E. Dunbar, contra.

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

GOOD, J.

Plaintiff, a mortgagee, instituted this action for the foreclosure of a real estate mortgage for the benefit of cross-petitioner Pitzer, alleging that the latter was the equitable owner of the mortgage. Defendant Berger, the mortgagor, made default. H. J. Hughes & Company, defendant, filed answer and cross-petition, setting up a lien by virtue of a judgment obtained against Berger, and alleging that plaintiff's mortgage had been paid and discharged and was no longer a lien on the premises, and prayed for a first

lien. Cross-petitioner Pitzer intervened and alleged that he was the equitable owner of the mortgage sought to be foreclosed in the name of plaintiff, and joined in the prayer of plaintiff's petition. The trial court found against plaintiff and cross-petitioner Pitzer, and awarded a first lien to H. A. Marr Grocery Company, successor in interest to H. J. Hughes & Company. Plaintiff and cross-petitioner have appealed.

In March, 1925, defendant Berger executed a mortgage for $5,000 to the plaintiff, to secure a loan of that amount. In February, 1926, defendant H. J. Hughes & Company, now H. A. Marr Grocery Company, obtained in the district court for Otoe county a judgment against Berger, which, subject to the above mortgage, became a lien against the mortgaged premises. In January, 1927, defendant Berger, by warranty deed, conveyed the mortgaged premises to cross-petitioner Pitzer, "subject to existing mortgage to Nebraska Central Building & Loan Association and all other liens of record." About September 15, 1927, Pitzer paid to the plaintiff the amount then due on its mortgage, and took the mortgage and note thereby secured, uncanceled, together with a release of the mortgage from the plaintiff and a letter from the plaintiff authorizing Pitzer to foreclose the mortgage at his own expense, in the name of the plaintiff, for Pitzer's benefit. Later, this action was instituted for the foreclosure of the mortgage.

The first question presented is whether the payment to plaintiff of the amount due upon its mortgage by Pitzer, he being then the owner of the equity of redemption, amounted to a payment and discharge of the mortgage.

It is evident, from the letter accompanying the note and mortgage at time of payment, that it was not the intention to discharge the mortgage, but that it should be held by Pitzer for his protection. The letter authorized him to foreclose the mortgage, for his benefit and at his own expense, in the name of the plaintiff, mortgagee. Clearly, it was not intended as a payment and discharge of the

mortgage. It is urged, however, that, by the acquisition of the mortgage in this manner, there was a merger of the lesser in the greater estate, or that the mortgage was merged into the fee simple title held by Pitzer.

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 jurisdiction 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 this record, it is clear that there was no merger intended by Pitzer.

Defendant H. A. Marr Grocery Company cites and relies upon a number of authorities where the holder of the fee, in taking conveyance, has, in that instrument, assumed and agreed to pay an existing lien. If that had been the case here, there would have been a direct obligation of Pitzer to pay the mortgage. In the instant case, however, Pitzer did not assume and agree to pay the mortgage. He was not personally liable thereon to the mortgagee for its payment. The authorities relied on are not in point.

Defendant H. A. Marr Grocery Company calls attention to the statute regulating building and loan associations, and particularly to section 8-309, Comp. St. 1929. That section, so far as applicable, is as follows: "No evidence of indebtedness taken by said association for the return of any loan shall be negotiable in form, and whatever be its form, every such evidence of indebtedness shall be nonnegotiable in law, and no such debt, or evidence of debt shall be assignable or transferable in any manner *so as to prevent the discharge thereof by payments to the association,* except that bonds and interest-bearing obligations in which temporary investments may be made as hereinbefore provided, may be converted into cash in due course." (Italics ours) It is contended that this provision entirely prevents a transfer of a building and loan mortgage, given by one of its members, to secure a loan of its funds to such member.

We think the provision of the statute against assignments was made for the protection of the borrowing member of the association, and was designed to permit him to make his payments in instalments to the association. In the instant case, Berger had transferred all his interest in the real estate. He has not sought, and of course, under the circumstances, would not seek, to make payments to the association. In any event, no one but the mortgagee

could complain of an equitable transfer of the mortgage. We think it is a generally accepted doctrine that the holder of nonnegotiable paper may transfer to another an equitable title to paper, but the transferee would take it subject to any defenses that could be urged by the maker.

It is evident that Pitzer intended to acquire the equitable title to the mortgage by the payment of the money to the mortgagee, and that the mortgage was not thereby discharged. The trial court should have awarded a foreclosure of the mortgage for the benefit of Pitzer as the equitable owner thereof.

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

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLANT, V. LOUIS KNUDTSEN, APPELLEE.

FILED MAY 22, 1931. No. 27530.

1. **Courts: JURISDICTION.** "The power to hear and determine a matter in controversy is jurisdiction. It is *coram judice*, whenever a case is presented which brings the power into action. It may be exercised according to the rules of the common law, or by special direction, or informally." *Smiley v. Sampson*, 1 Neb. 56.
2. **Judgment: CONCLUSIVENESS.** The action of a tribunal created by statute, where it has jurisdiction of the subject-matter and the parties, is conclusive unless reversed or modified in the mode provided by law.
3. **Injunction: ANIMALS: TUBERCULIN TEST.** District courts of this state may, by injunction, compel the observance of, and by that remedy enforce the provisions of, chapter 12, Laws 1927.
4. **Animals: TUBERCULIN LAW: CONSTITUTIONALITY.** Chapter 12, Laws 1927, was not enacted in contravention of section 14, art. III of the Constitution of Nebraska, nor does its terms involve an unconstitutional delegation of legislative power.
5. **Appeal: CONSTITUTIONALITY OF STATUTE.** When a statute is claimed to be invalid on the ground that its terms and pro-

visions are in contravention of the Fourteenth Amendment to the Constitution of the United States, and operate to deprive a suitor of his property without due process of law, such invalidity must be presented by the pleadings, or in some other form, in the trial court to be of any avail here. Such objections cannot be raised for the first time in the appellate court.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Reversed, and decree entered.*

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

Mullen & Morrissey and *P. F. O'Gara, contra.*

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

EBERLY, J.

This is an action brought by the state of Nebraska, on the relation of the attorney general, against the defendant, to enjoin the latter from obstructing and preventing the agents of the state from applying the tuberculin test to defendant's breeding cattle and otherwise carrying out the provisions of chapter 12, Laws 1927.

As a much abbreviated outline of the proceedings presented for review, it may be said that the petition of the attorney general sets forth: "That between November 1, 1926, and April 6, 1927, 1430 residents of Cedar county, Nebraska, representing more than 60 per cent. of the owners of the breeding cattle of said county, who were owners of 21,989 breeding cattle, which represented more than 51 per cent. of all the breeding cattle within said county, as shown by the report of the county assessor of said county for 1926, signed and presented to the department of agriculture of the state of Nebraska, in pursuance of and conformity with the provisions of section 1, chapter 7 of the Laws of Nebraska for 1925, petitions requesting that the county area plan for eradication of bovine tuberculosis be established for said county, and that all herds of

breeding cattle within said county be examined and tested for tuberculosis," and thereafter to be dealt with as provided by that act.

This pleading also included a detailed recital of all the steps taken pursuant to the petitions thus filed by the cattle owners of Cedar county, first referred to, including hearings had, notices given, judgments and orders made and entered, which as to notices, judgments and orders are set forth verbatim, all with such completeness and certainty that it may safely be said that, if supported by evidence, disclose a full and complete and proper compliance with the terms of the controlling legislation.

And this in turn, it is alleged, supports and justifies the determination and final order made and entered by the Nebraska department of agriculture on the 30th day of July, 1927, that Cedar county, Nebraska, be, and it is hereby declared, an area for inspection, examination and testing of cattle for tuberculosis, under the provisions of chapter 12, Laws 1927, and the subsequent entry of an order by the department of agriculture of Nebraska fixing a time for the commencement of testing cattle in Cedar county, and giving due notice thereof as provided in said act. In addition to setting forth and alleging full and complete performance of the provisions of the governing legislation, the petition also sets forth the several acts of the defendant refusing compliance with the law and interfering and obstructing its enforcement, and closes with a prayer for appropriate injunctive relief.

The main issues tendered by the pleadings, entitled "Answer" and "Cross-Bill and Answer," of the defendant, and arising during the trial below, as asserted by defendant and discussed in his brief, may be epitomized as follows: (1) That injunction was not available to plaintiff because the acts sought to be enjoined were by the provisions of section 13, art. 8, ch. 12, Laws 1927, made punishable by fine, or by imprisonment, or both, and therefore a plain adequate remedy was afforded to plaintiff; (2)

that chapter 7, Laws 1925, as well as chapter 12, Laws 1927, under which the Nebraska department of agriculture assumed to act, were never in force in Cedar county; (3) that chapter 7, Laws 1925, and chapter 12, Laws 1927, were each unconstitutional and void, in that each violated section 14, art. III of the Constitution of Nebraska; (4) that these acts were also void as involving a delegation of legislative power; (5) that the plaintiff and all officers and employees of the state have no power, right or authority to administer the tuberculin test in Cedar county, and the attempt so to do is, and was, to unlawfully deprive the defendant of his property without due process of law in violation of the Constitution of the state of Nebraska and the Constitution of the United States.

The defendant, at the conclusion of his pleading, prays that plaintiff's action may be dismissed, and that injunction may be issued for his protection.

To this pleading a reply in the nature of a general denial was filed by the state. There was a trial on the merits in the district court, evidence was received, and judgment entered, wherein that court "finds that the evidence is insufficient to warrant the relief prayed for in the petition," and also "finds generally for the defendant and against the plaintiff," and dismisses the plaintiff's petition, taxing costs to the petitioner.

The trial court in effect denied the defendant's prayer for an injunction. The plaintiff prosecutes appeal, but no cross-appeal is presented on the part of the defendant.

A careful reading of the bill of exceptions discloses that with one possible exception in all respects the evidence as introduced sustains the contentions of the state. Indeed the only real controversy of fact presented by it is in connection with the attack by the defendant on the sufficiency of the initial petitions first filed with the department of agriculture, praying to have Cedar county constituted a county area for inspection. On the issue of the sufficiency of the petitions certain evidence was received over objec-

tions on part of the state, which challenged the sufficiency of the same and the truth of some of the statements therein contained, and also of the finding and order of the secretary of agriculture made thereon.

It must be conceded, however, that these initial petitions "were fair and regular on their face;" that, after their reception in the Nebraska department of agriculture, notice was given of the proposed hearing to be had thereon; that objections were filed thereto and a certain hearing had, at which it was determined, upon consideration of the evidence and pursuant to the terms of the act of 1925, that the petitions then on file therein were and are signed by 60 per cent. of the owners representing more than 51 per cent. of the breeding cattle of Cedar county, as disclosed by the last assessment rolls of said county; that the petitioners were residents of Cedar county. This order was, it appears, if erroneous, subject to review in appropriate appellate proceedings.

But the challenges to the validity of this proceeding, as now made by the defendant, are not in the nature of a review, but are essentially a collateral attack on the determination thus made by the secretary of agriculture after the giving of the notice provided by statute, the reception of evidence, and due hearing thereon.

This court is committed to the doctrine that: "The power to hear and determine a matter in controversy is jurisdiction. It is *coram judice,* whenever a case is presented which brings the power into action. It may be exercised according to the rules of the common law, or by special direction, or informally." *Smiley v. Sampson,* 1 Neb. 56. Further, the action of a special tribunal created by statute, to ascertain and declare the existence or nonexistence of certain facts, is judicial in its nature, and the determination thereof constitutes a final order which cannot be collaterally impeached. *State v. Nelson,* 21 Neb. 572; *State v. Houston,* 94 Neb. 445; *State v. Morehead,* 101 Neb. 37; *State v. Stevens,* 78 N. H. 268; 34 C. J. 519,

878. The only conclusion consistent with the pronouncements just referred to is that, if the secretary of agriculture erred in the instant proceeding in determining from evidence adduced that the petitions before him, fair and regular in form, were sufficient to authorize him to create Cedar county an accredited area for testing cattle, it was an error subject to review, if at all, by a direct proceeding; that his action and order thus made are not subject to collateral attack (*Peverill v. Board of Supervisors*, 208 Ia. 94); and that the district court in this proceeding erred in receiving evidence challenging the correctness of the determination thus made by the secretary of agriculture.

Notwithstanding the able argument presented by counsel that injunction is not a remedy available to the state in the present class of cases, we are all of the opinion that this contention is foreclosed in this jurisdiction by the previous pronouncements of this tribunal. *State v. Heldt*, 115 Neb. 435; *State v. Wallace*, 117 Neb. 588; *State v. Splittgerber*, 119 Neb. 436. In addition, section 14, art. 8, ch. 12, Laws 1927, in express terms, confers the power upon the district courts of this state, "by injunction, to compel the observation of, and by that remedy enforce the provisions of this act." It would seem that this legislation removes the subject-matter from the domain of discussion.

As to the challenge to the validity of chapter 7, Laws 1925, and chapter 12, Laws 1927, we have carefully reexamined, reapproved, and now reiterate our previous decisions which sustain the statutes referred to as being neither enacted in a manner contravening section 14, art. III of the state Constitution, nor being in fact an unconstitutional delegation of legislative power. *State v. Heldt*, 115 Neb. 435; *State v. Wallace*, 117 Neb. 588; *State v. Splittgerber*, 119 Neb. 436.

In reference to the contentions made in the briefs and at the bar on behalf of the defendant, as to the laws under consideration being violative of certain provisions

of the federal Constitution, while it may be said that this court has in the three cases last cited determined these questions adversely to the position of the defendant, still this court is committed to the view that the constitutionality of a law will not be determined on review in any case where that question was not presented in the court below. *Pill v. State,* 43 Neb. 23; *Clearwater Bank v. Kurkonski,* 45 Neb. 1; *Farmers State Bank v. Nelson,* 116 Neb. 541; *McBride v. Taylor,* 117 Neb. 381.

Conceding that the constitutionality of a statute may be raised by answer, by reply, or by objections to the introduction of evidence, yet under the rule requiring the invalidity to be distinctly pointed out, the question is not raised by a plea of the general issue. In the present case, so far as disclosed by the record, the defendant's challenge in the trial court to the validity of certain statutes involved in this case was confined to his "answer" and "cross-bill and answer."

A statute will not be declared void unless its invalidity is distinctly and clearly shown, and therefore one who alleges a statute to be unconstitutional must point out the specific constitutional provision that is violated by it. As we read the defendant's "answer" and "cross-bill and answer," construing the same as an entirety, illegal action by officials in the administration of chapter 12, Laws 1927, is charged, predicated on two grounds, only: (1) Failure to comply with the initial requirements of the act itself; (2) violation in its enactment of certain requirements of the state Constitution.

This intended action by officials, in view of the alleged invalidity of chapter 12, Laws 1927, for the reasons thus stated, if true, being thus without power, right and authority, would therefore, it may be conceded for the purpose of this opinion, result in the defendant being deprived of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. But this conclusion, as by the terms of the

pleadings of the defendant set forth, is wholly dependent and conditional on the invalidity of the act involved, when tested by the state Constitution. This court has now determined that the initial requirements of chapter 12, Laws 1927, so far as relates to Cedar county, have been complied with, and that the act itself is not invalid nor vulnerable to objections based upon the provisions of the state Constitution.

Defendant has wholly failed to allege that chapter 12, Laws 1927, is, in fact and in truth, repugnant to the requirements of the Fourteenth Amendment to the federal Constitution, or that powers conferred in terms thereby and exercisable thereunder in compliance with its stated directions and limitations would operate to deprive defendant of his property without due process of law. The record, therefore, does not disclose that the question of the repugnancy of the legislation controlling in this case was presented to the trial court in relation to the claim that the same was in violation of the Fourteenth Amendment to the Constitution of the United States. Not having been presented to the trial court, the question involved may not be properly determined by this tribunal on appeal, and is not herein decided.

In view of the record as an entirety, we are of the opinion that the trial court erred in finding generally against the plaintiff and for the defendant, and in its order dismissing plaintiff's petition.

The judgment of the district court is, therefore, reversed, and a decree hereby directed to be entered in the cause in this court finding the allegations of plaintiff's petition to be true, and enjoining the defendant as prayed for in plaintiff's petition.

REVERSED, AND DECREE ENTERED.

ED MURRAY V. STATE OF NEBRASKA.

FILED MAY 22, 1931. No. 27831.

Bail. A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is not conditioned as the statute requires, is invalid and confers no jurisdiction on the district court.

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

A. L. Tidd and *W. G. Kieck*, for plaintiff in error.

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

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

PAINE, J.

The plaintiff in error, styled hereafter as the defendant, was convicted in the county court of Cass county upon a charge of assault and battery, and he was sentenced to pay a fine of $100 and costs.

Upon the same day that sentence was rendered, which was September 9, 1930, he appeared in the county court and filed an appeal bond, which was in substance a recognizance, although it is signed by defendant with his wife as surety. The condition of this recognizance or appeal bond is "that if the said Ed Murray shall personally appear forthwith and without further notice at the district court of said Cass county, state of Nebraska, on the 24th day of November, 1930, and from day to day thereafter until the final disposition of such appeal to answer the complaint against him, and to abide the judgment of the district court, and not depart therefrom without leave until the final determination of the aforesaid cause," etc.

The transcript from the county court was filed in the district court for Cass county on December 1, 1930.

On the same day the county attorney filed a motion in district court to dismiss the appeal for the reason that the bond given for an appeal was insufficient and not perfected according to law and that the court was without jurisdiction. This motion was sustained by the court on the same day on the ground that no legal bond had been filed.

The next day the defendant filed motion for a new trial. On January 3, 1931, upon motion of the county attorney filed December 31, 1930, the motion for a new trial was stricken from the files because no trial at all had been had in the district court.

From the rulings of the trial court dismissing the appeal and overruling the motion for a new trial, the defendant has appealed to this court.

Section 29-611, Comp. St. 1929, provides that in such cases the defendant shall, within ten days after the rendition of such judgment, appear before such magistrate and enter into a written recognizance, as therein provided, conditioned "for his appearance, forthwith and without further notice, * * * from day to day thereafter until the final disposition of such appeal," etc.

This court held in *Killian v. State,* 114 Neb. 4, in a very similar case, that a recognizance given by one convicted of a misdemeanor must require his appearance "forthwith" as required by the statute above cited. In that opinion the authorities are reviewed and discussed.

The defendant relies in the main upon *Abbott v. State,* 117 Neb. 350, in which it was held that a bond was good which required the appearance of defendant on the first day of the next term of court, which was, in fact, the first day of court held thereafter in the district court, and that no objection had been made thereto until after seven terms of court had intervened.

In the case at bar it appears that the district court was in session on November 19 and defendant did not appear, nor did he appear on the date fixed in the bond, to wit, November 24, nor until December 1, when the motion to

dismiss was sustained, so the case is not to be governed by the case of *Abbott v. State, supra.*

This court has decided the identical question in *Oppfelt v. State,* 117 Neb. 549, and in *Wilcox v. State,* 119 Neb. 422.

The district court did not err in its rulings and the judgment is

AFFIRMED.

GEORGE W. SHAFER, APPELLANT, V. WILSONVILLE ELEVATOR COMPANY ET AL., APPELLEES.

FILED MAY 29, 1931. No. 27681.

1. **Equity.** A court of equity has power to determine controverted issues involving the priority of specific liens on real estate.
2. **Appeal: FINAL ORDER.** An order vacating a former decree in equity at the same term of court without determining the merits of the suit is not a final or appealable order and may be reviewed on appeal from the final judgment.
3. **Pleading.** A contract inserted in a petition as part of a cause of action controls allegations which it contradicts.
4. **Statute of Frauds: MORTGAGES.** An oral pledge of a title deed, naming a third person as grantee, and possession thereof to secure a debt do not create a valid mortgage on the real estate described in the title deed, the statute of frauds and the recording acts preventing such a lien.
5. **Judgment: VACATION.** Invalid or erroneous orders in a decree in equity may be vacated by the trial court at the same term.
6. ———: ———: **REINSTATEMENT.** Where a valid judgment in favor of plaintiff in a cause of action to which defendant has no defense is improperly vacated at the same term of court on motion of a third person, equity, in subsequent proceedings in the same cause, may require its reinstatement as of the date originally entered.
7. **Lis Pendens.** The filing and recording of a *lis pendens* does not give notice of rights under a cause of action not pleaded.
8. **Mortgages: MERGER.** Where a mortgagee purchases the fee to protect his lien from an intervening claim without any intention of merging his two estates and pursues a consistent course with that end in view, the mortgage lien is not discharged by merger.

9. **Judgment:** VACATION. A void judgment in an undetermined suit in equity may be canceled by the equity court at a later date in the same proceeding, upon proper pleadings and evidence, even after expiration of the term of court at which it was rendered.

APPEAL from the district court for Wheeler county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

Stevens & Stevens, for appellant.

J. F. Fults and *Perry, Van Pelt & Marti, contra.*

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

ROSE, J.

Plaintiff commenced this action to recover from borrowers the amount due him on loans of money to them, to impress a first lien in his favor for a debt of $2,712.20 on 680 acres of land in Wheeler county and to foreclose as security an alleged equitable mortgage thereon.

The petition contains pleas that George W. Shafer, plaintiff, from April 6, 1927, to April 18, 1927, lent to Wilsonville Elevator Company, defendant, and to its manager and principal stockholder, S. M. Bird, defendant, various sums of money aggregating $4,583.08, of which debt a balance of $2,712.20 remains due and unpaid; that as a condition precedent to the loans and for the purpose of securing the debt, the defendants named orally pledged and delivered to plaintiff a warranty deed dated December 11, 1925, conveying the land from the owners to the Wilsonville Elevator Company; that Bird orally pledged and delivered his stock as security for the loan; that the properties pledged have not been redeemed and that plaintiff claims a first lien on the land; that the First National Bank of Shenandoah, Iowa, and its receiver, H. J. Spurway, defendants, claim an interest in the land under two registered mortgages dated August 7, 1923, one for $7,700 and the other for $8,600, both of which have been paid and should

be satisfied of record; that the Peters Trust Company, M. D. Cameron, and the Omaha Trust Company, defendants, appear to have an interest in the land under a mortgage dated January 10, 1917, but not registered until October 11, 1927, after plaintiff's lien attached. Plaintiff's petition and a notice of *lis pendens* were filed in the district court for Wheeler county February 3, 1928.

After service of summons, subsequent to answer day, all defendants were in default except the Omaha Trust Company. The latter filed an answer March 5, 1928, as trustee for Addie Drishaus, pleading ownership and nonpayment of an 8,600-dollar mortgage previously held by M. D. Cameron or the Peters Trust Company, alleging extension of time for final payment of the secured debt; original recording of the mortgage January 6, 1917; a second recording October 11, 1927, and praying for a decree adjudging this mortgage to be a first lien on the land described in plaintiff's petition.

The district court for Wheeler county, Judge Edwin P. Clements presiding, entered the default of all defendants, except the Omaha Trust Company, April 9, 1928, signed a formal decree on that date in favor of plaintiff and against the Wilsonville Elevator Company for $2,743.50, and, in the event of nonpayment thereof within 20 days, directed the sale of the land subject to the Omaha Trust Company's mortgage which was adjudged to be the first lien. May 12, 1928, J. F. Fults, attorney, served on the attorneys for plaintiff a notice that his client, the Home State Bank, would present to Judge Clements May 21, 1928, a motion to set aside the judgment entered April 9, 1928, and to obtain permission to intervene. After the decree had been rendered April 9, 1928, in absence of plaintiff and his counsel, on nine days' notice given to them by the attorney for the Home State Bank, a stranger to the action, the notice having been given without a petition of intervention or a summons to plaintiff, Judge Clements made the following order:

"This cause came on to be heard this 21st day of May, 1928, the same being one of the days of the regular April 1928 term of the district court held in and for Wheeler county, Nebraska, upon the motion of the Home State Bank of Wilsonville, and the court being fully advised in the premises, vacates and sets aside the decree entered herein on the 9th day of April, 1928, and leave is hereby given to the Home State Bank of Wilsonville to file its petition in intervention herein."

In the meantime the Home State Bank filed in the district court for Wheeler county in the action, May 19, 1928, a petition in intervention denying unadmitted allegations of plaintiff's petition and pleading in substance that the warranty deed, naming the Wilsonville Elevator Company grantee, had been recorded; that mere possession of the deed by plaintiff under an oral agreement gave him no interest in the land and no right to a lien thereon; that the oral agreement to mortgage the land to plaintiff is void under the statute of frauds and the recording acts; that intervener recovered in the district court for Furnas county March 19, 1928, a 2,257-dollar judgment which was docketed in the district court for Wheeler county March 26, 1928, and thus acquired a valid lien on the land described in plaintiff's petition. Intervener prayed for a dismissal of plaintiff's petition and for a decree making its judgment the first lien on the land.

September 12, 1928, the district court for Wheeler county, by formal decree, sustained the intervention by the Home State Bank, found that plaintiff had no interest in or lien on the land, dismissed his petition and discharged of record the mortgage held by the Omaha Trust Company.

In the same case plaintiff filed a supplemental petition October 25, 1928, pleading his ownership, by purchase and assignment, of the Omaha Trust Company's mortgage; the recording of that mortgage January 26, 1917; a duly recorded agreement to extend payment until March 1, 1927; a further extension agreement October 4, 1927; a second

recording of the mortgage October 11, 1927; a first lien by virtue of the mortgage; nonpayment of the secured debt; the invalidity of the decree of September 12, 1928. The supplemental petition of plaintiff contained also prayers for a decree establishing his mortgage as the first lien, for the vacating of the judgment of September 12, 1928, and for adjudging the interest of intervener, if any, to be inferior to the judgment and mortgage liens of plaintiff.

November 26, 1928, intervener interposed an answer to plaintiff's supplemental petition. This answer contained a general denial and also pleas that the decree of September 12, 1928, canceling the Omaha Trust Company's mortgage, assigned to plaintiff, is in full force and effect, the term at which it was rendered having expired and no appeal having been taken; that plaintiff acquired by deed the title to the land described in his petition; that the lien of the mortgage purchased by plaintiff, if any, merged in the fee and is no longer enforceable. The answer contains also a prayer for a dismissal of plaintiff's supplemental petition. Plaintiff filed a reply containing a general denial of unadmitted allegations in the answer and pleading that he procured a deed to the land April 17, 1928, from the Wilsonville Elevator Company; that the deed was given as security for his loans to grantor; that he purchased the mortgage from the Omaha Trust Company to protect the lien adjudicated by the decree of April 9, 1928, now in full force and effect, as he alleges; that his mortgage lien did not merge in his deed and that he is entitled to a foreclosure.

The district court for Wheeler county convened September 30, 1929, and entered a decree in favor of plaintiff October 1, 1929, adjudging all former proceedings in reference to intervention, and also the decree of September 12, 1928, void for want of jurisdiction, and establishing liens in the following order: Mortgage held by plaintiff and securing an unpaid indebtedness of $10,132.56, first; unpaid balance of loans by plaintiff to the Wilsonville Elevator

Company; $3,026.20, second; amount due intervener, third. This decree also ordered the foreclosure of the first and second liens. On motion of intervener this decree of October 1, 1929, was vacated March 25, 1930.

With counsel for both plaintiff and intervener present in the district court, the cause eventually came on to be heard April 17, 1930, upon the supplemental petition of plaintiff, the answer and petition of intervener and the reply. Upon a trial of the issues the district court ordered the sale of the incumbered premises and directed distribution of the proceeds to lienors as follows: First, to intervener on its judgment, $2,380.65 with interest at the rate of 10 per cent. per annum from September 12, 1928; second, to plaintiff on his mortgage, $10,598.40 with interest at the rate of 10 per cent. per annum from June 10, 1930; third, to plaintiff on his loans, $3,401 with interest at the rate of 7 per cent. per annum from June 10, 1930. From this decree plaintiff appealed.

The record shows conclusively that plaintiff has a lien on the 680 acres of land in Wheeler county for the amount due on the mortgage purchased by him from the Omaha Trust Company; that he is entitled to a lien for the amount due on his loans to the Wilsonville Elevator Company; that intervener has also a valid lien for the amount due on the judgment recovered by it in the district court for Furnas county and docketed in the district court for Wheeler county. The appeal presents for determination the order in which the liens attached to the incumbered land.

Both plaintiff and intervener asked the trial court for equitable relief. Their respective rights depend upon rules of law and equity applicable to the pleadings and the evidence on a trial *de novo*. A court of equity has power to determine controverted issues involving the priority of specific liens on real estate.

Plaintiff contends that the judgment rendered in his favor April 9, 1928, establishing his equitable mortgage, securing the amount due him on his loans to the Wil-

sonville Elevator Company, is in full force, giving as a reason that the order setting it aside May 21, 1928, was fraudulently procured without legal notice when he and his attorney were not present in court. The order of May 21, 1928, did not determine the merits of the case and was not an appealable order. It is therefore subject to review on this appeal from the final judgment. Plaintiff's original petition did not state a cause of action for the establishment and foreclosure of an equitable or oral mortgage. He did not plead a mortgage in writing but included in his petition a title deed naming the Wilsonville Elevator Company, not plaintiff, as grantee. The terms of the deed were at variance with his claim as mortgagee. A contract inserted in a petition as part of a cause of action controls allegations which it contradicts. *Carey v. Zabel,* 112 Neb. 16. The oral pledge to plaintiff and his possession of the title deed, as alleged by plaintiff, did not create a mortgage lien, such a method of acquiring one being at variance with the statute of frauds and the recording acts. Comp. St. 1929, sec. 36-103; *Bloomfield State Bank v. Miller,* 55 Neb. 243. The original judgment of April 9, 1928, and the order setting it aside were entered at the same term of court. The district court, therefore, had power to correct the error resulting in that part of the decree foreclosing an oral or equitable mortgage. The controlling precedent follows:

"The district court has power to set aside a judgment or decree during the term at which it was rendered, if satisfied that it has been procured by fraud or collusion, or if it believes that its former conclusion was erroneous." *Winder v. Winder,* 86 Neb. 495. See, also, *Bradley v. Slater,* 58 Neb. 554; *Coxe Bros. & Co. v. Omaha Coal, Coke & Lime Co.,* 4 Neb. (Unof.) 412.

Since plaintiff did not have a valid oral or equitable mortgage, that part of the decree adjudicating one in his favor was properly vacated at the same term of court. It does not follow, however, that the entire decree of April

9, 1928, should have been set aside. It contained a valid money judgment for the amount due plaintiff on his loans to the Wilsonville Elevator Company, and there was no justification for vacating that part of the decree May 21, 1928, or at any subsequent date. In the original petition plaintiff stated fully the particular facts entitling him to such relief. The borrower was a properly summoned defendant without any defense and made none. Intervener, though not then a party to the suit, though having no right, either legal or equitable, to prevent plaintiff from recovering a money judgment against the Wilsonville Elevator Company for the amount due him on his loans, interposed a mere motion, and thus procured a formal decree setting aside a valid judgment in a cause of action to which there has never been any defense. The petition in intervention did not state any defense to the plea of plaintiff for judgment on his loans or any ground for setting aside such a judgment. He was entitled to that judgment at the time it was rendered and at every subsequent stage of the proceedings, including the final decree. In exercising power to correct the decree of April 9, 1928, at the same term of court, the district judge should have confined his decision to the unauthorized relief granted—what was outside the pleadings and the law. The following procedure was adopted in a former opinion:

"If a court spreads upon its records a judgment void in part because not responsive to the pleadings, or not pertaining to subjects within its jurisdiction, a party against whom the judgment is directed or whose property rights it assumes to influence is entitled to have canceled and expunged from the records of the court so much of the judgment as is void." *Higgins v. Vandeveer,* 85 Neb. 89.

That part of the decree of April 9, 1928, including the judgment for the loans to the borrower, was improperly vacated and equity will restore the lien thereof as of that date. 18 Standard Ency. of Procedure, 1002.

Plaintiff gave notice of *lis pendens* February 3, 1928, and contends that consequently intervener did not acquire any adverse interest in or lien on the land, for the reason that the judgment rendered in Furnas county at a later date—March 19, 1928—was not docketed in Wheeler county until March 26, 1928. On the record presented for review the position thus taken is untenable. The contention of plaintiff that he had an interest in the land or a specific lien thereon when he gave notice of his *lis pendens* February 3, 1928, is based on his plea that he then had an oral or equitable mortgage. This plea, as already explained, did not state facts showing that he had such a lien. It necessarily follows that the *lis pendens* was not effective for the purpose of preventing intervener's judgment from attaching to the land when docketed in the district court for Wheeler county March 26, 1928, a date prior to that of plaintiff's judgment of April 9, 1928. The law applicable was stated in a former opinion as follows:

"A cause of action is not pending until pleaded. The title of a creditor seeking to enforce an equitable lien attaches only upon the institution of an action in which his lien is set forth. The existence of an indebtedness is not alone sufficient. It must have been reduced to judgment and uncollectible at law. A lien does not attach until a judgment is obtained and pleaded. To give plaintiff the relief sought, because he alleged in his original petition the existence of his unmatured note, would be to impound the property for the benefit of a creditor whose debt is neither a general nor specific lien upon the property. This would be contrary to a well-established rule to which this court is committed." *Hulen v. Chilcoat*, 79 Neb. 595.

In this view of the pleadings and the law, the judgment docketed by intervener in the district court for Wheeler county created a lien superior to the judgment therein entered in favor of plaintiff at a later date.

Plaintiff insists further that the mortgage purchased

by him from the Omaha Trust Company and pleaded in his supplemental petition takes precedence over the judgment of April 9, 1928, in his favor and over the judgment in favor of intervener. On the contrary, intervener argues that the lien of the mortgage was discharged by merger in the fee conveyed by the deed from the owner of the equity of redemption to plaintiff and that therefore intervener's judgment is the first lien since it attached before plaintiff procured his judgment for unsecured loans. An examination of the record leads to a different conclusion. Plaintiff purchased the mortgage to protect his own claims and to protect himself from the claim of intervener. He had no intention of allowing the merger of his two estates—the mortgage and the fee. No other finding is permissible under the evidence, the surrounding circumstances and the anomalous proceedings in the cause. Where a mortgagee purchases the fee to protect his lien from an intervening claim without any intention of merging his two estates and pursues a consistent course with that end in view, the mortgage lien is not discharged by merger. *Edney v. Jensen,* 116 Neb. 242; *Citizens State Bank v. Petersen,* 114 Neb. 809.

Intervener contends further that the decree of September 12, 1928, established its judgment as the first lien; that the term of court at which the decree of that date was entered expired; that plaintiff did not appeal therefrom; that the adjudication is final on the issue of priority. The argument in favor of these propositions is not well founded. When the decree of September 12, 1928, was rendered plaintiff was not the holder of the mortgage. The Omaha Trust Company as trustee was the owner of that security and had pleaded it as a valid, unsatisfied, recorded, first lien, in answer to plaintiff's petition. The petition in intervention stated the mere conclusion of law that intervener's judgment was "prior and superior to the claim or lien of plaintiff or the defendants" without stating any fact to justify the district court in canceling the mortgage

or in making the judgment of intervener the first lien. When the petition in intervention was filed and when the decree was signed, the intervener that procured the decree was charged by the public records with notice that the mortgage was the first lien. The decree to the contrary, without any pleading to support it, was void. Later in the same undetermined proceeding, a court of equity, upon proper pleadings and proof, had power to cancel such a decree, even after expiration of the term of court at which it was rendered.

The judgment from which this appeal was taken is reversed and a decree will be entered in the supreme court with a direction to the district court to carry it into effect. The mortgages formerly held by the First National Bank of Shenandoah, Iowa, and its receiver are canceled. The liens and the order in which they attach to the incumbered land are as follows: The mortgage purchased by plaintiff from the Omaha Trust Company is the first lien for $9,288 with interest at the rate of 10 per cent. per annum from October 25, 1928. The judgment docketed by intervener in the district court for Wheeler county is the second lien for $2,257 with interest at the rate of 10 per cent. per annum from March 19, 1928. The money judgment rendered in the district court for Wheeler county April 9, 1928, in favor of plaintiff, is reinstated for $2,743.50, as of that date, with interest therefrom at the rate of 7 per cent. per annum. Plaintiff's mortgage will be foreclosed and the proceeds distributed to lienors in the order indicated. Intervener will be required to pay its own costs in the district court and the costs in the supreme court. Other costs in the district court will be taxed to the Wilsonville Elevator Company, defendant.

DECREE ACCORDINGLY.

NORA MATTINGLY BURNHAM ET AL., APPELLANTS, V. CHARLES W. BENNISON ET AL., APPELLEES.

FILED MAY 29, 1931. No. 27580.

1. **Pleading**: DEMURRER ORE TENUS. A demurrer *ore tenus* admits only such material facts as are well pleaded and such inferences as may be logically drawn therefrom.
2. ———: DEMURRER. A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant.
3. **Judgment**: RELIEF. The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition.
4. **Constitutional Law**: COURTS. The provisions of section 13, art. I of the Constitution of Nebraska, are self-executing in their nature, and are controlling, paramount and mandatory upon all courts of this state, and require that "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."
5. ———: EQUITY: TRUSTS. General equity jurisdiction is vested in the district courts of this state by the terms of our Constitution, and such jurisdiction is beyond the power of the legislature to limit or control. One of the well-recognized grounds of equity jurisdiction thus conferred on district courts is the supervision of the administration of trusts.
6. **Trusts**: EQUITY POWERS. In the proper exercise of its equitable powers, the district court may review and, in a proper case, revise the exercise of the discretion of a trustee, and if it finds there has been an abuse of discretion, or if the trustee has acted in bad faith, or has failed to follow the directions and requirements imposed by the terms of the trust, or the requirements of law, such trustee's conduct will be subject to judicial control, and the court will make such orders as may be necessary to fully effect the purpose of the trust and to secure to the beneficiaries therein their just rights as lawfully intended and expressed by the creator thereof.
7. ———: ———: REMOVAL OF TRUSTEE. A court of equity has power and authority to remove a trustee from his office, when

any substantial personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted himself in office, when hostile relations exist between the trustee and his beneficiaries of such a nature as to interfere with the proper execution of the trust, or under any other conditions which render his removal necessary for the best interests of the trust estate, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his duties as trustee under the terms of his trust.

8. ———: PETITION: CONSTRUCTION. Petition construed (upon demurrer thereto), and *held* to state facts sufficient to entitle plaintiffs to substantial relief which the district court had jurisdiction to grant.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Reversed, with directions.*

James E. Brittain and *Frederick M. Deutsch*, for appellants.

Coufal & Shaw, contra.

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

EBERLY, J.

This is an action in equity commenced in the district court for Butler county on April 16, 1926. On that date summons was issued which was served on all defendants three days later. Then demurrers were filed challenging the jurisdiction of the court and the sufficiency of the petition to state a cause of action. Thereupon, after an adverse ruling on all demurrers so presented, defendants filed an answer which embraced, in addition to a general denial, certain allegations of new matter. To this pleading the plaintiffs filed a reply which was in substance a general denial of new matter pleaded.

Thereafter on April 28, 1930, the trial on the merits was commenced, and, plaintiffs having called a witness, defendants interposed a demurrer *ore tenus*, based on the contention that the petition did not set forth facts sufficient

to constitute a cause of action against "these defendants or any of them," or "in behalf of the plaintiffs or any of them;" that it did not state a cause of action in equity; that it did not disclose that any property of the Mattingly estate was in the possession of the administrator or the trustees; that the estate was in the process of administration in the county court, which was as yet incomplete; that the action was, therefore, prematurely brought.

These objections were sustained by the trial court, and the plaintiffs electing to stand upon their petition, and refusing to further plead, the petition of plaintiffs and the action were by the trial court dismissed. Plaintiffs appeal.

It may be said, in view of the procedure theretofore had, that the effect of the interposition of the demurrer *ore tenus* was in all respects identical with that of a formal demurrer; that by it the defendants, for the purpose thereof, admitted all the allegations of fact in the pleading to which it was addressed, which were issuable, relevant and material, and well pleaded. *Bresee v. Preston,* 91 Neb. 174; *City of Crawford v. Darrow,* 87 Neb. 494; *Hallstead v. Perrigo,* 87 Neb. 128; *Spalding v. Douglas County,* 85 Neb. 265; *Moriarty v. Cochran,* 75 Neb. 835; *State v. Porter,* 69 Neb. 203. It did not admit the conclusions of the pleader except as they were supported by, and necessarily resulted from, the ultimate facts stated in the pleadings. Nor did it, subject to this qualification, admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor the theory of the pleader as to the effect of facts, nor his construction of a written instrument, nor his conclusions of law in relation thereto. It is also true that "A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant." *Missouri Valley Land Co. v. Bushnell,* 11 Neb. 192; *Stephens v. Harding,* 48 Neb. 659. This is in accord with the general

rule. 6 Standard Ency. of Procedure, 912. In the instant case we find the pleading demurred to contains a prayer for general relief ("next step to the Lord's prayer"), in addition to prayer for certain special relief. On this subject, the general rule of equity pleading which is preserved by our Code appears to be that if there is a prayer for general relief, as well as for special relief, the court can extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition. 4 Standard Ency. of Procedure, 137. The conclusion follows that, if the petition here demurred to, considered as an entirety, sustains the conclusion that plaintiffs are entitled to any substantial relief within the jurisdiction of the trial court to grant, even though not covered by a specific prayer, the trial court erred in sustaining the general demurrer thereto.

No good purpose would be served by an exhaustive analysis of the language of the pleading under consideration. Conceding that many of the allegations and statements thereof under the rules determining the scope of admissions by general demurrer would deserve little or no consideration, still by the terms of the pleading presented for review it clearly appears, as admitted ultimate facts: (1) That George W. Mattingly died testate on April 17, 1924, and at the time of his death was a resident of Butler county; (2) his will was admitted to probate on August 7, 1924, and remains in full force and effect; (3) the residuary clause of this will provided in part: "(6) The rest, residue and remainder of my estate, real and personal, wheresoever situated, I give, devise and bequeath to C. W. Bennison and I. T. McCaskey, as trustees, upon the following trusts; (a) that my said trustees shall pay to Joseph Mattingly, a son of a half-brother of my father, the sum of $10,000 on condition that in the event that the said Mattingly is living at my death and appears and makes due proof of his identity to my said trustees within one year after my death; and if the said Joseph Mattingly

is dead or fails to appear then and in that event such payment shall be made to his children, if any he has, on condition and in the event that his child or children appear and make due proof to the said trustees of their relationship within two years after my death; and if the said Joseph Mattingly fails to appear and make such proof within one year and if, also, his child or children fail to so appear and make proof of their relationship within two years after my death, then the provisions of this paragraph made shall lapse and be null and void. * * * (c) My said trustees shall, during the term of said trust, cumulate the net income of said estate until the two year period after my death has elapsed and my said trustees are then directed to assign, transfer and set over to C. W. Bennison and I. T. McCaskey of David City, Nebraska, in equal shares, the rest, residue and remainder of the property remaining in the hands of said trustees and to vest in said C. W. Bennison and I. T. McCaskey the absolute title thereto; my intention being to give, bequeath and devise to said C. W. Bennison and I. T. McCaskey all of such residue absolutely and unconditionally." (4) That Joseph Mattingly, "mentioned, intended, referred to and described in the said will and the person to whom the testator intended" the trust fund of $10,000 to be paid, if alive, died on March 19, 1919, leaving surviving him as his sole and only children (or descendants) the plaintiffs named in the petition; (5) that there is sufficient money and property belonging to said estate to fully pay all costs of administration, claims, prior legacies, and specific trust funds described in said will, including the legacy provided for the plaintiffs; (6) that within the two year period after the death of the said testator the above named plaintiffs appeared before the trustees named and tendered competent evidence and proof of the death of their father, Joseph Mattingly, and of their relationship to him, identifying their father as the Joseph Mattingly named in the will, and also in all respects complied with the provisions

expressed in paragraphs "6 and 6-a" of the will of George W. Mattingly, deceased; (7) that the trustees, Bennison and McCaskey, however, have to this date wholly failed to accept, receive or hear said evidence and proof, and have failed to determine the facts established thereby; (8) that on the last day of the two year period provided for in said will, after the death of said George W. Mattingly, the plaintiffs herein filed this petition in the district court for Butler county, and at the time this cause was submitted to this court (February 4, 1931) were still being denied a hearing and determination of their rights as contemplated by the will aforesaid, by the trustees named, and that no part of the bequest has been paid to them.

In connection with the admitted facts above recited, it is to be noted that the two year period provided for in the will in which the child or children of Joseph Mattingly may appear and make due proof to the trustees is in no manner dependent on the actual receipt or taking over of the trust estate by the trustees. Its commencement is expressly fixed by the terms of the will as starting on the death of the testator, and it terminates two years after the death of testator. It is wholly unaffected by the fact that the administration of said estate may be completed or still in progress, or by the fact that the trustees may or may not have received and taken over the property passing by virtue of the residuary clause. When the evidence and proof were tendered within the two year period, it was the plain duty of the trustees to hear the same and proceed as contemplated by the testator. It is also quite apparent that, as the trustees named, under the terms of the will, should as individuals succeed to the bequest provided for Joseph Mattingly or his children in the event the latter failed to comply with the expressed condition within two years, their personal interests as individuals are inevitably in conflict with, and antagonistic to, their duties as trustees. In a sense, in view of the situation, these trustees are of necessity required to sit in judgment on their own case.

In view of these conceded facts, what was the duty of the district court for Butler county, and did it have jurisdiction to grant any substantial relief upon the petition presented?

Aside from, and unless excused by, the necessary effects of technical errors of procedure committed by plaintiffs in the presentation of their cause or resulting from untoward events or accidents for which neither judge nor parties are responsible, the obligatory direction to courts of all jurisdictions, as expressed by the provisions of section 13, art. I of our Constitution, is controlling, paramount and mandatory, viz.: "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." In this connection, it is to be remembered that, "when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other." I Cooley, Constitutional Limitations (8th ed.) 138. This constitutional provision is also self-executing. 12 C. J. 729. Therefore, when it stands here admitted for the purpose of this determination (1) that plaintiffs are the parties designated by the Mattingly will who are entitled, upon conclusion of the administration proceedings, to receive the $10,000 bequest provided therein, and (2) that they, after a lapse of more than six and one-half years since the death of the testator, and of more than four and one-half years since the commencement of this proceeding, have not yet been permitted or accorded the opportunity to make due proof of the identity of their forbear, and of their relation to him, which due proof has heretofore been seasonably tendered by them in compliance with the terms and conditions of that instrument (the will), can it be said that these plaintiffs have been accorded in full measure their constitutional remedy, and that they have not been denied their constitutional right

to have justice administered without denial or delay?

Did the district court for Butler county possess the essential power to administer substantial relief in the instant case, and was the exercise of such power, if possessed, properly invoked?

It may be said that, by the terms of the Constitution, district courts in Nebraska are vested with "chancery jurisdiction." Const. art. V, sec. 9. This we have construed as vesting district courts with equity jurisdiction which they may exercise without legislative enactment. *Matteson v. Creighton University,* 105 Neb. 219. Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. *Lacey v. Zeigler,* 98 Neb. 380. One of the well-recognized grounds of equity jurisdiction thus conferred on, and available in, courts of this state, by virtue of this constitutional provision, is the supervision of the administration of trusts. *Matteson v. Creighton University,* 105 Neb. 219; *Gotchall v. Gotchall,* 98 Neb. 730.

Indeed, the inherent power of a court of equity to supervise and control trustees in the execution of their trust is well recognized. In the proper exercise of this power, courts may review and revise the exercise of the discretion of a trustee, and if they find there has been an abuse of discretion, or if the trustee has acted in bad faith, or has failed to follow the directions and requirements imposed by the terms of the trust, or the requirements of the law, such trustee's conduct will be subject to judicial control, and the court will make such orders as may be necessary to fully effect the purpose of the trust and to secure to the beneficiaries therein their just rights as lawfully intended and expressed by the creator thereof. 25

Standard Ency. of Procedure, 99. Nor does the proper exercise of this equitable jurisdiction by the district court involve any conflict with the lawful powers of our probate court. Not only would the source of the equity powers exercisable by the district court render such a situation inconceivable, but the limitations imposed by Constitution and statute on the jurisdiction and powers of the county court, as interpreted by this tribunal, render such a conflict impossible. This court is also fully committed to the view that the jurisdiction of the county court, in the exercise of its functions as a probate court, terminates with the enforcement of its order of final distribution, and ends when the distributees come into possession of their respective properties. Such distributee, even though constituted a testamentary trustee by the express terms of the will admitted to probate, and under which the distribution is made, or is to be made, is in no manner accountable to, or subject to the supervision or control of, the probate court in the performance of his duties as such trustee enjoined by the terms of such will. The enforcement of the performance of such duties is vested in the district court. *In re Estate of Frerichs,* 120 Neb. 462; *Abbott v. Wagner,* 108 Neb. 359.

In principle it appears well established that "A court of equity * * * has power and authority to remove a trustee from his office, when any personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted himself in office or mismanaged the trust property, when hostile relations exist between the trustee and his * * * beneficiaries, such as to interfere with the execution of the trust, or under any other conditions which render his removal necessary for the best interests of the trust estate." 25 Standard Ency. of Procedure, 118. See *May v. May,* 167 U. S. 310.

In view of the facts admitted by the demurrer, disclosed by the record before us, viz., that for a period of more than six and one-half years the trustees have not accorded

the plaintiffs, as beneficiaries of this trust, the opportunity to appear and make proof of their relationship to Joseph Mattingly, though it is likewise admitted that these plaintiffs are the real beneficiaries of the $10,000 trust fund, and entitled in due time to have and receive the same, and that litigation with the admitted beneficiaries has been here carried on by the trustees for more than four years, and at the same time the duties of such trustees are inevitably in conflict with their personal interests as devisees under the will, we arrive at the conclusion that the ultimate facts well pleaded which stand admitted on the record unquestionably entitle plaintiffs to substantial relief under the general prayer of their petition. And in view of the admitted relation of the trustees to the trust property, and that if the just claims of the plaintiffs were defeated they, the trustees, would succeed to the ownership of the same under the terms of the will, the following rule announced by Dean, J., for this court, in the case of *In re Estate of Marconnit,* 119 Neb. 73, though applied in that case to an executor, in principle is equally applicable and controlling here:

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

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

It follows that, in view of the nature and extent of the ultimate facts admitted by the demurrer, and the nature and extent of the jurisdiction vested in district courts, the plaintiffs must be deemed to be entitled to substantial relief against the defendant trustees. Indeed, on the restricted basis evidenced by the pleadings before us, they

are entitled to receive in due time the bequest of $10,000, provided for the children of Joseph Mattingly, and they are entitled to have the trust administered by trustees not disqualified by adverse personal interest, but standing indifferent between the parties.

The district court, therefore, erred in sustaining the demurrer *ore tenus* interposed on behalf of the defendant trustees at the trial of the action in the court below. We do not prejudge the merits of this case. These will be finally determined by due consideration of competent evidence adduced at the trial, hereinafter ordered, and may therefore differ in important, possibly controlling, particulars from the case here presented.

The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion, with directions to overrule the demurrer *ore tenus* interposed on behalf of the defendant trustees, but to permit the parties to file amended and supplemental pleadings within a time to be fixed by the court, if they so request, to the end that all matters in issue may be determined and justice administered without unnecessary delay.

REVERSED.

TROYER FURNITURE COMPANY ET AL., APPELLANTS, V. ORCHARD & WILHELM COMPANY ET AL., APPELLEES.

FILED MAY 29, 1931. No. 27613.

1. Appeal: REVIEW. Alleged errors which are predicated upon the evidence at the trial will not be considered, unless such evidence is preserved in a bill of exceptions, and in the absence of such bill of exceptions this court will only determine whether the pleadings sustain the judgment rendered thereon.
2. Appearance. A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally.

3. ———. In the instant case defendant Finkelstein, by moving for an order requiring plaintiffs to give security for costs, admitted the jurisdiction of the court over him, which could be lost only by an actual dismissal of the action.

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

Harry R. Ankeny and *James E. Bednar,* for appellants.

Crossman, Munger & Barton and *Mockett & Finkelstein, contra.*

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

EBERLY, J.

This, an action at law, was commenced by appellants, as plaintiffs in the district court for Lancaster county, against the defendants (appellees herein) to recover damages suffered by reason of the fact that, as alleged in the petition, "the defendants and each of them, acting wilfully, intentionally, purposely, maliciously," with a wilful disregard of plaintiffs' rights and without probable cause, caused to be filed, and filed, an involuntary petition in bankruptcy (in a court of competent jurisdiction), thereby causing plaintiffs to suffer in loss and damage in the amount alleged.

Summons was issued and served on the defendants named, but these defendants (excepting defendant Finkelstein) each challenged the sufficiency of such service by special appearances, which after hearing the trial court sustained. The plaintiffs "electing to stand upon their petition, the service had, and the record made in the case," the district court thereupon dismissed the action.

The plaintiffs seek a reversal in this court. The transcript discloses that the case was tried in the district court on affidavits presented on behalf of all parties to the record. No motion for new trial was filed, and a bill of ex-

ceptions has not been preserved and presented to us. Affidavits filed in support of objections to jurisdiction over the person to be available in proceedings in error must be preserved by bills of exceptions. *Gretch v. Maxfield,* 4 Neb. (Unof.) 256; *Edwards v. Kearney,* 14 Neb. 83; *Gaines v. Warrick,* 113 Neb. 235. In the absence of a bill of exceptions, the only question presented by the record is the sufficiency of the several appearances, considered as pleadings, to support the judgment of the trial court. For the purpose of this examination, it will be presumed that the statements and allegations contained in such appearances were at the hearing properly supported by ample competent evidence. On this basis, as to the defendants Orchard & Wilhelm Company, Don Lee Furniture Company, Chittenden & Eastman Furniture Company, Henry L. Nestor, William A. Brown, and Paul W. Cummings, the record before us discloses that no error was committed by the trial court, and its action in dismissing the proceedings against them and each of them must be affirmed.

As to the defendant Louis B. Finkelstein, however, it appears that on November 25, 1929, he filed in his own behalf a motion "to dismiss the petition of plaintiffs filed herein for the reason that the plaintiffs are nonresidents of Lancaster county." The transcript, however, fails to show that this motion was ever acted upon by the trial court. This motion must, however, be considered a general appearance which the district court was thereafter without power to treat as a challenge to its jurisdiction by Finkelstein as by the special appearance filed in his behalf. *Cropsey v. Wiggenhorn,* 3 Neb. 108; *Healy v. Aultman & Co.,* 6 Neb. 349; *McKillip v. Harvey,* 80 Neb. 264, 266.

As to whether the district court by its dismissal entered on the 18th day of June, 1930, actually dismissed this action as to Finkelstein, the transcript is not entirely clear. On the assumption that such was the effect of the final order entered on that date, so much of that order as dis-

misses said action as to defendant Finkelstein is reversed, and the cause is remanded for further proceedings in harmony with this opinion. As to the other defendants the judgment of the district court is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

R. O. BROWNELL, RECEIVER, APPELLEE, V. T. G. ADAMS ET AL.: L. B. FULLER ET AL., APPELLANTS.

FILED MAY 29, 1931. No. 27682.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: REMEDY. "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver." *Rogers v. Selleck*, 117 Neb. 569.
2. ———: ———: JURISDICTION. Jurisdiction of equity to enforce constitutional liability of stockholders of an insolvent banking corporation is based upon the rule obtaining in this state that equity has jurisdiction of an action by a receiver against all the stockholders of a corporation jointly to enforce their contractual or statutory liability.
3. **Process**: SUMMONS TO ANOTHER COUNTY. Where an action is rightly brought in one county against a number of defendants properly joined, and a *bona fide* defendant served in that county, a summons may be issued to other counties for service upon proper defendants.
4. **Banks and Banking**: APPOINTMENT OF RECEIVER: COLLATERAL ATTACK. When a court of competent jurisdiction has appointed a receiver of an insolvent banking corporation pursuant to notice to the corporation, and the receiver has qualified and performed the legal duties devolving upon him, the regularity and validity of the order of his appointment cannot be questioned in a collateral proceeding.
5. **Evidence**: BANK STOCK: OWNERSHIP: STOCK BOOK. The stock book of a banking corporation is competent evidence, when properly identified, of the ownership of the corporate stock.
6. ———: ———: ———. In this, a case to establish the constitutional stockholder's double liability, the stock book of the corporation, properly identified by the president who issued

and signed all the certificates of stock and under whose direction the book was kept, and the quarterly report required by law to be made to the department of trade and commerce, are sufficient evidence to sustain a finding that one was a stockholder.

7. Executors and Administrators: ACCOUNTING. "The trust of an administrator or executor is a continuing one, and a decree of final accounting does not destroy the relationship of such officer, but only discharges him from liability for the past." *Hazlett v. Estate of Blakely*, 70 Neb. 613.
8. Infants: CONTRACTS. Where an infant has received some benefit during infancy, he must repudiate the contract within a reasonable time after attaining majority; but not having received any benefit and not having ratified the contract after his arrival at majority, he is not bound by same.

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

Perry, Van Pelt & Marti, C. E. Sandall, C. J. Campbell, Stiner & Boslaugh, Edmund Nuss and *Littrell & Patz*, for appellants.

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

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

DAY, J.

The receiver of the Pioneer State Bank of Omaha brings this as a suit in equity in the district court for Douglas county, for the benefit of all the unpaid creditors of the bank, to recover from the stockholders the double liability imposed upon them by the Constitution. Some of the defendant stockholders resided in Douglas county where they were served with process and others resided in various other counties of the state where they were served with summons sent from the Douglas county court. The defendants prosecuting this appeal from a judgment in favor of the receiver are those who were not served in Douglas county.

The appellants present the following general propositions for our consideration: (1) Did the court have jurisdiction over the defendants who were served in the various counties of the state with process issued out of the district court for Douglas county? (2) Were the original receivership proceedings null and void? (3) Does the evidence sustain the finding of the trial court that the defendants were stockholders of said bank?

It is the well-established rule in this state that "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver." *Rogers v. Selleck*, 117 Neb. 569. See, also, *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *Pickering v. Hastings*, 56 Neb. 201; *Hastings v. Barnd*, 55 Neb. 93; *Brown v. Brink*, 57 Neb. 606; *Brownell v. Anderson*, 117 Neb. 652.

Jurisdiction of equity to enforce constitutional liability of stockholders of an insolvent banking corporation is based upon the rule obtaining in this state that equity has jurisdiction of an action by a receiver against all the stockholders of a corporation jointly to enforce their contractual or statutory liability. In order to recover upon the statutory liability of stockholders of an insolvent corporation, a suit in equity should be brought, by the receiver, or by a creditor on his own behalf and for all other creditors, against all the stockholders of the corporation. *Emanuel v. Barnard*, 71 Neb. 756. In *McCall v. Bowen*, 91 Neb. 241, the court announced this rule as applicable to a suit brought by the receiver of a mutual insurance company to collect an assessment. To the same effect is the holding in *Randall v. McClain*, 94 Neb. 487. We content ourselves with a brief restatement of the rule, for a discussion of which we refer to *Rogers v. Selleck*, 117 Neb. 569, and *McCall v. Bowen*, 91 Neb. 241. Suffice it to state that

there can now be no question but that in this jurisdiction it was proper for the receiver to bring this suit in equity against the stockholders of the insolvent Pioneer State Bank in Douglas county to recover their constitutional liability.

Since this suit was rightly commenced in Douglas county against defendants who were served with process within the county, summons could be issued for other defendants in other counties. Section 20-504, Comp. St. 1929, provides: "When the action is rightly brought in any county, according to the provisions of this Code, a summons shall be issued to any other county against any one or more of the defendants at the plaintiff's request." The receiver brought this suit and requested, under the authority of this provision of the statute, that summons be issued to other counties for certain defendants. In *McCall v. Bowen,* 91 Neb. 241, which was a suit by a receiver of a mutual insurance company to recover from the stockholders an assessment made by the court to pay the liabilities of an insolvent corporation, it was held that it was properly brought in equity against all the stockholders and that a summons might be issued out of the county in which the action was brought to any other county in the state in which a defendant resided or could be summoned.

The appellants contend that the liability of a stockholder is several and not joint, and that a summons may not be issued from one county to another unless the obligation is joint. In *Rogers v. Selleck, supra,* we said: "The stockholders united in a common purpose to procure from the state a charter to conduct a commercial bank with permission to deal with the public in an enterprise affected with a public interest. It required the joint action of all the subscribers for stock to accomplish that purpose. * * * The rights of the creditors and the liabilities of the stockholders had a common source in the conditions imposed by the Constitution and in the contractual obligations assumed thereunder. Except in amount the claims of the

different creditors in the present suit in equity are alike, requiring the same proofs. The law and facts essential to defenses are also of a similar nature in some respects at least and may be the same."

Equity is invoked, not only to prevent a multiplicity of suits, but also because of the trust nature of the fund created for the benefit of creditors. There is a common liability on the part of the stockholders, contractual in its nature, which requires them to contribute to this fund for the benefit of creditors an amount equal to the amount of stock held by each individual. There is no joint liability on the part of stockholders of an insolvent corporation in the sense that, if one does not pay, another stockholder must pay for him. The limit of the liability is the amount of stock each holds. 6 Thompson, Corporations (3d ed.) sec. 4802; *Hanson v. Davison,* 73 Minn. 454; *Crease v. Babcock,* 10 Met. (Mass.) 525; *Vick v. Lane, Hazlehurst & Co.,* 56 Miss. 681; *Mitchell v. Banking Corporation of Montana,* 81 Mont. 459. We have held that where two defendants are jointly liable, summons for one may be sent to another county from the one in which the suit is instituted. *Nebraska Nat. Bank v. Parsons,* 115 Neb. 770; *First State Bank v. Ingrum,* 107 Neb. 468; *Barry v. Wachosky,* 57 Neb. 534; *Farmers & Merchants Bank v. Tate,* 96 Neb. 142; *Wiley v. National Surety Co.,* 103 Neb. 68.

In *Ayres v. West,* 86 Neb. 297, this court said: "The law is well settled that, in an action for a money judgment, a summons cannot be lawfully sent to a county other than the one wherein the litigation is pending, unless there is a joint demand against the nonresident defendant and the party summoned in the county where the suit is commenced." The appellants quote and rely on this case. The defendants sought to be joined in the *Ayres* case were the makers, and it was said in that case that the two defendants were not by virtue of their contracts subject to a joint suit. It was pointed out that the causes of action were improperly joined and the plaintiff was prosecuting two dis-

tinct and several causes of action against different defendants. This, we think, clearly distinguishes that case from the one at bar. In the case at bar the suit was properly brought in equity and joined all the stockholders whose liability was a common one though not a joint liability. To the same effect is *First Bank of Ulysses v. Warren,* 113 Neb. 361.

Where an action is rightly brought in one county against a number of defendants properly joined, and a *bona fide* defendant served in that county, a summons may be issued to other counties for service upon proper defendants.

The receivership proceedings in the case of the Pioneer State Bank of Omaha were commenced in the district court for Douglas county by the filing of a petition by the attorney general of the state of Nebraska, alleging that the bank was insolvent, that it had been taken over by the department of trade and commerce of the state of Nebraska on the 2d day of June, 1921, and other facts justifying a receivership under the laws of the state of Nebraska. Upon the same day there was filed in the office of the clerk of the district court for Douglas county an entry of appearance, confession of judgment, and consent to appointment of receiver, signed by the president, chairman of the board of directors, vice-president, and cashier of said bank. Upon the same day there was served upon the same officers of the Pioneer State Bank a notice of application for appointment of receiver, which notice was accepted by the officers of said bank. This notice provided that the hearing for the appointment of receiver of said bank was to be heard by the district court for Douglas county on June 7, 1921, at 11:30 a. m. The court thereafter, pursuant to said entry of appearance and the service and acceptance of the notice of the time of hearing on the application, appointed the receiver. The original receivership proceeding was brought under section 49, art. 16, title 5, ch. 190, Laws 1919. This is a special statute providing for the appointment of a receiver

of a banking corporation. Since this special statute does not provide for the giving of notice, the general statutes on receiverships must govern in that particular. Section 20-1081, Comp. St. 1929, which in its identical form was in force and effect at the time, provides, *inter alia,* that "A receiver may be appointed * * * Fourth. In all cases provided for by special statutes." The notice provided for is contained in section 7811, Rev. St. 1913, and was carried in its identical form as section 8755, Comp. St. 1922, which, as amended in 1927, now appears as section 20-1082, Comp. St. 1929. In the section of the special statute, there is no provision for any method for the appointment of a bank receiver. Necessarily, since that section does not provide the procedure or the notice necessary, and since section 8754, Comp. St. 1922, being the general statute, does provide for such procedure, it must apply. This is especially true, since the general section applying to receivership provides that a receiver thereunder may be appointed "in all cases provided for by special statute."

In *Holcomb v. Tierney,* 79 Neb. 660, it was held that the general provisions for the appointment of a receiver apply to the appointment of a receiver in a bank case, except in so far as the special statute above referred to makes specific provisions therefor. The receivership proceedings in this case were brought against the Pioneer State Bank, a corporation engaged in the banking business. Notice was given to the corporation. "Service of process in the main case is not any different in a case where a receiver is sought than in any other case. The statutory requirements must be complied with whether the defendant is an individual or a corporation. * * * If an appearance is made, the validity of it is determined by the general rules applicable to such appearances." 2 Tardy's Smith, Receiverships (2d ed.) p. 1964. Section 20-511, Comp. St. 1929, which in its identical form was in force and effect at the time of the receivership proceeding, is as follows: "A summons against a corporation may be served upon

the president, mayor, chairman of the board of directors or trustees, or other chief officers," etc. Section 20-516, Comp. St. 1929, provides: "An acknowledgment on the back of the summons or the voluntary appearance of a defendant is equivalent to a service."

The appearance of the corporation and service of notice in this case was sufficient to give the court jurisdiction for the appointment of a receiver. "A court has power to appoint a receiver when the parties to a suit waive the statutory notice and consent to the appointment." *Veith v. Ress*, 60 Neb. 52. "On an application for the appointment of a receiver, the five days' notice required by the statute may be waived by the parties entitled thereto." *Murphy v. Fidelity Mutual Fire Ins. Co.*, 69 Neb. 489.

The appellants cite the case of *Furrer v. Nebraska Building & Investment Co.*, 108 Neb. 698, as authority for the proposition that all stockholders must be made parties and served with notice where an action is brought to place a bank in receivership. An examination of that case indicates that it is not authority for that proposition. The proceedings in that case were brought by one of the stockholders alleging misconduct and mismanagement of the corporate business by the officers and asking for the appointment of a receiver to wind up the affairs of a solvent corporation. In that case it was said: "Where a petition for the appointment of a receiver for a corporation shows on its face that the managing officers are not properly representing stockholders, but are using corporate powers and corporate property for individual benefits, the appointment of even a temporary receiver without notice to the stockholders themselves is an abuse of discretion and erroneous; notice to the derelict officers, under such circumstances, not being sufficient." In the *Furrer* case, the stockholders went into the original receivership proceeding and objected to the appointment of a receiver. To a like effect is *Bowen v. Bowen-Romer Flour Mills Corporation*, 114 Kan. 95. See the annotations of the last two

cases cited in notes in 43 A. L. R. 242, 245, where the annotations are properly restricted to the inherent power of equity, at the instance of a stockholder, to appoint a receiver for, or to wind up, a solvent, going corporation, on the ground of fraud, mismanagement or dissension. The purpose of the action in these cases was to take away from the duly authorized officers the management and control of the corporate property. The officers and directors of the corporation had a right to the possession and control of the property as against the stockholders. In this case, at the time the receivership proceedings were commenced, the property and assets of the banking corporation were in the control and possession of the department of trade and commerce of the state of Nebraska, under authority of section 8-181, Comp. St. 1929. There is no contention that the department of trade and commerce of the state of Nebraska was wrongfully in possession of the Pioneer State Bank at the time of the application for the appointment of said receiver. In fact, it is admitted by the parties that, at the time of the appointment of the receiver, the bank was hopelessly insolvent. The contention of the appellants is based upon the fact that notice was not given to the stockholders personally, and that they are "parties to be affected thereby," as mentioned in section 20-1082, Comp. St. 1929, as necessary parties to have notice. It would seem that the notice to the corporation would be sufficient notice to the stockholders for the purpose of the appointment of a receiver. In such a case the stockholders are not entitled to the possession of the corporate property and cannot exercise any control over it because the management had been entrusted to the directors and officers. In this state, banking is a quasi-public business and subject to regulation and control of the state. Comp. St. 1929, sec. 8-114. Therefore, at the time of the application for the appointment of the receiver, this bank and its assets were in the control of the department of trade and commerce of the state of Nebraska. The stock-

holders had agreed to this provision. It was a condition precedent to their engaging in the banking business, and they had purchased their stock in this banking corporation for the purpose of engaging in the banking business. The relation of a stockholder to a corporation is a contractual one and the banking laws of the state of Nebraska became a part of their contract. The department of trade and commerce is vested with general supervision and control of state banks with authority to do all those reasonable necessities for protection of depositors therein throughout the state. Comp. St. 1929, secs. 8-101, 8-181, 8-1,102; *State v. Exchange Bank,* 114 Neb. 664. "State department of banking may close a state bank for insolvency." *State v. Citizens State Bank,* 115 Neb. 776. In the case of *Commonwealth Mutual Fire Ins. Co. v. Hayden,* 60 Neb. 636, we said. "*In Hawkins v. Glenn,* 131 U. S. 319, 329, it was held: 'The stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of a corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member.' The rule thus laid down by the supreme court of the United States has been generally adopted by other courts." In the case at bar, in lieu of the service of the summons, the president, vice-president and cashier entered voluntary appearances in the cause of action. Service was had upon the officers of the corporation at the time of the hearing for the appointment of a receiver.

This question doubtless will not arise again, since section 8755, Comp. St. 1922, under which this action was brought, was amended by chapter 49, Laws 1927, to provide that service of a notice of application for a receiver might be served upon the corporation, and that the corporation, its officers, and stockholders should be bound thereby. However, we are of the opinion that, in the case

of a banking corporation, service upon the corporation bound the stockholders under the statute as it existed at the time of the commencement of this suit.

There is no question about the insolvency of the bank and no objection was made to the appointment of the receiver from the date of the appointment, June 7, 1921, until after this action was brought, December 28, 1928, a period of more than seven years. The appointment of a receiver has been attacked for the first time collaterally by the appellants in this suit to enforce stockholders' liability. "When a court of competent jurisdiction has appointed a receiver in an action where such appointment is authorized, the authority of such receiver is not open to collateral attack." *Andrews v. Steele City Bank*, 57 Neb. 173. "The order of a district court appointing a receiver is not subject to collateral attack, because such order was made in a law action, or because the petition fails to disclose all the facts usually required in a petition for that purpose." *Murphy v. Fidelity Mutual Fire Ins. Co.*, 69 Neb. 489. See, also, *Holcomb v. Tierney*, 79 Neb. 660; *In re Estate of Ramp*, 113 Neb. 3; *Gwynne v. Goldware*, 102 Neb. 260. "The regularity, propriety, and validity of the appointment of such a receiver can only be questioned in a direct proceeding to test that question." *Basting v. Ankeny*, 64 Minn. 133. "Where one has qualified as a receiver, the validity of his appointment cannot be collaterally impeached if the court had jurisdiction of the subject-matter." *Davis v. Shearer*, 62 N. W. 1050 (90 Wis. 250).

Another proposition argued by the appellants is that the evidence is not sufficient to support the finding and judgment of the court. The stock book of the Pioneer State Bank, they argue, is inadmissible as evidence to prove that they are stockholders in the corporation. The stock certificate book of the bank was received in evidence. It was identified by the president of the bank as containing the original records of those who were the original and subsequent stockholders of the bank. The president testi-

fied that these books were kept under his direction, and that he, as president, had signed every stock certificate that had been issued; that at the time these certificates were issued the stubs in the stock book were filled in to show to whom the stock had been issued, the number of shares and the date. While it is true that the entries were made by a number of different clerks who were not available as witnesses, the entries were made under the direction of the witness, who testified that at the time he signed the certificates the data written in the stubs corresponded to the certificates which he had signed.

The appellants contend that the books alone and unaided by any other evidence were not sufficient to show they were stockholders of the Pioneer State Bank. The leading case upon this question is *Turnbull v. Payson*, 95 U. S. 418. In *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 724, this court discussed and approved the above rule as set out in the following quotation: "The plaintiff insists that the burden of rebutting that presumption is cast upon the defendant. Several cases are cited upon this point, one being *Turnbull v. Payson*, 95 U. S. 418, from which the following quotation is made in the brief: 'Where the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant.' This rule obtains in an action where the claimant of the stock is a party to the suit. No doubt upon a direct issue between two parties, both claiming to own the stock, the *prima facie* presumption is that the stock stands upon the company's books in the name of the real owner; but when that presumption is overcome the burden of proof would still be upon the plaintiff to show his ownership in the stock." Although this rule has been challenged and severely crit-

icised by courts and authors of text-books, it is recognized by courts and the authorities as the general rule. 14 C. J. 836, states: "The rule asserted in many cases is that the books and records of a corporation are competent, and *prima facie* evidence of who are its members or stockholders. However, the view adopted in some cases is that such books and records are not admissible against a person to show that he is a stockholder unless there is introduced other evidence showing his membership or connecting or making him privy in some way to the entries in question. Under either rule such books and records are not conclusive and they must be properly identified."

Thompson, who criticises this rule in his work on Corporations, vol. V (3d ed.) p. 680, uses the following language: "Without repeating either the substance or the cases of what has formerly been said as to books and records being evidence as to who are stockholders, it may be stated in this connection that the books and records are *prima facie* evidence of the fact that those whose names appear thereon are owners of the stock." The same author in his work on Liability of Stockholders, sec. 177, states: "The general rule is that a person whose name appears on the books of a corporation is a shareholder, both as to the corporation and as to the public. An extensive examination of the cases constantly brings us back to this idea —an idea based on the most salutary considerations; which gives meaning and value to the registry of shareholders kept by the corporation; notifying creditors of the names which stand as guarantors of the corporate ventures, and of the extent of their several liability; and notifying shareholders of the names to whom they may look for contributions to the common burden."

Morawetz, Private Corporations, p. 76, says: "While the rule * * * appears to be well established by authority, it is difficult to support it by any principle of the common law. The stock books of a corporation are undoubtedly evidence against it, as admissions; but they can-

not be admitted on this ground for the company, against a person who denies that he is a shareholder."

The rule announced in *Turnbull v. Payson, supra,* is criticised in numerous cases. *Carey v. Williams,* 79 Fed. 906, is the leading case announcing the contrary rule. See, also, *Harrison v. Remington Paper Co.,* 140 Fed. (Kan.) 385. The rule has also been criticised in *Hinsdale Savings Bank v. New Hampshire Banking Co.,* 59 Kan. 716, in the following language: "It is wholly insufficient. It is evidence *res inter alios acta,* nothing more. Entries in the books of a private corporation are made by its officers and concern nobody but the corporation and its members. If membership in a corporation is admitted, the books kept by its officers, with some exceptions, are admissible in evidence against the member, but they are not admissible to establish even *prima facie* the fact of membership, as against one protesting his lack of connection with the company. As to him such books are hearsay of the baldest kind." *Girard Trust Co. v. Loving,* 71 Kan. 559, states: "The books from which certain entries were offered in evidence were wholly unidentified as to the purpose for which they had been kept. There is nothing to indicate that the entries offered in evidence were correct, or were made at or near the time of the transactions to which they relate, if they do relate to actual transactions, or that they were original in the sense that they constituted the first permanent record of the business to which they refer."

One criticism of the rule in the texts and the cases is directed to the proposition that the books, unidentified, should be *prima facie* evidence of the ownership of stock. But the proof in this case goes far beyond that, since the books are identified by the president of the Pioneer State Bank, who signed every certificate of stock as the stock record of the bank, representing the original issuance and the subsequent transfers of stock.

Another criticism of the rule that stock books are competent evidence is that, since the relationship of a stock-

holder and the corporation is contractual, it is necessary that both the corporation and the stockholder assent to the relationship. It is conceded that the books are admissible to prove the corporation's assent; but, as evidence of the stockholder's assent, it is, in a suit against the corporation, a self-serving declaration, and, in a case between others, hearsay. In this connection we must remember that in this case we are concerned with a banking corporation, subject to the control and strict supervision of the state. Certain corporate acts are required as a condition precedent to engaging in the banking business. The state and the public have a right to know the stockholders who guarantee by their investment in stock and by their additional constitutional liability the payment of creditors, including depositors, of the bank. The stockholders united in the corporate body for the purpose of engaging in the banking business. The keeping of records, including a record of stockholders and the reports required by the state, were corporate acts which they were obliged to perform. It is the general rule that books and records of corporations, when properly kept and identified, are evidence of the acts and proceedings of the corporate body. So, in the instant case, this objection is not formidable.

In *Gruetzmacher v. Quevli*, 226 N. W. 5 (208 Ia. 537), it was held that the "exclusion of corporate stock records in a receiver's suit to enforce stockholder's liability held erroneous. In suit by receiver, * * * the exclusion of the corporate stock book and records tending to show defendant's status as stockholder on the objection that defendant was not shown to have been a stockholder or to have had knowledge concerning records or to have ever in fact received stock certificate held erroneous; the corporate records being admissible in connection with other evidence on issue of her membership in corporation." To prove appellee was a stockholder, appellant offered in evidence the stock book and the stub thereof, which is as

follows: "Certificate No. 6. For 400 shares, issued to Anna M. Quevli, Mason City, Iowa. Dated December 22, 1921." It is identical with the stub in the instant case. See, also, *Lebens v. Nelson,* 148 Minn. 240; *Holland v. Duluth Iron Mining & Development Co.,* 65 Minn. 324. It is impossible to cite, discuss and analyze all the cases upon the proposition, because of the great number. There is a hopeless conflict and they cannot be reconciled. We have cited only a few of the many to indicate the diversity of opinion.

Our statutes seem to be controlling in this case. Section 20-1212, Comp. St. 1929, provides that books of account are receivable in evidence under certain circumstances. In *Volker v. First Nat. Bank,* 26 Neb. 602, it was said that bank books were admissible in evidence under the provisions of the foregoing section. The stock book of a banking corporation is competent evidence, when properly identified, of the ownership of the corporate stock. The books in this case are so identified. The statute has declared banking to be a quasi-public business, and as such is subject to public control and supervision. Banking corporations are required by law to keep true records. There was offered and received in evidence a quarterly report of the bank made while it was a going concern, just prior to the receivership, which contained a list of all stockholders and the number of shares held by each, which was sent to the banking department as required by law, and was made up from the records of the bank. The statutes provided criminal penalties for false records and false reports. It is presumed that the officers of the bank have obeyed the law and kept the records correctly, and made accurate reports, although of course the evidence may be rebutted by any competent evidence. There is no evidence to rebut the presumption in this case that the record and the report as to the ownership of the stock was accurate. In making this statement, we are not unmindful that the record contains evidence of the conviction of the president for embezzlement. In this case, to establish the con-

stitutional stockholder's double liability, the stock book of the corporation, properly identified by the president who issued and signed all the certificates of stock and under whose direction the book was kept, and the quarterly report required by law to be made to the department of trade and commerce, are sufficient evidence to sustain a finding that one was a stockholder.

The appellant Sol Greenamyer, in addition to the assignments of error heretofore discussed, urges an assignment especially applicable to him. He was made a party to the suit as executor of the estate of Amos Greenamyer, deceased. The question he presents is whether or not, for the purpose of establishing a claim against the estate, he was the duly appointed, qualified, and acting executor and legal representative of Amos Greenamyer, deceased, at the time of service of a summons upon him, when he had been formerly discharged as executor. In this particular, the case is controlled by the rule announced in *Hazlett v. Estate of Blakely,* 70 Neb. 613, in which we said: "The trust of an administrator or executor is a continuing one, and a decree of final accounting does not destroy the relationship of such officer, but only discharges him from liability for the past." The purpose of this suit is to render a contingent claim absolute. The claim having been established as an absolute one, it is not within our province to determine in this case whether or not the claim may be collected from the estate.

One of the defendants, Henry C. Lemke, challenges the right of the plaintiff to recover for that he inherited the bank stock at a time when he was 17 years of age, and at the time the receivership proceedings were commenced he was less than 18 years of age, and did not attain his majority until over three years after the bank had failed. The relationship of a stockholder in a corporation is contractual. *Allen v. White,* 103 Neb. 256; *Enterprise Ditch Co. v. Moffitt,* 58 Neb. 642. The plaintiff in this case contends that, since the minor had retained this stock for

more than five years after he became of age, and prior to bringing this suit, and did nothing to disaffirm this contractual relationship, he is liable as a stockholder. Ordinarily, it is necessary for the infant to return or tender back any part of the consideration which he may have and disaffirm the contract. *Krbel v. Krbel,* 84 Neb. 160. The stock of the Pioneer State Bank was without value, and was known to be worthless at least from the date of the appointment of a receiver. The fact is well established by the record that it was a liability rather than an asset. The minor in this case never received any benefit from the stock and did not exercise any dominion over it in the sense that he acted as a stockholder. Being a contractual relationship, the minor could not make a binding contract which would render him liable for the stockholder's liability. He did nothing to affirm his contract. Therefore, the minor cannot be said to have retained any benefits under the contract and it was not necessary for him to make an express repudiation. The retention of the benefits of a contract made by an infant after reaching his majority is ordinarily held to be a ratification of the contract. However, the question of whether or not there has been a ratification is ordinarily a question of fact. In the case at bar, the defendant inherited this bank stock while a minor, and more than three years before his majority it was known to be worthless. He never received any benefit from this stock and his inheritance in this particular was nothing but a liability. Where an infant has received some benefit during infancy, he must repudiate the contract within a reasonable time after attaining majority. *Englebert v. Troxell,* 40 Neb. 195; *Johnson v. Storie,* 32 Neb. 610; *Krbel v. Krbel,* 84 Neb. 160. But not having received any benefit, and not having ratified the contract after his arrival at majority, he is not bound by the same. This defendant did not retain any benefit from this contractual relationship, and the fact that after reaching his majority he did not repudiate

the relationship is not sufficient to bind him. The theory of the law is that one who retains the benefits, in effect, ratifies the contract. There were no benefits in this case and the stock certificate had become three years before he attained his majority a mere scrap of paper. The plaintiff is not entitled to a recovery against this defendant, as to whom the judgment is reversed.

For the reasons herein set out, the judgment of the district court is in all things affirmed, except as to Henry Lemke, against whom the judgment is reversed and dismissed.

AFFIRMED IN PART, AND REVERSED IN PART.

ALBERT A. KILLION, ADMINISTRATOR, APPELLEE, V. HERMAN DINKLAGE, APPELLANT.

FILED MAY 29, 1931. No. 27721.

1. Death: ACTION: PETITION. In an action to recover for wrongful death, a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and does not allege any pecuniary loss to such survivors as are described.
2. ———: PRESUMPTION OF PECUNIARY LOSS. A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another.
3. ———: ACTION: PETITION. A petition alleging a loss and injury caused by loss of service and contributions for support is sufficient averment of pecuniary loss to state a cause of action.
4. Trial: QUOTIENT VERDICT. A quotient verdict is one where the jury for the purpose of arriving at a verdict agree that each should write on his ballot a sum representing his judgment; that the aggregate should be divided by the number of jurors; that they will be bound by the result and the quotient shall be the verdict. Such a verdict will be set aside.
5. ———: ———. A verdict is not a quotient verdict where the jury acted on the suggestion that each should indicate his judgment as to the amount and that the aggregate amount should be divided by twelve to ascertain the average, where

there is no agreement that the amount so found should be their verdict.

6. ———: ———. The fact that the verdict was not the average amount arrived at by adding and dividing is evidence of the fact that it was not a quotient verdict.
7. Jury: EXAMINATION. Where it is called to the attention of the defendant's attorney before the jury are impaneled and sworn that the relationship of attorney and client existed between the plaintiff's attorney and some jurors it is lack of diligence upon his part not to inquire further into the matter.
8. Negligence: INSTRUCTION. An instruction that casts the burden of proof upon the defendant to establish contributory negligence of plaintiff to prevail in his defense to such a degree as to defeat recovery is in conflict with the statutory comparative negligence rule of this state and is erroneous.
9. New Trial: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative or impeaching or not of such controlling force as would probably change the result of the trial.
10. Death: RECOVERY. A parent can recover funeral expenses incurred for an unmarried minor child whose death was caused by defendant's negligence.

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

Fred S. Berry, for appellant.

C. H. Hendrickson and *Saxton & Hammes, contra.*

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

DAY, J.

This is an action brought by the administrator of the estate of Charles Killion, deceased, under sections 30-809 and 30-810, Comp. St. 1929, to recover damages for the death of the deceased caused by the negligence of the defendant in the operation of his automobile, resulting in a collision. This action was prosecuted for the benefit of the father and mother of the deceased. From a verdict in favor of the administrator, the defendant appeals.

The petition alleges: "Charles Killion died unmarried, intestate, leaving surviving him his father, Albert Killion, and his mother, Jessie Killion, who are his next of kin; * * * that the plaintiff has sustained and suffered great loss and injury occasioned by loss of services and means of support and contributions therefor, and has been damaged on this first cause of action for the benefit of said father and mother." The petition of the plaintiff was challenged by a general demurrer. It is the contention of the defendant that this is not sufficient to state a cause of action in favor of plaintiff. He relies on the case of *Chicago, B. & Q. R. Co. v. Van Buskirk,* 58 Neb. 252. It was there held that a petition alleging that deceased left as his heirs and next of kin a father and mother did not state facts sufficient to constitute a cause of action. To practically the same effect is *Chicago, B. & Q. R. Co. v. Bond,* 58 Neb. 385, and *Chicago, R. I. & P. R. Co. v. Young,* 58 Neb. 678. Upon a retrial of the latter case, the petition was amended to include an allegation of pecuniary loss. *Chicago, R. I. & P. R. Co. v. Young,* 67 Neb. 568. Where there is a legal duty to support, it has been held that an averment of relationship is sufficient. *City of Friend v. Burleigh,* 53 Neb. 674; *Omaha & R. V. R. Co. v. Crow,* 54 Neb. 747; *Kearney Electric Co. v. Laughlin,* 45 Neb. 390; *Orgall v. Chicago, B. & Q. R. Co.,* 46 Neb. 4. It appears that the rule has long been established in this state that, in an action to recover for wrongful death, a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and does not allege any pecuniary loss to such survivors as are described. The plaintiff relies upon the case of *Tucker v. Draper,* 62 Neb. 66, to support his petition. The allegation was that the father was damaged "by reason of death and loss of service" of a three year old son. Since the father of a three year old son is legally entitled to his service during his minority, the averment or relationship was held sufficient. A presumption of pecuniary loss exists in favor

of one legally entitled to service or support from one killed by the wrongful or negligent act of another. The petition in the case at bar describes the parents of deceased, but does not show them to be legally entitled to service or support from the deceased. There is neither allegation of the minority of the deceased nor averment that parents are legally dependent upon him for support. Whether or not a petition which alleges "loss and injury occasioned by loss of services and means of support and contributions therefor" is a sufficient allegation of pecuniary loss under the statute is undoubtedly a close question. A majority of the members of this court are of the opinion that a petition alleging a loss and injury caused by loss of service and contributions for support is sufficient averment of pecuniary loss to state a cause of action. The general demurrer to the petition was therefore properly overruled.

The appellant claims that the judgment should be reversed because the verdict was what is commonly known as a quotient verdict. A quotient verdict is one where the jury for the purpose of arriving at a verdict agree that each should write on his ballot a sum representing his judgment; that the aggregate should be divided by twelve; that they will be bound by the result and the quotient shall be the verdict. It is almost universally held that, if the jury arrive at their verdict in such a manner, it will be set aside. The vice in such a verdict is that it does not represent the deliberate judgment of the jurors and that it is subject to manipulation and partakes of the nature of a lottery. Such an agreement would enable one juror by voting for a very large or a very small sum to produce an average for an amount which would be unreasonable and at variance with the judgment of the other jurors. Such a verdict has been condemned in numerous cases. *Burke v. Magee,* 27 Neb. 156; *Sylvester v. Town of Casey,* 110 Ia. 256; *Haight v. Hoyt,* 50 Conn. 583; *George's Restaurant v. Dukes,* 216 Ala. 239; *Anderson v. Kirby,* 105 Kan. 596; and numerous other cases.

A verdict is not a quotient verdict where the jury acted on the suggestion that each should indicate his judgment as to the amount and that the aggregate amount should be divided by the number of jurors to ascertain the average, where there is no agreement that the amount so found should be their verdict. *Herbert v. Katzberg,* 104 Neb. 395; *Janesovsky v. Rathman,* 107 Neb. 165; *Village of Ponca v. Crawford,* 23 Neb. 662; *Peak v. Rhyno,* 200 Ia. 864; *In re Estate of Havenmaier,* 163 Minn. 218; *Crawl v. Dancer,* 180 Mich. 607; *Reick v. Great Northern R. Co.,* 129 Minn. 14. The fact that the verdict was not the average amount arrived at by adding and dividing is evidence of the fact that it was not a quotient verdict. *McElhone v. Wilkinson,* 121 Ia. 429. It was established by affidavits of jurors, uncontradicted, that the amount arrived at by computation was either $8,600 or several hundred dollars in excess of the verdict returned. We are not unmindful of the fact that there was an attempt to impeach the testimony of the foreman of the jury by impeaching testimony to the effect that he stated shortly after the verdict was returned that the amount arrived at was $8,313, and that they merely cut off the $13. This testimony is denied by the juror. Even the affidavits of the four jurors who stated that they agreed in advance that the amount of said division should be the amount of the verdict do not state that verdict was arrived at without further deliberation. The issue of fact presented by affidavits and counter affidavits of jurors and oral testimony was passed upon by the trial court. This will not now be disturbed. *Janesovsky v. Rathman,* 107 Neb. 165; *Canon v. Farmers Bank,* 3 Neb. (Unof.) 348; *Farmers Irrigation District v. Calkins,* 104 Neb. 196.

Misconduct of juror is another ground urged for reversal. It is alleged that on his *voir dire* examination he testified falsely that he did not have a case pending for trial in the district court for Wayne county and that one of the plaintiff's attorneys was not his attorney in any

matter. The *voir dire* examination of the jury is not preserved in the bill of exceptions. What occurred at the time is presented by affidavits filed in support of a motion for new trial. It appears that the juror had a case pending and that an attorney for the plaintiff represented him in that case. The case was not pending for trial at that term since it had been continued. Therefore this did not constitute a statutory ground sufficient by itself to sustain a challenge for cause. Comp. St. 1929, sec. 20-1609. The attorney for the defendant had some knowledge that there was a case pending in the court in which a man named Beckman was defendant, but he does not contend that he called the juror's attention to it. It also appears that, before the jury had been sworn, an attorney for the plaintiff stated to the attorney for the defendant that some of the jurors were clients of his. Instead of inquiring further, the defendant's attorney stated that he was perfectly willing to try the case to a jury of clients of the plaintiff's attorney. This is admitted by defendant's attorney who now says that he thought it referred to another juror. The attorneys for the plaintiff and the juror deny, or at least say that they have no recollection, that such a question was asked on *voir dire* examination. Therefore this is an issue of fact upon disputed evidence and was determined by the trial judge adversely to the defendant's contention.

It is also true that the right to challenge a juror for cause may be waived or lost where there is a lack of diligence. *Coil v. State,* 62 Neb. 15. When it is called to the attention of defendant's attorney before the jury are impaneled and sworn that the relationship of attorney and client existed between the plaintiff's attorney and some jurors, it was lack of diligence upon his part not to inquire further into the matter.

Complaint is made of the following instruction to the jury by the court: "On the other hand, where contributory negligence is pleaded as a defense as it is in this

case, the burden is upon the defendant to establish that the death of Charles Killion was due to his own negligence to such a degree as to defeat recovery." Similar instructions have been held erroneous by this court. *Gerish v. Hinchey,* 120 Neb. 51; *Davenport v. Intermountain R. L. & P. Co.,* 108 Neb. 387. The burden of proof is upon the plaintiff to establish the negligence of the defendant in order to recover. Contributory negligence does not bar a recovery, where the negligence of the defendant is gross in comparison. *Morrison v. Scotts Bluff County,* 104 Neb. 254. An instruction that casts the burden of proof upon the defendant to establish contributory negligence of plaintiff to prevail in his defense to such a degree as to defeat recovery is in conflict with the statutory comparative negligence rule of this state and is erroneous. While the court in other instructions states the correct rule, the error in this instruction which specifically refers to contributory negligence is such that it undoubtedly confused the jury. This erroneous instruction requires a reversal of the judgment.

Another ground which the appellant urges for a reversal is that he may offer newly discovered evidence. As a general rule a motion for new trial is addressed to the sound discretion of the trial court. A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative or impeaching or not of such controlling force as would probably change the result of the trial. *Parkins v. Missouri P. R. Co.,* 79 Neb. 788; *Blaha v. Chicago & N. W. R. Co.,* 119 Neb. 611; *Simonsen v. Thorin,* 120 Neb. 684; *Omaha, N. & B. H. R. Co. v. O'Donnell,* 24 Neb. 753; *Riley v. Missouri P. R. Co.,* 69 Neb. 82. The testimony offered is in its nature impeaching and cumulative and not such as would probably change the result.

The plaintiff seeks to recover the amount expended for the funeral expenses of the deceased. Recovery of damages is under the statutes. Comp. St. 1929, secs. 30-809,

30-810. This statute was suggested to us by the English law known as Lord Campbell's Act. The English cases hold that funeral expenses are not recoverable. *Clark v. London General Omnibus Co.*, 2 K. B. (1906) 648. In this case, cited by many authorities as representative of the English rule, it is said: "A father cannot recover, either at common law or under the fatal accidents act of 1846 (Lord Campbell's Act), the funeral expenses to which he has been put in burying an unmarried infant daughter, whose death was caused by reason of defendant's negligence and who was residing with her father at the time of her death." Some American cases have followed this rule. See *Delaware, L. & W. R. Co. v. Hughes*, 240 Fed. 941. Some cases cited as authority to support the view that funeral expenses are not recoverable were decided in actions at common law and were not brought under a statute. See *Sherman v. Johnson*, 58 Vt. 40; *Trow v. Thomas*, 70 Vt. 580. In this country, funeral expenses of the deceased may generally be recovered where any of those for whose benefit the action is brought are legally bound to pay them. *Stejskal v. Darrow*, 55 N. Dak. 606; *Castner v. Tacoma Gas & Fuel Co.*, 126 Wash. 657; *Kelly v. Higginsville*, 185 Mo. App. 55; *Swift & Co. v. Johnson*, 138 Fed. 867; *Marshall v. Miller*, 112 Kan. 706; *Carnego v. Crescent Coal Co.*, 164 Ia. 552; *Herning v. Holt Lumber Co.*, 153 Wis. 101; *Palmer v. New York Central & H. R. R. Co.*, 138 N. Y. Supp. 10.

The view of these cases is expressed by the language of *Consolidated Traction Co. v. Hone*, 59 N. J. Law, 275, reversed on rehearing, 60 N. J. Law, 444: "The funeral expenses being part of the pecuniary damages resulting from the death of the son, and which had been paid by the father, can be recovered in the action by the father as the administrator under the statute." The theory upon which recovery is allowed in cases of this nature is that those who have suffered a pecuniary loss on account of the wrongful death of the deceased may recover for the

damage they have sustained by reason of the wrongful act in respect of which the deceased could have brought an action had he lived. The gist of the action is the pecuniary loss for the removal by death of the deceased. It is not a recovery for the injury inflicted on the deceased as such. This reasoning, it is said, leads to the conclusion that funeral expenses are not proper items of recovery. The decisions which hold that funeral expenses are not recoverable adhere to the strict rule that the sole measure of damages is for pecuniary loss occasioned by the destruction of life of the deceased. The weight of authority is to the effect that recovery can be had for funeral expenses which have been paid by the beneficiaries or for which they were liable. 17 C. J. 1338; 8 R. C. L. 827, sec. 105.

Sedgwick, in his work on Damages, sec. 573, explains that the compensation is for death and not injuries to deceased. This reasoning, he says, leads to the conclusion that medical and funeral expenses are not recoverable. However, he adds, in this country generally funeral expenses of deceased may be recovered where any of those for whose benefit the action is brought are legally bound to pay.

Tiffany, in his work on Death by Wrongful Act, sec. 157, states the rule as follows: "In the United States, however, funeral expenses are generally held to be a legitimate element of damages, at least when paid by one of the beneficiaries who was under obligation to pay them." Such claim for damages is not an asset to an estate. *City of Friend v. Burleigh*, 53 Neb. 674. To confine the damage, as some courts have, to the loss occasioned by the decedent "not being alive" is in our judgment to construe the statute too narrowly. Funeral expenses are literally caused by the death. It is the duty of parents to bury their deceased minor children.

In *Marshall v. Miller Bros.*, 112 Kan. 706, it was held that, under the statute authorizing a recovery for the

benefit of the next of kin against one whose wrongful act has occasioned a death, the damages recovered by a father for the death of his minor son may include compensation for funeral expenses; that "while under some decisions adhering to the strict rule that the sole measure of damages is the pecuniary loss occasioned by the destruction of life of the deceased person, there can be no recovery for medical or funeral expenses, the weight of authority is to the effect that recovery can be had for medical and funeral expenses which have been paid by the beneficiaries, or for which they are liable."

Some of the cases which do not allow funeral expenses as a part of the measure of damage adopt the argument sometimes suggested that the defendant should not be held liable for funeral expenses, because eventually they would have to be paid anyway, and that the tort did not cause the expense, but merely accelerated the date of payment. This argument is not persuasive in a case where the action is brought for the benefit of the father and mother for the wrongful death of a minor child, for the reason that, in such a case, the presumption is that, in the absence of the wrongful and negligent act of the defendant, the parent would never be called upon to pay the funeral expenses. In line with the weight of authority, we adopt the rule that a parent can recover funeral expenses incurred for an unmarried minor child whose death was caused by defendant's negligence.

In accordance with this opinion the judgment of the trial court is reversed and the cause remanded.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. LILBURN B. LAKE, APPELLANT.

FILED MAY 29, 1931. No. 27634.

Physicians and Surgeons: LICENSES: REVOCATION. In an action to revoke the license of a physician to practice his profession for

procuring an abortion, authorities and evidence are reviewed, and evidence found sufficient to revoke the license.

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

William N. Jamieson, D. M. Murphy and *Ray W. McNamara,* for appellant.

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

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

PAINE, J.

This was an action brought by the state of Nebraska, on relation of the attorney general, as a result of which the secretary of the department of public welfare of the state of Nebraska revoked the license of the defendant to practice medicine.

The petition charged that Lilburn B. Lake, the defendant, was licensed by the department of public welfare of the state of Nebraska to practice the profession of medicine and surgery in the state of Nebraska and was engaged in such practice in Omaha by virtue of such license. The petition also charged that said defendant, Lake, was guilty of an act and offense for which his said license to practice the profession of medicine and surgery in Nebraska should be revoked, to wit, immoral, unprofessional, and dishonorable conduct, in that said defendant did, on or about the 12th day of January, 1929, procure or aid in procuring a criminal abortion upon Mrs. Rhoda Hoyt, of Omaha, Douglas county, Nebraska. The defendant filed a general denial.

A hearing was had before Ernest M. Pollard, secretary of the department of public welfare of Nebraska, and an order revoking and canceling the license of said defendant to practice his profession was duly entered.

Thereupon appeal was taken to the district court for Douglas county, a trial had to the court, and on April 24, 1930, a decree was rendered herein, affirming the order of the department of public welfare. Motion for new trial was overruled by the court, and a notice of appeal was filed and the case was brought before this court for review.

There is little agreement on the facts in this case, but the plaintiff insists that the evidence shows that Mrs. Rhoda Hoyt died at the Methodist Hospital in Omaha on February 16, 1929, from general septicemia which resulted from an abortion performed by the defendant; that she left surviving her an adopted boy and her husband, who has since remarried.

It appears that Mrs. Hoyt first called at the office of her family physician, Dr. Glenn Miller, on January 8, 1929, who found her about five weeks along in pregnancy, but said she needed no medicine and that her condition was entirely normal.

Three nights later Mrs. Hoyt told her husband that she had visited Dr. Lake, the defendant in this case, and had told him of her great difficulty, the winter before, in having a child born dead, and that the defendant had told her he did not blame her for not wanting to go through pregnancy again, and that he would charge $35. On the next evening, January 12, Mrs. Hoyt told her husband that she had had the abortion performed that day. She described the instruments that he used and the technique of the operation, but her husband refused to give her money to pay for it. On leaving home in the afternoon, she had left her adopted boy with a neighbor, Mrs. Brown, to whom she had already told of her pregnancy, and this neighbor in that conversation had advised her against having an abortion performed. She reported that on her return from her first trip to the defendant there was "nothing doing," and when she returned from her second trip she said there had been "something done." At 4:30

on the morning of January 23 Mrs. Brown was called, and Mrs. Hoyt had had a uterine hemorrhage and later fainted, and after her husband went to work at 6:30 a. m., Mrs. Brown called Dr. Lake from a neighbor's telephone, as they had none in the house. In response thereto Dr. Lake arrived with his instruments, which Mrs. Brown helped him sterilize in a dishpan, and he gave Mrs. Hoyt a surgical packing; while the defendant insists that this is the first time that he had been called on the case, that he knew nothing about the nature of the case and brought no instruments with him. He made repeated visits to her home, and on January 27 she had another hemorrhage upon her return from church and went to Dr. Lake's office that afternoon with her husband, at which time he paid Dr. Lake $5 on his bill. Her condition changed for the worse and upon the evening of February 1 Dr. Lake recommended that she be taken to a hospital, at which time the husband discharged Dr. Lake, who had nothing further to do with the case. The family physician, Dr. Miller, was called and found her temperature 105 and had her given the best of hospital care. In spite of several blood transfusions she grew steadily worse and died February 16, 1929. For the last ten days of her life she was too weak even to move her hands without assistance. She had lost the entire sight of one eye by an abscess from the infection, and during this time she made statements that she believed she was about to die. She said to Albert Hanna, "Goodbye, Mr. Hanna, it is all over with me now." On February 6, and at other dates thereafter, she said she gave up the ship, and asked her husband what they would do with the adopted boy.

1. In the assignments of error it is insisted that the court erred in admitting into evidence testimony as to alleged dying statements made by Rhoda Hoyt, covering the circumstances leading up to the cause of her sickness and her resulting death, being statements by certain witnesses as to conversations had with decedent, which defend-

ant claims did not in fact and in law constitute dying statements, insisting that, this not being a criminal prosecution involving manslaughter or murder charges, said purported dying statements are not admissible in evidence.

Defendant cites from a case in which a defendant poisoned his daughter-in-law: "A statement made by one who is ill and vomiting, but who had said nothing to indicate that he realized that he was dying, was not admissible as a dying declaration." *State v. Swenson*, 26 S. Dak. 589. He also cites from 30 C. J. 255, sec. 498: "The fact that the declarant believes himself in great danger and entertains a fear that he must die is not sufficient." And he calls attention to the case of *Thrasher v. Board of Medical Examiners*, 185 Pac. 1006 (44 Cal. App. 26), wherein the following pertinent syllabus occurs in a similar case, also brought to revoke a license for an abortion: "Dying declarations are not admissible in a proceeding before the board of medical examiners to revoke a license to practice medicine, or in any other proceeding, except in criminal cases of homicide."

It may be granted that ordinarily such evidence is only admissible in criminal cases, yet in 10 Boston University Law Review, 470-487, it is stated that many exceptions have been made to this rule, and that as early as 1761 the dying statement, made three weeks before his death, of a scrivener of a will, to the effect that the will was a forgery, was admitted in evidence. Many courts have evinced a strong tendency to admit dying declarations as part of the *res gestæ* when they are not too remote in time, and the writer of this article insists that there is a drift in recent years to more liberality in the admission of such statements, and that the probative force of a dying declaration should be no greater in a prosecution for homicide than in a civil action for wrongful death growing out of the same facts, and insists that the rule should be extended to allow dying declarations to be admitted in civil actions when they are made before the action is begun.

In 3 Wigmore, Evidence (2d ed.) 164, the author says: "In several jurisdictions the aid of the legislature has been invoked to stop the further defiance of common sense by the courts over such monstrous trivialities, and to admit dying declarations in charges of abortion and related offenses"—citing cases from Ohio and Massachusetts.

In 9 Oregon Law Review (Feb. 1930) 174, in an article on the same subject, we are told that in 1909 an amendment was passed by the legislature of Oregon which struck out the words "in criminal actions" in reference to dying declarations, and therefore in that state such declarations are admissible in civil cases as in criminal cases. In *Thurston v. Fritz*, 91 Kan. 468, we are told that in Kansas dying declarations are permitted in civil cases, and in Massachusetts, Missouri, New York, Ohio, Pennsylvania and North Carolina such declarations are now permitted in certain forms of civil actions.

The plaintiff suggests that, even if the dying declarations were not proper in a civil case, they were clearly admissible as part of the *res gestæ*, and also admissible as statements of a co-conspirator, citing the admission in evidence of Miss Ruth Ayer's letter to her sweetheart, Watson Alexander, of Hayes Center, Nebraska, as found in *Fields v. State*, 107 Neb. 91; but it must be noted that this was a criminal prosecution, in which Dr. Fields was sentenced to the penitentiary for performing the abortion which resulted in her death. In *Edwards v. State*, 113 Neb. 698, is found a very full discussion of the same subjects by this court.

In *Mathews v. Hedlund*, 82 Neb. 825, all of the earlier cases upon revoking licenses of physicians are reviewed, and we read: "The judgment should be affirmed if all of the jurisdictional facts were established by any competent evidence, even though opposed by other and weighty evidence. In referring to the evidence as 'competent' we mean evidence competent for that character of proceedings."

Judge Fawcett, in the second hearing of *Munk v. Frink*,

81 Neb. 631, says: If defendant has been given "full opportunity to appear in person or by counsel to cross-examine the witnesses against him, and to introduce testimony in his own behalf, * * * the findings of the board as to the sufficiency of the evidence, * * * will be upheld, unless it appears there is no evidence to sustain such findings."

The laws relating to revocation of a license to practice medicine and surgery, as found in sections 71-601 to 71-615, Comp. St. 1929, permit such license to be revoked for fraud in securing the license, drunkenness, untruthful statements in his advertising, or for failure to pay his annual renewal fees. If a license may be revoked for such things, why should the authorities hesitate in revoking a license for performing a criminal abortion resulting in death?

The statute provides that the proceeding shall be summary in its nature and triable as an equity action (Comp. St. 1929, sec. 71-609), and if appealed to the district court it must be advanced over all other cases except compensation and criminal cases (Comp. St. 1929, sec. 71-614), and if appealed from district court no bond except for costs shall be required, and that the giving of such cost bond does not restore the right of defendant to practice his profession pending appeal to this court (Comp. St. 1929, sec. 71-615).

In a very similar case the New Jersey court overruled an objection that the action for revocation of license was not brought until after a criminal prosecution for the abortion had been barred by the statute, and say: "The statute authorizing revocation of the license is not intended as a punishment of the physician for the crime involved, but as a protection of the public, and the statute of limitations is no defense to this proceeding." *Blumberg v. State Board of Medical Examiners*, 96 N. J. Law, 331.

The relation of physician and patient is of such a confidential and serious nature that the moral character of a

physician is considered highly important. In this case the defendant is charged with immoral, unprofessional and dishonorable conduct.

The court is convinced, by a careful reading of the whole evidence in this case, that the defendant brought about the criminal abortion upon the deceased, Mrs. Rhoda Hoyt, and that this abortion was not brought about by her taking quinine or taking an automobile ride, as the defendant naively suggests in his testimony.

This case was tried to the court as an equity case, and it has frequently been held that it is unnecessary in such cases to pass upon assignments of error in the admission of evidence upon review in this court. It will not be presumed that the trial court acted upon or considered incompetent evidence and the action of that court in admitting evidence will not be reviewed. *Rozean v. State,* 109 Neb. 354; *Kemmerling v. State,* 89 Neb. 98; *State v. Knight,* 204 Ia. 819.

The district judge entered an order reading in part: "Wherefore, it is considered, ordered and decreed by the court that the order herein entered February 14, 1930, by the department of public welfare of the state of Nebraska revoking and canceling the license and certificate heretofore granted to the defendant Lilburn B. Lake to practice the profession of medicine and surgery in the state of Nebraska be, and hereby is, affirmed."

This order is right and is hereby

AFFIRMED.

EBERLY, J., concurs in result.

IN RE ESTATE OF ERNEST B. GRAINGER.
DOROTHY H. WARD, APPELLANT, V. LINCOLN NATIONAL BANK & TRUST COMPANY, ADMINISTRATOR, APPELLEE.

FILED JUNE 5, 1931. No 27896.

1. **Abatement and Revival: ACTION FOR NEGLIGENCE: DEATH OF**

WRONGDOER. An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.

2. ———: ———: ———. The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought.

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

Loren H. Laughlin, for appellant.

Fred N. Hellner and *W. A. Selleck, contra.*

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

DEAN, J.

This is an appeal by Dorothy H. Ward from the dismissal of her claim in the district court for Lancaster county against the estate of Ernest B. Grainger, deceased, for $20,250, as damages for personal injuries which she alleges she sustained, on or about November 9, 1929, while she was riding with Grainger, as his invited guest, in his Packard automobile which was then being driven by him on a public highway between Lincoln and Omaha. Ten days thereafter, namely, on November 19, 1929, Grainger died from the effects of the injuries which he sustained in the accident. On May 1, 1930, this action against his estate was begun.

The Lincoln National Bank & Trust Company, as administrator of the decedent's estate, filed an amended demurrer, wherein it is alleged that the claim "is not a proper and lawful claim under the laws of the state of Nebraska; that said claim, if any, abated with the death of Ernest B. Grainger, deceased, and that said claim and claims do not constitute a cause of action against the estate of Ernest B. Grainger, deceased." The court sustained the amended demurrer as to the first cause of action, namely, the sum of $20,250, but, as to the second cause of action, an

item for $47 for the destruction of clothing worn by claimant at the time of the accident, it was agreed that proceedings on such claim should be suspended until an appeal had been perfected on this, the first cause of action.

The claimant alleged that before, and at the time of the accident, Grainger was driving the car at an excessive and highly dangerous rate of speed approximating 70 miles an hour, and that she urgently requested him to reduce the speed of his car, but that he gave no heed to her pleas. In respect of the accident, the claimant alleged that the Grainger car collided with a truck which was towing a wrecked car at an intersection of the highway, and that, as a result of the accident, she sustained severe and permanent injuries, and that, solely as a result of such collision, she has been totally unable to continue her occupation as an employee in a medical clinic.

It is the contention of the administrator that the action does not survive Grainger's death, and that, under the laws of this state, no lawful provision exists upon which such action can be sustained. Counsel for the claimant, however, contend that the common-law rule that a cause of action does not survive the death of the tort-feasor is not applicable to existing modern conditions and that it does not prevail in Nebraska.

Section 20-1401, Comp. St. 1929, provides:

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

And in section 20-1402, Comp. St. 1929, we find this provision:

"No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace

for misconduct in office; which shall abate by the death of the defendant."

And section 49-101, Comp. St. 1929, contains this provision:

"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 the law within the state of Nebraska."

From the provisions of section 49-101, above cited, it is clear that the common law exists in this state only where applicable and not inconsistent with the laws of this state. *Bishop v. Liston,* 112 Neb. 559; *Kerner v. McDonald,* 60 Neb. 663.

Under the common law, a cause of action did not survive either the death of the wrongdoer or that of the person injured. And, except as changed by statute in recent years, the common-law rule has very generally prevailed. As stated in *Hambly v. Trott,* 2 English Ruling Cases, 1, a decision rendered in 1776, the reasoning appears to have been that all private crimes die with the offender and that an executor cannot be held liable so far as a tort was there concerned; but, where the act of the offender involved a benefit to his estate, the executor was held chargeable. In later cases, however, it was held that actions involving injury to property interests also survived. *Lansdowne v. Lansdowne,* 1 Mad. (Eng.) 116.

There now appears to be a noticeable deviation from the common-law rule as applied to a tort committed by one who subsequently came to his death. It has been held that a cause of action does not abate with the death of the person injured, and that such injured person's estate or surviving relatives may recover from the wrongdoer for damages sustained by his death. *Brown v. Chicago & N. W. R. Co.,* 102 Wis. 137. In *Harris v. Nashville Trust Co.,* 128 Tenn. 573, the court held that an action might be

maintained against the executor of an estate, as such, for defamatory words contained in a will, which was published for probate, on the ground that the maxim, *actio personalis moritur cum persona,* did not apply. The court there said: "The determinative question, therefore, is whether a wrong has been inflicted for which plaintiff is entitled to recover lawful damage, and not whether there is a precedent for the suit." And the court, in the above cited *Harris* case, quoted from *Jacob v. State,* 3 Humph. (Tenn.) 493, wherein this language was used:

"The common law of a country will, therefore, never be entirely stationary, but will be modified, and extended by analogy, construction and custom, so as to embrace new relations, springing up from time to time, from an amelioration or change of society. * * * Though principles once established by judicial determination can only be changed by legislative enactment, yet such is its malleability (if we may use the expression) that new principles may be developed, and old ones extended, by analogy, so as to embrace newly created relations and changes produced by time and circumstances."

We have held that a pending action for personal injuries does not abate by the death of the injured person but may be revived by the decedent's personal representative. *Webster v. City of Hastings,* 59 Neb. 563; *Murray v. Omaha Transfer Co.,* 98 Neb. 482. See, also, *Levin v. Muser,* 107 Neb. 230. But there has not been a decision pointed out bearing directly on the facts herein, nor do we know of any in this state. The claimant argues that it is not an equal protection of the laws to deny to her the right of recovery against the decedent's estate when, under our decisions, as noted above, the right to recover from a living tort-feasor has been granted to a dead person's estate.

We do not think that the claimant should be precluded from presenting the facts pertaining to the accident and her injuries. Nor does any valid reason appear that should tend to prevent her from being heard upon the presentation of her cause of action.

The judgment of the district court must be and it hereby is reversed, with directions that the claimant, if so advised, be permitted to present her cause in manner and form provided by law.

REVERSED.

JAMES R. CROFT ET AL., APPELLANTS, V. SCOTTS BLUFF COUNTY, APPELLEE.

FILED JUNE 5, 1931. No. 27662.

1. **Eminent Domain:** DAMAGES. "Damages for the taking of land or for the injury to land not taken belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee of the land, except by a provision to that effect in the deed or by separate assignment." 20 C. J. 858.
2. **Pleading.** "The failure to allege a material fact raises a presumption that it does not exist." *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 523.
3. **Waters:** FLOODING: NEGLIGENCE. "Although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be forseen that it may occur again; and a party engaged in a public work, the construction of which involves the change or restraint of the flow of water in a natural channel, is guilty of negligence if he fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur." *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.*, 79 Neb. 854.
4. ———: ———: ———: LIMITATIONS. The provisions of section 39-833, Comp. St. 1929, are applicable to, and controlling in the disposition of, the issues involved in this controversy. Further, such provisions, including the limitations therein prescribed as to the time of the commencement of the actions provided for, must be observed.

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

Raymond & Fitzgerald, for appellants.

Floyd E. Wright and *Rush C. Clarke, contra.*

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

EBERLY, J.

This action was instituted by the plaintiffs against Scotts Bluff county to recover damages to their crops, as itemized and set forth in their petition. It is alleged that these damages were occasioned in the following manner: In the year 1921 a steel concrete bridge about 500 feet in length was constructed across the North Platte river south of the village of Morrill; that since 1923 the plaintiffs owned land north of that river, adjoining the same, and situated on both the east and west sides of the public road leading to the bridge from the north; that immediately prior to the construction of this bridge the waters of the North Platte river were flowing in a number of distinct channels, into which that river had divided at a point some distance west of plaintiffs' land, and all of which merged again into a single channel at some distance east of plaintiffs' land; that as part of the construction of this bridge the south channel of the North Platte river at this point was dammed, and thereby all the waters theretofore carried in that channel were forced into the north channel, and thereby caused to flow under the bridge in such channel; that as thus constructed the passageway of the waters of the river under the bridge was materially decreased in size and was insufficient to afford a proper outlet for such waters during seasons of high water, and in May or June, 1928, and in May or June, 1929, wholly due to the insufficiency of the new channel thus created, the waters therein were backed up and overflowed plaintiffs' land, causing the water table therein to rise under plaintiffs' land, and because of such overflow and rising of the water table, the crops of plaintiffs thereon were damaged in an aggregate sum of $3,960.

The defendant county, in its answer, denied generally the allegations of the petition, set forth as affirmative mat-

ter the due and proper construction of the bridge, a plea of the statute of limitations, and that such flood causing the damages set forth in plaintiffs' petition, if such there were, was properly to be considered as an act of God. To this answer the plaintiffs filed their reply in the nature of a general denial.

There was a trial to a jury, verdict for defendant, and from the order of the trial court overruling the motion for a new trial the plaintiffs below appeal.

It appears conceded from the record that the plaintiffs became owners of the land in 1923, two years after the completion of the improvement.

The general rule appears to be: "Damages for the taking of land or for the injury to land not taken belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee of the land, except by a provision to that effect in the deed or by separate assignment." 20 C. J. 858. The record is silent as to any such "provision to that effect in the deed" or as to a "separate assignment" as such. Therefore, the existence of neither can be assumed, but both will be presumed not to exist. *Chicago, R. I. & P. R. Co. v. Shepherd,* 39 Neb. 523. The general rule above quoted, as to the right to damages sustained, has been approved in this jurisdiction. *Chicago, B. & Q. R. Co. v. Englehart,* 57 Neb. 444; *Chicago, R. I. & P. R. Co. v. Shepherd,* 39 Neb. 523; *Hogsett v. Harlan County,* 4 Neb. (Unof.) 309.

As to whether, under the rule announced, the plaintiffs may maintain their action for damages under the constitutional provision (Const. art. I, sec. 21), for injuries having their origin in point of time as well as arising from conditions wholly created prior to the acquirement of title by them, *quære.*

However, in the present case the recovery sought involves damages to crops on the land only and not damages to the land itself.

Indeed, in the present record, we have controlling facts

substantially identical, in legal effect, with those involved in *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.*, 79 Neb. 854. In the case last cited this court announced the governing rule as follows: "Although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again; and a party engaged in a public work, the construction of which involves the change or restraint of the flow of water in a natural channel, is guilty of negligence if he fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur."

The plaintiffs in their petition having pleaded that the defendant in the instant case "in the construction of said bridge and grade * * * carelessly and negligently * * * so constructed said highway across the said North Platte river as to entirely obstruct the flow of the water in the south channel of said river by means of the highway grade above referred to," and also by means of a dam contemporaneously built as a part of such public improvement, did so diminish the capacity of said open channel of the North Platte river as to cause said waters to overflow plaintiffs' land, and injure the crops thereon to plaintiffs' damage. By these allegations, plaintiffs, so far as pleading was concerned, placed themselves squarely within the doctrine of the case of *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co., supra.* The only substantial difference between the two cases is to be found in the fact that in the *Fairbury Brick Company* case there was as defendant a private corporation, and in the instant case we have as defendant the county of Scotts Bluff. This difference was eliminated, however, when the legislature enacted chapter 290, Laws 1921, "relating to damages resulting to property from the accumulation of water due to the construction or repair of any bridge, culvert or highway due to the fault, neglect or oversight of the board of county commissioners," etc. These provisions now appear as section 39-833, Comp. St.

1929. By the terms of this enactment counties are made responsible for "any special damage" occasioned by the "accumulation of water due to the construction or repair of any bridge, culvert or highway due to the fault, neglect or oversight of the board of county commissioners." This statute was construed and applied in *Clark v. Cedar County,* 118 Neb. 465. It would seem, in the light of the doctrine announced in that case, its provisions are controlling here.

And it is to be noted that the same conclusion is arrived at if the causes of action set forth by plaintiffs be deemed to be wholly based on section 21, art. I of the Nebraska Constitution. Assuming that the rights of plaintiffs are created and preserved by virtue of the constitutional provision referred to, still, "The legislature has power to formulate, prescribe, enlarge, modify and alter remedies, provided, however, that it does not, under the guise of a statute relating to procedure, attempt to deprive any person of a right secured to him by the Constitution." 12 C. J. 825. This is the obvious purpose of section 39-833, Comp. St. 1929. True, in this aspect of the case, it in terms prescribes a limitation as to the time in which the right conferred by the constitutional provision in question is to be enforced, in the following words: "Provided, such action is commenced within ninety days from the time of the injury or damage to property so occurring." However, the enactment of reasonable statutes of limitations is one of the undoubted legislative powers. So, whether section 39-833 be conceived as creating a new right and imposing a new obligation or liability on counties, or merely as relating to procedure for the enforcement of the rights created and preserved by section 21, art. I of the Nebraska Constitution, its provisions, including the limitation prescribed, are controlling and must be complied with.

It seems to be conceded, at least in arguments at the bar, that the present action was not instituted by the plain-

tiffs in the district court within ninety days from and after the time of the injury or damage to the property. A demurrer *ore tenus* was interposed by the defendant in the form of an objection to the introduction of evidence, based on this ground, which appears to have been seasonably made and in effect substantially overruled. Upon due consideration we are of the opinion that the causes of action set forth in plaintiffs' petition are each barred by the lapse of time. The objections made, therefore, if we are correct as to conceded facts in the instant case, should have been sustained. It also follows that, irrespective of what we might deem the merits of this action had the jurisdiction of the district court been more promptly invoked, in view of the actual situation presented the determination made by the trial jury is the only one possible.

The verdict of the jury and the judgment of the district court entered thereon are therefore correct, and are

AFFIRMED.

PETER H. PETERSEN, APPELLANT, V. HENRY J. BEAL, COUNTY ATTORNEY, ET AL., APPELLEES: INDEPENDENT CAB OWNERS ASSOCIATION, APPELLANT.

FILED JUNE 5, 1931. No. 27674.

1. **Automobiles: CARRIERS: INSURANCE.** The state has the right to require persons engaged in the business of carrying passengers for hire in motor vehicles upon and over public streets and public highways to file securities or insurance for the payment of judgments for death or injury to person or property caused in the operation, or by defective construction, of such motor vehicles.
2. ———: CONSTITUTIONAL LAW. House Roll 306 (Laws 1929, ch. 147), together with resolution 110 of the state railway commission supplemental thereto, construed to be a proper exercise of the power above set forth, and that they do not in their terms contravene section 3, art. I of the Constitution of Nebraska, or section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. Statutes: VALIDITY: MOTOR VEHICLE LAW. The invalidity of said law, in so far as applicable to the class of cars commonly known as "drive-it-yourself" cars, in no manner affects its validity as applied to the operation of motor vehicles engaged as "common carriers" for hire.
4. Automobiles: STATE RAILWAY COMMISSION: POWERS. Resolution 110 adopted by the state railway commission as supplemental to House Roll 306 is not in excess of the powers vested in that governmental agency.

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

O'Sullivan & Southard, for appellants.

C. A. Sorensen, Attorney General, Hugh La Master, R. E. Powell, Henry J. Beal, Bryce Crawford, Jr., and *J. W. Yeager, contra.*

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

EBERLY, J.

House Roll 306 (Laws 1929, ch. 147), entitled "An act relating to taxicabs and public cars and providing for the filing of insurance policies, surety bonds or securities with the state railway commission for the protection of the public; and to provide penalties for the violation thereof," was enacted by the legislature of 1929 and duly approved by the executive on April 6 of that year.

Section 1 thereof defines the terms "taxicab" and "public car." Sections 2 and 3, as a prerequisite to the operation of a taxicab and of a public car as thus defined, require the deposit with the Nebraska state railway commission of "either a liability insurance policy or a surety bond with an approved surety company as surety or negotiable and salable securities" at the option of the applicant, "but which shall be approved by the commission, in such sum and with such other terms and provisions and on such conditions as the commission may deem necessary adequately to protect the interest of the public having due

regard for the number of persons and amount of property affected." Section 4 provides penalties for violations of its terms and also of the orders of the Nebraska state railway commission made pursuant thereto. This act now appears as sections 60-201 to 60-204, Comp. St. 1929.

This action to enjoin the enforcement of House Roll 306 and resolution 110 adopted by the state railway commission supplemental thereto was thereafter commenced in the district court for Douglas county based on the alleged unconstitutionality and invalidity of such statute and order. That court on the trial found in favor of all persons engaged in operating, renting or hiring of motor vehicles commonly known as "drive-it-yourself" cars, and made permanent the temporary injunction theretofore granted restraining the enforcement of the statute as to such cars only, but otherwise dismissed the proceedings and dissolved the temporary injunction which had been theretofore granted restraining the enforcement of the statute against taxicabs and such other "public cars" as are defined by the statute which were engaged in the business of common carriers for hire.

From this final order the plaintiff and the intervener appeal. No appeal is prosecuted by the defendants below.

The appellants here contend that the statute in suit and resolution 110 pertaining to automobiles used as common carriers are invalid as being in contravention of section 3, art. 1 of the Constitution of the state of Nebraska, and of section 1 of the Fourteenth Amendment to the Constitution of the United States; that the district court erred in determining that the portion of House Roll 306 commonly known as "drive-it-yourself" cars was not an inducement to the passage of the act; and that resolution 110 was not within the lawful powers of the Nebraska state railway commission to issue. It will be noted that the effect of the decree of the district court was to sustain the validity of the act so far as it related to the business of "common carriers" as that term is defined both at com-

mon law and by our statute, section 75-401, Comp. St. 1929.

It may be said generally that statutory provisions requiring those engaged in or causing the operation of motor vehicles, or certain classes of them, to furnish securities for the benefit of any person who may be injured through negligent or faulty operation have been enacted in many states; and the decisions are uniform in upholding the power to prescribe such regulations. *Commonwealth v. Slocum*, 230 Mass. 180; *People v. Kastings*, 307 Ill. 92; *In re Cardinal*, 170 Cal. 519; *Jitney Bus Ass'n v. City of Wilkes-Barre*, 256 Pa. St. 462; *West v. Asbury Park*, 89 N. J. Law, 402; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416; *City of Memphis v. State*, 133 Tenn. 83; *City of New Orleans v. Le Blanc*, 139 La. 113; *Willis v. City of Fort Smith*, 121 Ark. 606; *Hazleton v. City of Atlanta*, 144 Ga. 775; *Ex parte Dickey*, 76 W. Va. 576; *Packard v. Banton*, 264 U. S. 140. Unquestionably the state has the right to require persons engaged in the business of carrying passengers for hire in motor vehicles upon public streets and public highways to file securities or insurance for the payment of judgments for death or injury to person or property caused in the operation, or by defective construction, of such motor vehicles. *Packard v. Banton*, 264 U. S. 140; *Interstate Busses Corporation v. Holyoke Street R. Co.*, 273 U. S. 45; *Sprout v. City of South Bend*, 277 U. S. 163; *Lutz v. City of New Orleans*, 235 Fed. 978, 237 Fed. 1018.

The enforcement of House Roll 306 and resolution 110 of the state railway commission, as contemplated by the decree appealed from, clearly assumes compliance with their provisions as a prerequisite to engaging in the business of "common carriers of passengers," and such being the case, under the authorities referred to, it does in no manner contravene the provisions of section 3, art. I of the Nebraska Constitution or section 1 of the Fourteenth Amendment to the Constitution of the United States.

As to the asserted fact that the requirements thus pre-

scribed are so burdensome as to amount to a confiscation and therefore result in depriving appellant of his property without due process of law, the answer may be made by the following excerpt from the opinion of Sutherland, J., delivered in *Packard v. Banton*, 264 U. S. 140: "The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right, and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former. See *Davis v. Massachusetts*, 167 U. S. 43."

Nor do we find that in the adoption of resolution 110 the Nebraska state railway commission exceeded the powers possessed by it. The constitutional provision controlling, adopted in 1906 as a separate and independent amendment to the Constitution, created a state railway commission, and further provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." Const. art. 4, sec. 20.

This court is committed to the view that, "In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and not as an amendment to the executive, legislative or judicial articles thereof." *In re Lincoln Traction Co.*, 103 Neb. 229. The general view of the constitutional provision in question is well stated by Sedgwick, J., in the same case in the following language: "Unless there

has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise. While this power must be exercised in harmony with the provisions of the federal Constitution, and the general provisions of our own Constitution that affect all branches of the government, it is plainly not limited by the special provisions of the Constitution which distinguish between the legislative and judicial departments of the government. The functions of this commission are largely administrative, but, as is stated in *Prentis v. Atlantic Coast Line Co., supra* (211 U. S. 210), the commission necessarily has independent legislative, judicial, and executive or administrative powers."

Therefore, in the light of the constitutional provision quoted and referred to, as well as the express terms of House Roll 306, we are of the opinion that resolution 110 was within the power of the commission to lawfully adopt and enforce.

Nor do we entertain the view that the portions of the act in suit applicable and relating to noncommon carrier vehicles or "drive-it-yourself" cars was an inducement to its passage and because thereof the entire act must fall.

"The general rule upon the subject is that, where there is a conflict between an act of the legislature and the Constitution of the state, the statute must yield to the extent of the repugnancy, but no further. (Citing cases.) If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by courts and made effective." *Scott v. Flowers,* 61 Neb. 620, 623.

Eliminating all portions of the act solely relating to "drive-it-yourself" cars, the remainder still is intelligible, complete and capable of execution. It therefore must be upheld and enforced. As we see no reason which would justify our accepting the view that the portion solely applicable to "drive-it-yourself" cars was an inducement to the adoption of the residue, the remainder fully and completely covers the subject of "common carriers" as applied to the use of motor vehicles. It therefore must be held to be a valid enactment and in full force. *State v. Stuht*, 52 Neb. 209; *Logan County v. Carnahan*, 66 Neb. 693.

It therefore follows that the decree entered by the district court for Douglas county is in all respects correct, and it is

AFFIRMED.

DAY, J., dissents.

THOMAS KILPATRICK & COMPANY, APPELLEE, V. LONDON GUARANTEE & ACCIDENT COMPANY, APPELLANT.

FILED JUNE 5, 1931. No. 27598.

1. Insurance: ACCIDENT: PRESUMPTION. When it has been sufficiently established by circumstantial evidence that a person has suffered injury by reason of falling from a dangerous height, it will be presumed, in the absence of evidence to the contrary, that the fall was accidental.
2. Appeal: INSTRUCTIONS. The trial court should instruct the jury as to the burden of proof, but a failure to do so will not require a reversal of the judgment, when no such instruction was requested by the complaining party and no prejudice appears.
3. Insurance: NOTICE OF SUIT: WAIVER. An insurance company whose policy provides that the assured shall forward to the company every summons and other process in suits as soon as served upon him waives compliance with such provision by an unconditional denial of its liability. The insurer having denied any liabilty under its contract, it is neither necessary nor proper to notify him again.

4. ———: INDEMNITY CONTRACT: BREACH. An indemnity insurance company obligated to defend suits against the insured, even if groundless, breaches its contract by a denial of liability as to an accident and thereby releases the insured from an agreement in the policy not to settle any claim.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Morsman & Maxwell, contra.

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

DAY, J.

This is an action upon a public liability policy of insurance, brought by the insured against the insurance company. The plaintiff seeks to be indemnified for an amount paid upon a claim for damages and for which the company denies liability. The company appeals from a judgment.

A woman was caught shoplifting in the store of plaintiff. She was taken to a private room on the third floor of the store building, where she was questioned by the officers of the plaintiff. They stepped outside of the door of the room to discuss and determine whether or not they would arrest her. When, after a brief interval, they reentered the room, she was gone. Looking out of the open window, they saw her lying on the sidewalk. There is no direct evidence as to how the accident happened. Plaintiff called a doctor who gave the woman medical attention. Later, the doctor sued the plaintiff and obtained judgment for his services. The insurance company refused to defend the doctor's suit, claiming the accident was not covered by its policy. The deceased woman's legal representative brought suit against the plaintiff, claiming damages based upon negligence. Plaintiff gave the insurance company no notice of this suit, but the company knew such

suit had been commenced. In that suit judgment was entered, and this judgment, as well as the judgment in the doctor's suit, having been paid by plaintiff, it brought this suit against the company to recover the amount paid on the two judgments.

Among other things, the appellant complains of the giving of this instruction to the jury: "The jury are instructed that the accident to Mrs. Lipp on October 19, 1925, which resulted in her death was an accident within the meaning of the policy of insurance issued by defendant to plaintiff." The obligation of the insurance company as defined by the policy is that as respects bodily injuries, including death suffered or alleged to have been suffered as the result of accidents occurring, to defend any claim or suit against the assured, even if groundless, to recover damages on account of such injuries and to pay the loss from liability imposed by law upon the insured for damages on account of such injuries, and, in addition, to pay (a) for the immediate surgical aid made necessary by such accidents, and (b) all expenses incurred by the company for investigation, negotiation and defense for claims and suits for damages on account of such injuries. There is no question in this case that Mrs. Lipp fell from the third story window of Thomas Kilpatrick & Company's store to the sidewalk below, and that as a result of said fall she was fatally injured. That was an accident within the meaning of the insurance policy. In this case the court so instructed the jury, but did not instruct them that this was an accident for which the insured was liable. Under the contract, it appears that the insurance company insured the plaintiff herein against any claim or suit, for damages resulting from accidents, even if groundless. In *Western Travelers Accident Ass'n v. Holbrook*, 65 Neb. 469, it was held: "When it has been sufficiently established by circumstantial evidence that a person has suffered injury by reason of falling from a dangerous height, it will be presumed, in the absence of evidence to the contrary, that

the fall was accidental." See, also, *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235, wherein this court held: "An accident, within the meaning of contracts of insurance against accidents, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby." The instruction complained of correctly informed the jury that the injury of Mrs. Lipp was an accident within the meaning of the policy.

The appellant casually complains that the court erred in not giving any instruction on the burden of proof. No instruction was requested upon this matter. "The trial court should instruct the jury as to the burden of proof, but a failure to do so will not require a reversal of the judgment, when no such instruction was requested by the complaining party, and no prejudice appears." *Chalupa v. Tri-State Land Co.*, 92 Neb. 477. We have examined the instructions carefully, and while there is no specific charge to the jury upon the question of the burden of proof, the instructions taken as a whole would cast that burden upon the plaintiff, and it does not appear that the appellant was in any way prejudiced by the failure of the court to give an instruction including the term "burden of proof."

It is undisputed that, when the personal representative of Mrs. Lipp, deceased, filed suit against the appellee, who was insured, to recover for damages by reason of the accident, the summons was not forwarded to the insurance company and that no notice was given to the company. The policy provides that the assured "shall forward to the company or its authorized agent * * * every summons and other process in suits as soon as served upon him." The plaintiff contends that it was excused from sending the summons in the case of Lipp v. Thomas Kilpatrick & Company, in which case they paid a judgment, for the reason that previously the insurance company had denied all liability upon the policy. The evidence as to whether or not the defendant had denied liability on the

policy to the plaintiff was in sharp conflict. Two witnesses, Mr. Morsman and Mr. Baxter, attorney and president of the plaintiff company, respectively, testified that they had repeatedly orally demanded to know the position of the company; that they had written a letter to the agent of the company demanding an answer in writing as to the position of the company as to liability on the policy; that they received no letter or written statement as to the position of the company, and that the agent of the company denied all liability under the policy. On the other hand, Mr. Rance, the agent of the company, stated that he informed Mr. Baxter and Mr. Morsman that whether or not their policy covered this accident depended upon the kind of claim that was made against Kilpatrick & Company, and that when suit was commenced they would determine whether or not it was their duty to defend. This is denied by Morsman and Baxter. The action by the doctor, who rendered first aid, was brought after the suit for wrongful death. Thomas Kilpatrick & Company forwarded the summons in that case to the insurance company, who denied liability in a letter as follows: "We are returning herewith the petition and summons in the case of Dr. N. H. Attwood v. Thomas Kilpatrick & Company, a corporation, for the reason that our policy does not cover this action and, consequently, we cannot take care of it." This was a circumstance which, in connection with all the other evidence, would tend to establish a course of conduct consistent with the contention of Thomas Kilpatrick & Company. Whether or not the company had denied liability was a question of fact to be determined by the jury, which was by the verdict resolved in favor of the plaintiff. The plaintiff in this case complied with the provisions of the policy providing that the assured shall forward to the company or its authorized agent written notice of every accident as soon as practicable and prompt notice of every claim. The Kilpatrick company promptly notified the insurance company of the accident and prompt-

ly notified the company that claim had been made against the company for damages as a result of the accident.

Was the insurer released from liability because the assured did not forward the summons to the company or their agent? An analogous situation, we think, is presented by the cases where an insurer has denied liability, and it has been held in such a case that "Waiver of proofs of loss may be made before suit brought by the insurer's unconditional denial of its liability for the loss." *Omaha Fire Ins. Co. v. Hildebrand,* 54 Neb. 306. The reason for the rule is that it would be a useless thing to notify the company in face of its denial of liability. In *Lowe v. Fidelity & Casualty Co.,* 170 N. Car. 445, the company defended on the ground that the insured failed to forward to defendant the summons and process served on the insured when the action was commenced. In that case the failure to give satisfactory notice was sought to be excused on account of the fact that the insurance company had theretofore refused and declined to recognize any liability under the terms of said policy. The insurance company contended that they did not intend to deny all liability to the insured upon the contract, but only a denial of the liability of the insured for the death. The court found that the defendant denied its liability upon its contract to the insured. The court said: "Consequently, the insured was relieved from the duty of forwarding the process served on it. An insurance company cannot deny all liability under a contract of insurance and then be heard to say, after it has repudiated the contract, that assured should have given it notice when the action was instituted, so that it could have defended the action in accordance with the terms of the contract. Having denied any liability under the policy, it was neither necessary nor proper to notify defendant again." Paraphrasing the language of these cases, we find the rule applicable to the case at bar to be: An insurance company whose policy provides that the assured shall forward to the company

every summons and other process in suits as soon as served upon him waives compliance with such provision by an unconditional denial of its liability. The insurer having denied any liability under its contract, it is neither necessary nor proper to notify him again.

The insurance company also seeks to avoid liability in this case because of a provision in its policy which provided as follows: "The company shall have the right to settle any claim or suit at its own cost, and the assured shall not incur any expense (other than for said immediate surgical aid) nor settle any such claim or suit except at his own cost, without the written consent of the company." Assuming for the purpose of the consideration of this position that the assured in this case settled the claim in question, does this fact relieve the company of liability under its contract? In *St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.*, 201 U. S. 173, the court said: "An insurance company issued its policy insuring the assured against statutory and common-law liability for damages caused by negligence of insured or its employees, the insured to give immediate notice of any accident to the company, which agreed to defend any suit for damages brought against the assured, the latter not to make any settlement without the company's consent, and not to bring any action under the policy except for loss actually paid in satisfaction of judgment after trial. After an accident of which notice was duly given the assured was sued and the company refused to defend on the ground that the accident was not within the risks assumed. The assured to avoid heavy judgments settled the suits out of court and sued the company. Held, that the refusal of the company to defend the suits constituted such a breach of the contract that it released the assured from the agreement not to settle the claim without its consent and amounted to a waiver of the condition that it was only liable for judgment rendered against the assured after trial and satisfied." In *Royal Indemnity Co. v.*

Schwartz, 172 S. W. (Tex. Civ. App.) 581, it was held that the insurer, after repudiating its obligation to defend, was estopped to set up a failure of the insured to obtain its consent in writing before incurring expenses for fees which were paid by insured in defense to a suit against him. In *Interstate Casualty Co. v. Wallins Creek Coal Co.*, 176 S. W. 217 (164 Ky. 778), it is said: "A policy of employer's liability insurance provided that the insurer should not be responsible for settlements made by insured not specially authorized in writing by the insurer, and agreed to investigate all claims and defend all suits. The employer, having become liable to an employee for personal injuries, duly notified the insurance company, who investigated the case, but took no further steps in the matter, nor did it repudiate liability. After a delay of three months the employer settled the claim for a reasonable amount, and brought suit for reimbursement against the insurance company. Held, that the insurer was estopped to rely on the stipulation forbidding settlement." In *Mayor, Lane & Co. v. Commercial Casualty Ins. Co.*, 155 N. Y. Supp. 75, a condition of this kind was held to be limited to cases wherein the insurer performs its contract requiring it to defend accidents against the insured, and the latter was held not precluded from recovery because he settled an action against him after insurer had refused to defend it. In *Fullerton v. United States Casualty Co.*, 184 Ia. 219, it was held that an assurer who abandoned its obligation to defend could not defeat recovery for money paid by the insured in settlement of the claim, although the policy provided for a recovery only when the payment by the insured was in satisfaction of the judgment. In *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, it was said that an insured in such a situation as occasioned by the insurer's breach of duty to defend or settle need not go to trial and risk being subjected to a verdict in excess of his insurance. A provision that " 'the company is not responsible for any settle-

ments made or expenses incurred by assured, unless * * * authorized in writing by the company,' * * * can only apply where both parties were proceeding under and in accordance with the terms of the policy. It has no application where the company, in direct violation of the terms of the policy, refuses to defend the action against the insured." *Rosenberg v. Maryland Casualty Co.*, 3 N. J. Misc. Rep. 1132. An insurance company, by denial of its liability under an automobile indemnity policy and refusal to settle or defend an action against insured as agreed, "breached the contract and released the insured from its agreement not to settle the claim without written consent of the insurer and waived a clause in the policy under which actual trial of the issue was made a condition precedent to a recovery against it." *Independent Milk & Cream Co. v. Aetna Life Ins. Co.*, 68 Mont. 152.

In the case at bar, whether or not the insurance company had denied all liability was a question of fact upon which the evidence was conflicting, therefore the verdict of the jury that the company had denied all liability is conclusive. An indemnity insurance company obligated to defend suits against the insured, even if groundless, breaches its contract by a denial of liability as to an accident and thereby releases the insured from an agreement in the policy not to settle any claim. In such a case, the insured is not compelled to go to trial and risk the hazard of a large judgment, but is justified in making a favorable settlement.

There is a suggestion that the settlement in this case made by the insurer was surrounded by some element of fraud. An examination of the record does not sustain this contention. An accident had occurred and Thomas Kilpatrick & Company was anxious to have the matter disposed of. It notified the insurance company of the accident and requested it to take charge of the claim which had been made against it as a result thereof. The insurance company through its agent had denied liability, at least, even according to the statement of its agent, it questioned its

liability. The insured employed competent attorneys who negotiated with the claimant and who were of the opinion that there was liability on the part of the insured. Accordingly, they negotiated a settlement. It was a claim for wrongful death which could only be prosecuted by the administrator for the estate of the deceased. It was necessary that a suit be filed and that a judgment be entered by the district court in order to make an effective and binding settlement. The attorney for the administrator prepared a petition and submitted it to the attorneys for the defendant. The attorney for the insured made some suggestions relative to the petition and the same was redrafted in his office. The insurance company bases its claim of fraud upon this fact. It is doubtful whether the insured would have been released or protected by a settlement made by the payment of a judgment upon a petition which did not state a good cause of action. It was the duty of the attorneys for Thomas Kilpatrick & Company to see that it was protected by a proper judgment. The petition was filed and the insured filed an answer denying liability. Subsequently, an order and judgment was entered by the court as follows:

"This cause coming on to be heard on this 5th day of April, A. D. 1926, and the parties appearing in open court and being represented by their attorneys, a jury was waived, and trial had to the court.

"The court having heard the testimony does now find in favor of the plaintiff and against the defendant and assesses the plaintiff's damages at the sum of two thousand one hundred thirty-four and 25/100 ($2,134.25) dollars.

"Wherefore, it is now ordered and adjudged that the plaintiff, Arthur H. Lipp, Administrator of the Estate of Myrtle May Lipp, deceased, do have of and recover from the defendant, Thomas Kilpatrick & Company, a corporation, the sum of two thousand one hundred thirty-four and 25/100 ($2,134.25) dollars and costs of suit, and that execution issue therefor. By the Court, Charles A. Goss, Judge."

This judgment was paid by the insured. It is noted that this was not a judgment entered by consent or agreement, but was entered by the court after hearing testimony in the case.

A provision of the policy is that the insurer shall not be liable for any expenses incurred by the assured unless they are specifically authorized in writing by the insurer, except that the insured may incur expense for immediate surgical aid. In this case the insured provided immediate and necessary surgical aid. The insurance company refused to pay the claim and subsequently refused to defend the suit of the doctor against the insured. It was the duty of the insurance company under this policy to pay the expenses incurred, and the action of the trial court in directing a verdict in favor of the insured for the amount it was compelled to pay upon the judgment secured against it by the doctor for immediate surgical aid was required.

There is no prejudicial error in the record, and the judgment is

AFFIRMED.

GEORGE O. HUCKETT V. STATE OF NEBRASKA.

FILED JUNE 5, 1931. No. 27771.

1. **Criminal Law: ARSON: INSTRUCTIONS.** In a prosecution for arson, when the defense relied upon is an alibi, *held*, that a mere inaccuracy in a general instruction, which was not prejudicial to the defendant, is not ground for reversal.
2. ———: **ALIBI.** The term "alibi" applies particularly to a claim that the defendant was elsewhere when the crime was committed. To prove it, the defendant offers evidence that, because of the place at which he was at the time of the commission of the crime, there arises in the minds of the jurors at least a reasonable doubt that he committed the crime. The court correctly instructed the jury on the defense of alibi.

ERROR to the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Jack & Vette, for plaintiff in error.

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

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

PAINE, J.

This is a writ of error to the district court for Gage county. The plaintiff in error, George O. Huckett, hereafter called the defendant, was convicted of arson in two counts, one relating to the burning of the dwelling house in Wymore occupied by him as a tenant, being in violation of section 28-501, Comp. St. 1929, and the other count being brought under section 9591, Comp. St. 1922, now section 28-503, Comp. St. 1929, charging the burning of his household goods and personal property in said house, insured by the Travelers Insurance Company for $2,000. The defendant was found guilty and sentenced to the penitentiary for one to five years, but was admitted to bail pending hearing in this court, and assigns 53 alleged errors in his petition in error for reversal. As it is argued that the evidence is insufficient to sustain the verdict, it will be necessary to review the evidence at some length.

George O. Huckett, the defendant, testified in his own behalf that he was married at Alliance, Nebraska, May 15, 1927, and had lived in Alliance, Creston, Iowa, and Wymore, working for the Burlington. The trial in this case was begun upon October 7 and the jury returned a verdict of guilty upon October 10, 1930, and the evidence taken is set out in the bill of exceptions of 362 pages. The evidence discloses that J. W. Smith, agent for the Travelers Insurance Company, testified that the defendant submitted to him a list of household goods, and that he suggested that $2,000 would be about the right amount of insurance, which the defendant agreed to take, and paid

the premium thereon, and he said that when Mr. Huckett first moved to Wymore he had seen them unloading some of the furniture, and that from what he had seen at that time and the list submitted by the defendant he thought the furniture was worth insurance for $2,000. It is established that this is the first time the defendant ever had fire insurance upon his household goods and that the policy was taken out April 28, 1930, some 33 days before the fire occurred.

It is undisputed that the dwelling house, household goods and personal property were burned by fire of incendiary origin, which followed an explosion which wrecked the building, and occurred around 3 o'clock in the morning of June 1, 1930. A portion of an unburned mattress and some wearing apparel were found which had been soaked with kerosene or gasoline. The only question is whether the defendant is guilty of burning the property as charged. No witness testified that he saw the defendant at his house on the night of the fire, but at 6:00 p. m., May 31, the evening before the fire, the defendant rented a Ford coupé from the Standard Auto Exchange in Lincoln and at that time told the man at the garage that he was going to make a trip to York, Nebraska.

Charles Davis, who received the car at the Exchange when defendant returned it about 7:00 a. m. the morning after the fire, testified as follows: "Did he say where he had been? A. I made the remark to him, 'You made quite a little trip.' And he said, 'Yes; to Wymore and back.' "

After turning back the rented Ford, which had been driven 134 miles during the night, defendant took a Burlington train to Wymore.

L. J. Butcher, the assistant state fire marshal, interviewed the defendant on June 3, and the defendant said that he had been in Lincoln all night on May 31, partly on business and partly for his own amusement; but when he interviewed him again two days later he stated that he

had been to Omaha that night in the Ford car which he had rented in Lincoln, with a Miss Losey and a Miss Mann, and that the reason he had concealed this trip upon the first interview was because he did not want his wife to know that he had stepped out. These two ladies admitted, when interviewed by Mr. Butcher, that the defendant had asked them to testify that they had made such a trip to Omaha on the night in question, which was false, and later the defendant admitted he had made such a request of them, but then insisted that he had taken a lady from Lincoln to York on the night in question, and that he thought it would be easier for his wife if she thought that he had gone to Omaha in company with friends of hers rather than gone to York with a strange woman. He told a number of other stories, all of which are utterly conflicting as to time and place.

Defendant's wife testified that she left home four days before the fire and was visiting in Ravenna, Nebraska, when notified that everything had been burned.

J. E. Mitchell testified that shortly before the fire whistle blew he saw a car going by his place in Wymore.

Claude Allington testified that he lives in Blue Springs at the intersection of the road going out of Wymore and along the west limits of the town of Blue Springs, and that he heard the fire whistle blow in Wymore and about five minutes after that, or less, he heard a car go north past his home and it was going real fast.

The defendant wanted the jury to believe that at the time of the fire he was probably en route between Lincoln and York with one Grace Clark, and offered an instruction, which was refused, to the effect that, if the jury believed that the defendant was in fact in York or on the road between Lincoln and York at the time of the fire, then the jury must return a verdict of not guilty.

1, 2. With this statement of the facts, we will now consider the questions of law in dispute.

The court gave 24 instructions, and instruction No. 21

reads as follows: "You are instructed that throughout these instructions, in each and every instance, wherever the words 'if you find from the evidence,' or words of like import are used, those words mean 'if you find from the evidence beyond a reasonable doubt,' and you should so take and construe them."

Defendant claims that this instruction, while apparently harmless of itself, has wrought havoc with the rights of the plaintiff in error when applied to other instructions, and cites a portion of instruction No. 12, which would make that part of instruction No. 12 read as follows: "The court further instructs the jury that if they believe from the evidence that, at the time the fire occurred, as set out in counts 1 and 2 of the information in this case, and at the time the crimes were alleged to have been committed by defendant, the defendant, George O. Huckett, was not in Gage county, Nebraska, as testified to by said defendant and some of defendant's witnesses, and was not present at the scene of the fire, as charged in counts 1 and 2 of the information, at the time the crimes charged were alleged to have been committed, then you must acquit the defendant."

Defendant insists that the instruction, when considered with instruction No. 21, requires the jury to insert the words "beyond a reasonable doubt" after the word "evidence" and thereby shifts the burden of proof of this defense of alibi to the defendant, as it requires the defendant to prove his defense beyond a reasonable doubt. The burden of proving an alibi does not rest with the defendant in a criminal case and it is error to so instruct.

The court, however, did not stop instruction No. 12 with the paragraph quoted, but the last paragraph in that same instruction reads as follows: "The jury are further instructed that, as a matter of law, if they entertain any reasonable doubt, after a careful and candid consideration of all the evidence in the case, whether the said George O. Huckett was present at the time the crimes charged were

alleged to have been committed, or was at another place at said time, then it is a rule of law, inflexible in its operation, that the jury must give the benefit of the doubt to the defendant and render a verdict of acquittal."

This instruction on alibi is very long, but in our opinion, if read carefully in its entirety, it left with the jurors the command that, if they entertained any reasonable doubt of defendant's presence at the place of the fire, they should render a verdict of acquittal.

We believe the ordinary juror would understand that the trial court intended to instruct them by instruction No. 21 that throughout the instructions pertinent to the state's case they should clearly understand that the state's evidence must be proved beyond a reasonable doubt, and that in considering the only defense interposed, of an alibi, if the evidence on that point left a doubt in their minds the defendant should be acquitted.

In a prosecution for arson, when the defense relied upon is an alibi, and defendant insists that the court required this defense to be proved beyond a reasonable doubt, which would be error, it is held that, when the objectionable instruction is susceptible of two constructions, it will be presumed that the jury were not misled, but considered it in that light in which it stated the law correctly, for the record does not show prejudice to the defendant. *Heyen v. State,* 114 Neb. 783; 17 C. J. 225; *Davis v. State,* 25 Ohio St. 369; *State v. Summers,* 173 N. Car. 775; *White v. State,* 153 Ind. 689; *Browne v. State,* 115 Neb. 225.

There is not entire harmony in the decisions as to the degree of proof of an alibi which must be produced in order to entitle a defendant to an acquittal. *State v. Hardin & Henry,* 46 Ia. 623, 26 Am. Rep. 174.

In *State v. McGarry,* 111 Ia. 709, the case was reversed because the court instructed that the defense of alibi is not a defense but a fact shown in rebuttal of the state's evidence; and when the evidence is all in, the primary

question is, is the defendant guilty beyond a reasonable doubt? He has met that condition when he has succeeded in raising in the minds of the jurors a reasonable doubt as to whether or not he was at the place of the crime when it was committed. 2 Thompson, Trials, sec. 2436; *State v. Thornton,* 10 S. Dak. 349; *Fountain v. State,* 135 Md. 77, 5 A. L. R. 908.

The defense of alibi arises when there is evidence that the accused was at a point where he could not have been guilty of participating in the offense. *Funk v. State,* 84 Tex. Cr. Rep. 402; *Colbeck v. United States,* 10 Fed. (2d) 401.

The term "alibi" applies particularly to a claim that the defendant was elsewhere when the crime was committed. To prove it, the defendant offers evidence that, because of the place at which he was at the time of the commission of the crime, there arises in the minds of the jurors at least a reasonable doubt that he committed the crime.

There was abundant circumstantial evidence to show a motive for burning the property, and the many conflicting stories told by the defendant probably caused the jury to doubt the evidence he gave on the trial as to his whereabouts at the time the fire occurred.

There appears to be no reversible error and the judgment and sentence of the trial court is

AFFIRMED.

J. H. MELVILLE LUMBER COMPANY, APPELLANT, V. WELPTON LUMBER COMPANY ET AL., APPELLEES.

FILED JUNE 10, 1931. No. 27539.

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

Halligan, Beatty & Halligan and *M. M. Maupin,* for appellant.

L. A. De Voe, C. J. Thurston and *Beeler, Crosby & Baskins, contra.*

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

PER CURIAM.

The Melville Lumber Company, in 1923, entered into a contract with the Welpton Lumber Company, which, among other things, provided that at the end of a five-year lease, then made of four lumber yards, the Melville Company should have the right to purchase all real estate and improvements at each of said yards at a stipulated price. The contract also provided that the Welpton Company at the termination of the five-year lease had the right to take possession of the yards by purchasing the stock at the market value. Melville Company brought suit in equity asking specific performance of the agreement to convey the real estate to it at a stipulated price and the Welpton Company filed a cross-petition seeking specific performance of the agreement to sell the stock in the yards and turn them over to it.

Our court is committed to the doctrine that "Courts of equity will not always enforce the specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case." *Morgan v. Hardy,* 16 Neb. 427. A few of the numerous cases to the same effect are *Lopeman v. Colburn,* 82 Neb. 641; *Wilson v. Bergmann,* 112 Neb. 145; *Goodall v. Swartsley,* 108 Neb. 753; *Sennett v. Melville,* 85 Neb. 209; *Furse v. Lambert,* 85 Neb. 739; *Evans v. Kelly,* 104 Neb. 712. The trial court found that on October 22, 1928, the time when the Welpton Company under the contract was to exercise its option to buy the stock, it was not ready and able to perform, but that it was ready and able on November 17, 1928. Time is not generally considered as the essence of a contract, unless it is expressly

provided or it appears that it was the intention of the parties that it should be of the essence thereof. *Homan v. Steele, Johnson & Co.*, 18 Neb. 652; *Brown v. Ulrich*, 48 Neb. 409; *Wilson v. Perry*, 110 Neb. 535. The trial court properly found that time was of the essence of this contract, but that the parties by their acts had waived that provision.

Thereafter, the Melville Company treated the contract as breached and sought to enforce the option to purchase the real estate; a refusal or failure of the Welpton Company to exercise its option being a condition precedent to plaintiff's right to enforce its option. It could not make its refusal to perform the contract a condition precedent to a suit in equity to enforce specific performance of the contract. *Schields v. Horbach*, 30 Neb. 536.

The trial court filed an elaborate decree consisting of about twelve pages in the transcript, which contains findings of fact covering every issue in the case. Upon a trial *de novo*, the preponderance of the evidence supports like conclusions upon our part. We find no prejudicial error in the record; we conclude that the decree entered was a proper one; and we affirm the judgment.

AFFIRMED.

FRANK MARTIN, APPELLEE, V. CHARLES H. HARRIS, APPELLANT.

FILED JUNE 10, 1931. No. 27631.

1. Fraud: FALSE REPRESENTATIONS: QUESTION FOR JURY. As a general rule, it is for the jury to determine from the evidence whether a purchaser of real estate who was defrauded by false representations relied on them and whether he was justified in doing so under the evidential facts and circumstances.
2. ———: ———: PROOF. Evidence of positive, false statements of particular facts as to the value of land offered in exchange for other real estate is material on the issue of fraud in an action to recover damages for fraudulent representations inducing the exchange.

3. ———: ———: PROVISIONS OF CONTRACT. In a contract to exchange real estate, provisions that the parties had not made representations as to value and that each party is to rely on his own judgment after inspection, *held* not to defeat an action for damages for false representations, where the defrauded party was thereby induced to enter into the contract.

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

John J. Hess and *Merrow & Murphy,* for appellant.

Leon & White and *John A. McKenzie, contra.*

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

ROSE, J.

This is an action by Frank Martin, plaintiff, to recover $53,120 in damages for fraud inducing him to exchange his apartment houses and grounds in Omaha for the 3,320-acre Cowboy Ranch of Charles H. Harris, defendant, in Cherry county. Plaintiff alleged, among other things, that defendant falsely represented to plaintiff that the value of the ranch was $18 an acre; that it had produced annually sufficient hay and pasture to feed 200 head of cattle; that it had recently been sold for $60,000; that defendant had an available purchaser for it at $18 an acre; that its reasonable cash rental value was $3,000 a year and that it had been rented for a number of years for $3,000 a year; that in the event of an exchange defendant would lend plaintiff sufficient money to purchase cattle to stock the ranch; that these representations were false and that plaintiff relied on them in entering into the exchange contract.

In an answer to the petition defendant denied the fraud charged and pleaded the exchange contract and the fairness thereof. The answer contained also the following plea:

"That said contract was subject to the inspection of the Cherry county land by the plaintiff; that after the

execution of said contract, subject to inspection of said Cherry county land by the plaintiff, said land was inspected by the plaintiff, who drove over and upon the same, and inquired of different individuals as to whether or not he should make the exchange, and the plaintiff had every opportunity to investigate and inquire relative to the same, and did investigate and inquire until he satisfied himself that said exchange was advantageous, and after such investigation, inspection and inquiry, the plaintiff approved said contract."

The exchange contract pleaded by defendant contained also the following provision:

"There have been no representations of the reasonable value of any of the properties herein described made by or to either party to this contract. Each party is relying upon his own judgment of such values after a personal inspection of the properties."

The exchange contract shows further that plaintiff indorsed thereon this statement: "I have inspected this ranch property and accept and approve it."

In a reply unadmitted allegations of the answer were denied and plaintiff pleaded that he was induced to enter into the exchange contract by the fraudulent representations enumerated in the petition.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $7,720 with interest from August 16, 1926. From a judgment on the verdict for $9,216.56 defendant appealed.

On appeal defendant contends that the trial court erred in overruling a motion by him to direct a verdict in his favor on the ground that plaintiff failed to make a case. The evidence was conflicting and the jury found the issues in favor of plaintiff. There is abundant competent evidence in the record that defendant made the false representations already summarized from the petition; that plaintiff believed and relied on them; that he was defrauded by the exchange to the extent found by the jury;

that plaintiff was a mechanic who was without knowledge of farming or stock raising; that he was justified in relying on defendant's false representations; that defendant refused to lend money to stock the ranch. As a general rule it is for the jury to determine from the evidence whether a party defrauded by false representations relied on them and whether he was justified in doing so under the evidential facts and circumstances. *Sanders v. Nightengale,* 109 Neb. 667. The jury determined this question against defendant. Evidence of positive, false statements of particular facts as to the value of land offered in exchange for other real estate is material on the issue of fraud in an action to recover damages for false representations inducing the exchange. *McCandless v. Greusel,* 103 Neb. 472.

Defendant contends further that recovery by plaintiff is defeated by the terms of the exchange contract to the effect that there had been no representations of value and that each party is relying on his own judgment after inspection, in connection with plaintiff's indorsement—"I have inspected this ranch property and accept and approve it." In respect to a purchase of land stipulations or recitals of the nature now under consideration do not necessarily "estop the purchaser from establishing that false and fraudulent representations were made in order to induce such purchase." *Stroman v. Atlas Refining Corporation,* 112 Neb. 187. The exchange contract was signed before plaintiff saw the ranch. The evidence on his behalf is sufficient to sustain findings that he was induced by fraudulent representations to enter into the exchange contract, including the provisions relating to representations of value and to reliance on the judgment of each party after inspection; that those stipulations were false as to plaintiff when made; that agents of defendant interfered with plaintiff's inspection of the ranch. Furthermore an inspection of the ranch, if fully made, would not have disclosed the false representations that the ranch had been

recently sold for $60,000; that defendant had an available purchaser for $18 an acre; that the ranch had been rented for a number of years for $3,000 a year; that in the event of an exchange defendant would lend plaintiff money to stock the ranch. The circumstances were such as to permit a recovery for fraud, notwithstanding the stipulations to avoid the consequences of fraud. According to the evidence the verdict is not excessive. Error prejudicial to defendant has not been found in the record.

AFFIRMED.

MAGDALENE MUENSTER BARTELS ET AL., APPELLANTS, V. HANS H. STABEN ET AL., APPELLEES.

FILED JUNE 10, 1931. No. 27688.

1. Trusts. In an action to impress a trust upon certain described lands, upon the theory that a guardian had invested certain trust funds therein, such trust may thereby be impressed on the lands for only the amount actually invested therein.
2. Fraudulent Conveyances: HUSBAND AND WIFE. The transfer of real estate between a husband and a wife is to be closely scrutinized, where the interests of third parties are involved, but in such case the transfer will be upheld as against other creditors where it appears to have been made in good faith or in the payment of a just debt.

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

Philip E. Horan and *Fred N. Hellner*, for appellants.

W. G. Kieck, D. O. Dwyer and *W. L. Dwyer, contra.*

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

DEAN, J.

This suit was begun in the district court for Cass county by Magdalene Muenster Bartels and her sister, Agnes Muenster, plaintiffs herein, to establish a trust in the sum

of $2,933.18, upon the following described real estate in Cass county, namely, the northwest quarter of section 31, township 12, the title whereof stands in the name of Hans H. Staben, defendant. The plaintiffs pray for an order for the sale of the land to satisfy a judgment obtained by them in the sum above mentioned in Douglas county in an action for an accounting against the defendant.

The court found and decreed that the defendant, as the plaintiffs' guardian, converted to his own use $1,900 belonging to the plaintiffs, and that the plaintiffs were entitled to a lien on the land above described in that amount, with interest thereon at the rate of 7 per cent. per annum from June 16, 1923, that being the date when the defendant converted plaintiffs' money to his own use. The court, however, found that Mrs. Staben, also a party defendant, some years before the proceedings herein, advanced $4,500 to her husband for the purchase of a tract of land in Sarpy county, and that the above named sum, pursuant to agreement, constituted a prior lien upon the Cass county land. Thereupon the court ordered that the land be sold to satisfy the judgment. From that part of the judgment finding that the defendant had converted but $1,900 to his own use, and also that part holding that Mrs. Staben's mortgage was superior to the lien of the plaintiffs' judgment, the plaintiffs have appealed. The defendants have filed a cross-appeal.

Hans H. Staben and his wife are the uncle and aunt, respectively, of the plaintiffs and, on June 15, 1918, Staben was appointed their guardian. The plaintiffs were then 13 and 15 years of age, respectively. An inventory of the plaintiffs' property filed by Staben, March 3, 1919, fixed the value of the property in the following sums, namely, a real estate mortgage, valued at $3,500; war-saving stamps, at $496; and cash on hand, $94.49; making a total value of $4,090.49 of property then under his control.

In 1928 a hearing for an accounting was held in the county court in and for Douglas county upon the application of the plaintiffs. The record discloses that the defendant then filed a report of the disposition of the funds that had come into his hands as guardian. Upon submission, and an examination, the county court found and decreed that $2,933.18 was due the plaintiffs from the defendant. The judgment was affirmed by the district court and, upon appeal, was also affirmed by this court. The present action is to enforce a trust in the sum of $2,933.18 which, as noted above, is the amount found due the plaintiffs from the defendant in the accounting proceeding, and also to have an order entered for its priority over Mrs. Staben's mortgage.

It is elementary, of course, that: "When a fact has been once determined in the course of a judicial proceeding * * * it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision which, from motives of public policy, the law does not permit to be done." *Cromwell v. County of Sac,* 94 U. S. 351. See, also, *Lowe v. Prospect Hill Cemetery Ass'n,* 75 Neb. 85. But, in the present case, the court found that $1,900 of plaintiffs' money had been invested in the land and, for the purpose of this action, a trust could be impressed for only the amount actually invested in the lands. It appears to us that the court had authority to pass on the question as to the amount of trust funds invested in the lands and as to the priority of the liens.

Staben testified that, when he purchased a certain tract of land in Sarpy county, his wife advanced $4,500 to apply on the purchase price, and that it was agreed then that she was later to be reimbursed therefor. Later, with this in view, a mortgage was executed by Staben which, by its terms, was payable to her order to secure the payment of the loan. Staben denied that he had told plaintiffs' attorney, as the attorney testified, that he had spent

the guardianship money to apply on the purchase price of certain land in Cass county. Staben contends that he used the guardianship money to pay for the plaintiffs' schooling in a normal school and in the state university.

Staben's testimony was corroborated by that of his wife, who testified that she at one time inherited $3,500 from her father's estate, and that she loaned this amount to her husband to purchase the Sarpy county land. She also testified that she later loaned her husband $1,000, and that it was understood between them that a deed was to be made out in her name and in her husband's name jointly, but that, in 1928, she discovered that his name only appeared on the deed. Thereafter Staben gave his wife his note for $4,500, secured by a mortgage on the Cass county land, for the money so loaned by her to him.

In an action involving the transfer of property, as between a husband and wife, such transfer should be closely scrutinized, where the interests of third parties are involved, but the transfer will be upheld as against other creditors where it appears to have been made in good faith or in the payment of a just debt. In 27 C. J. 562, the rule is announced that, where a husband borrows money from his wife, he becomes indebted to her and may transfer property to her in payment of or as security for such debt. And in *Ward v. Parlin,* 30 Neb. 376, we held: "A husband may lawfully give his wife a deed or mortgage to secure a preexisting *bona fide* debt owing to her, and such conveyance is not fraudulent as to his other creditors, if taken in good faith, and without any fraudulent purpose." See, also, *Dayton Spice-Mills Co. v. Sloan,* 49 Neb. 622.

The judgment of the district court is supported by the evidence and the law. No reversible error appears therein. The judgment is therefore

AFFIRMED.

ALBERT F. RASP, APPELLEE, V. WILLIAM D. MCHUGH, ELECTION COMMISSIONER OF DOUGLAS COUNTY, ET AL., APPELLEES: CITY OF OMAHA, APPELLANT.

FILED JUNE 13, 1931. No. 27923.

1. **Elections**: BALLOTS: INDORSEMENT. A ballot which has been carelessly signed by a judge of an election precinct, with his initials or with his last name only, and is not signed as the law requires, need not be rejected in the canvass of the votes for that reason alone.
2. ———: ———: ———. A voter who has accepted a ballot at an election polling place with two names indorsed on the back thereof, each of whom he believes to be a judge of election in that precinct, will not be deprived of his vote because one of the names was the signature of an "inspector" appointed to that polling place under the election laws enacted for counties of over 150,000 population, such "inspector" having assumed to act as a *de facto* judge of that election precinct.
3. ———: VOTING BY MAIL. The Nebraska law on voting by mail, as set out in sections 32-801 to 32-816, Comp. St. 1929, examined, its provisions explained, and the requirements necessary to make it effective discussed in detail.
4. ———: ———: RECORD. Upon receipt of an application from an absent voter for a mail ballot, the clerk (or election commissioner in counties of over 150,000 population) is required to enter all facts relating thereto in a poll book, which shall be open to the public. This plain requirement, duly enacted by the legislature for safeguarding mail voting by absent voters, is not met simply by keeping the original applications on file in the office.
5. ———: ———: INDORSEMENT OF BALLOT. An official ballot, before being sent to a mail voter, is required by section 32-812, Comp. St. 1929, to be identified by the clerk (or election commissioner in counties of over 150,000 population) indorsing his name and title on the back thereof. A voter upon receiving a ballot indorsed simply "Mrs. Thomas" should at once return the same. It is not a legal ballot and cannot be counted. It is the duty of the voter in such an event to write for a ballot indorsed so that, according to law and the instructions sent him with the ballot, he can, after marking his choice thereon, fold the same so that the indorsed name and title of the official are

exposed on the back thereof when he hands it to the notary public or other officer to be placed in the official envelope by such officer.

6. ———: ———: CANVASS OF VOTES. The counting or canvass of mail votes should proceed exactly in the manner specified by the legislature in section 32-816, Comp. St. 1929. This requires that the board of county canvassers shall take the ballot box containing all the mail votes to a separate room and count them, with no other person present therein. This law is not complied with when mail votes are turned over to clerks or employees in the office of the official to count and report the result to the board of canvassers.

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

John P. Breen, John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle,* for appellant.

Kelso A. Morgan, Brogan, Ellick & Van Dusen, Henry J. Beal and *Albert May, contra.*

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

PAINE, J.

At a special election called to vote upon bonds, the proceeds of which were to be used to widen a street in the city of Omaha, the report of the official canvass was that the proposition was defeated by a vote of 26,136 for to 26,245 against, thus failing to carry by 109 votes.

Thereupon the plaintiff, a resident taxpayer, brought a contest in the district court against the city of Omaha, the election commissioner and the members of the canvassing board to secure a recount of the ballots.

The transcript shows no record of any appointment of a referee, but about 30 pages of the transcript set forth a report of Referee George W. Pratt, in which he states that he was appointed by the district judge upon December 29, 1930, to hear said matter; that he began a recount of the ballots on the same day and called them off person-

ally and they were tallied by Gerald E. LaViolette and C. E. Musgrove, which work consumed fourteen days; that thereafter three days were spent in taking evidence and the argument of counsel, after which the referee spent six days in the study of the briefs and in the preparation of his report.

The report discloses that the evidence was taken by a court reporter and many exhibits were introduced in evidence. But, unfortunately, no bill of exceptions or exhibits are brought to this court, which must content itself with the examination of only such facts as are to be found in the referee's report, which was adopted by the district judge over many objections of the appellant, the city of Omaha.

The results, according to the referee's report, showed that 26,049 had voted for the proposition and 26,028 voted no, making a majority, according to the referee, of 21 votes in favor of the proposition, approving awards of $318,026.36 for widening the street and authorizing the issuance of bonds of the city in the aggregate sum of $217,887.13 to pay the excess cost of said improvement.

The district judge approved and ratified the report of the referee upon the facts as well as upon the law and allowed him the sum of $600 for his services, taxed all costs against the city of Omaha and directed the city to at once proceed with the project.

1. In the referee's report it is set out that A. I. Creigh, one of the judges of election in the seventh precinct of the third ward, indorsed 99 ballots with his initials only; and in the seventh precinct of the eighth ward a judge, Alva M. Gregg, signed only his last name on 83 ballots; and in the twentieth precinct of the tenth ward Edwin Hogle, one of the judges, signed only his last name upon 236 ballots.

The provision which relates thereto reads as follows: "When any duly qualified elector shall present himself at the polling place of his election district or precinct, for the

purpose of voting at any election then in progress, he shall receive from the judge of the election board a ballot, on the back of which two judges of the election board shall first write their names in ink." Comp. St. 1929, sec. 32-704. See *State v. Russell,* 34 Neb. 116.

In *Orr v. Bailey,* 59 Neb. 128, it was held that, as the Australian ballot law requires that the names of two judges shall be written on the back of each ballot, a ballot not so indorsed shall be void and not counted, thus deciding that it is mandatory. Chief Justice Harrison also wrote the long opinion in *Mauck v. Brown,* 59 Neb. 382, which was handed down at the same term of court. This Nuckolls county case disclosed a remarkably close race for the office of county attorney, and while it appeared on the face of the returns that H. H. Mauck had won by four votes, yet nine ballots were discovered with only the name of one judge indorsed on the back. These ballots being thrown out, an election was changed because of the negligence and carelessness of one of the judges of election in that precinct in failing to indorse such ballots.

In *Crosby v. Haverly,* 82 Neb. 565, this court declared that ballots not indorsed at all by any election official are absolutely void. Therefore, this court has held that ballots with no indorsements were void and ballots with the indorsement of but one judge were void, yet it has liberalized this rule somewhat.

In *Griffith v. Bonawitz,* 73 Neb. 622, ballots were signed by one judge and with the initials of another judge, as in the present case. The court decided that, the purpose of the indorsement being to identify and establish the authenticity of the ballots, the spirit and purpose of the statute were entirely complied with by the signature of the one judge by his initials.

A ballot which has been carelessly signed by a judge of an election precinct with his initials only, or with his last name only, and not as the law requires, need not be rejected in the canvass of votes.

2. The referee finds that in the seventh precinct of the fourth ward 22 "yes" ballots, 14 "no" ballots and 9 blank ballots were signed by but one of the judges of election, and that an inspector stationed at that polling place by the name of William Haffke had taken said ballots and signed the word "Haffke" on the back of said 45 ballots; and that in the second precinct of the fifth ward the inspector, Arthur Espergan, stationed at said polling place, had taken ballots signed by but one judge and signed his name in the place of a second judge upon 25 "yes" ballots and 20 "no" ballots and 4 blank ballots, a total of 49 ballots.

Upon these facts the referee makes his finding that this complies fully with the statute, and the associate counsel for the appellee argue that the objections made to these inspectors assuming to act in the place of judges of election are completely disposed of by the case of *Bingham v. Broadwell,* 73 Neb. 605. This was another Douglas county case, and Commissioner Ames found that in the first precinct of the fifth ward of South Omaha some of the ballots were signed by one judge and also one clerk. He held that these ballots were valid by the expedient of treating the signature of an election clerk as being that of a *de facto* election judge. In justifying and explaining this conclusion, the court quoted the provision of our Constitution protecting the elective franchise, and declared that statutes limiting the right and opportunity of the elector to register his will must be liberally construed in his favor.

Many states have held to a more strict rule than has Nebraska, and we may cite the case of *Kirkpatrick v. Deegans,* 53 W. Va. 275, in which the provision of the statute is discussed which requires two poll clerks "to write his name" on the back of the ballot before it is given to the voter, and the court held: "Hence the words, 'shall write his name,' mean that the name of each poll clerk shall be placed on the back of each ballot voted, in his own hand-

writing, and ballots on which the names of both poll clerks are written by one of them, or by some other person, are void and cannot be counted."

The same court, in a later holding on the same point, says that if ballots have not been personally signed by both poll clerks they should not be counted. *State v. Farley,* 97 W. Va. 695; *State v. Heatherly,* 96 W. Va. 685.

Our attention is called to the case of *Weber v. O'Connell,* 55 N. Dak. 867, in which the North Dakota court, in construing a statute which provided in the canvass of the votes any ballot which is not indorsed as provided in this chapter by the official stamp and initials shall be void and shall not be counted, held that absent voters' ballots not indorsed by official stamp and initials pursuant to statute cannot be counted.

In addition to the section of our statute, heretofore quoted, which requires two judges to sign their names in ink on the back of the ballot, we find section 32-707, Comp. St. 1929, which reads in part as follows: "The voter shall fold his ballot so as to conceal the names and marks thereon and to expose the names of the judges of the election board upon the back thereof, and shall without delay, and without exposing the names or marks upon the front thereof, and without leaving the inclosure in which the compartments are placed, deliver the ballot so folded to the judge of election, who shall, without exposing the names or marks on the front or face thereof, approve the signatures upon the back thereof, and deposit the ballot in the ballot box in the presence of the elector."

The voter in the case at bar, having so folded his ballot as to expose the two signatures on the back thereof, had probably no personal knowledge that they were not the signatures required by law, and the judge who accepted his ballot had the duty under his oath of approving such signatures on the back as the signatures of two judges, which he did by depositing it for the voter in the ballot box.

This court has accepted ballots signed by clerks who assumed to perform the duties required by law to be performed by a judge, and very reluctantly in this case we broaden this holding to include an "inspector" appointed under the election laws in force in the metropolitan city of Omaha, but those in charge of selecting judges of election boards should caution them to so perform the duties of their office that the signing, examining and approving of the names indorsed on the back of each ballot will be in truth what the law requires, i. e., the names of two judges of that election precinct, and of no other person. If judges fail in this regard they should be replaced by those who will act in accordance with our election laws.

A voter who has accepted a ballot with two names indorsed on the back thereof, each of whom he believes to be a judge, will not be deprived of his vote because one of the names was signed by an "inspector" appointed to that polling place under the election laws provided for Nebraska counties of over 150,000 population.

3. We will next consider the absent voters law. During the Civil War many states, both north and south, passed laws permitting the soldiers who were in the armies to vote in both national and state elections, and such laws have been held to be constitutional, even where they allowed the ballot boxes to be opened anywhere within or without the state and when they were in charge of only the commanding officer, who might not be a voter in that state at all nor subject to the jurisdiction of that state, and these laws permitted soldiers to vote where there was no evidence at hand of their qualifications to vote had they been at home. These early laws permitting absentee voting were confined strictly to soldiers in the army, and such laws were approved by the federal house of representatives, which held such statutes constitutional so far as they affected the election of members to that body.

In some states soldier voting acts were held to be unconstitutional as applied to state officers—*Bourland v. Hil-*

dreth (1864) 26 Cal. 161, which interpreted an article of the California Constitution as requiring the actual presence of the voter on election day in the county of his residence.

During the time of the Spanish-American war similar acts were passed to allow those electors of various states who were in military service to vote and in 1916 and 1917, during the World War, additional laws were passed with the same end in view.

Absent voting by soldiers having been found satisfactory, several states adopted laws to permit voting by others whose peacetime occupations required their absence from their residence on election day.

In the case of *Straughan v. Meyers* (1916) 268 Mo. 580, the court upheld a law passed in Missouri to enable railroad employees, traveling salesmen, and other persons whose duties or occupations required them to be absent from their voting precincts on election day, to cast their vote wherever they might be within the state, and we find the following language used in the opinion: "In the first place, it was enacted to provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised."

4. Occupational absentees being thus accorded this privilege, many states began to enact laws allowing sick and disabled voters to share in the right of suffrage by voting by mail.

The Nebraska law governing such voting is found in sections 32-801 to 32-816, Comp. St. 1929. Such voter, if he has resided in a precinct where registration is required, must furnish to the county clerk a certificate of the registration officer to the effect that he is duly registered in that precinct, and upon receipt of the application from the absent voter, with the certificate of registration, the clerk issues an absent voter's ballot to him with an identification envelope, a return envelope, and an instruction card, as hereinafter described. Section 32-804 then directs: "The

clerk shall at once enter said voter's name, post-office address, residence and voting precinct, with party affiliation if the election be a primary one, in a poll book to be kept by such clerk for such purpose, which poll book shall be open to the public; and shall notify the election board of applicant's precinct of such application."

The referee finds that the commissioner did not keep the poll book for mail voters, as prescribed by statute, which poll book the law requires must be kept open to public inspection, but suggests that he simply retained the original applications sent in for such mail votes.

Upon receipt of an application from an absent voter for a mail ballot, the clerk, or election commissioner in counties of over 150,000 population, is required to enter all facts relating thereto in a poll book which shall be open to the public. This plain requirement of the statute is not met simply by keeping the original applications on file.

5. Section 32-812 further directs that before issuing the ballot to such applying voter "the clerk shall identify the same by indorsing his name and official title on the back of the ballot."

The law provides that upon receipt of such absent voter's ballot he must exhibit the same to a notary public, a commissioned officer of the army, or such other official as may be allowed to administer oaths, and must exhibit the unmarked ballot to such official and then in his presence mark the ballot, and, as provided in section 32-805, must then "fold the same so that the indorsed name and title of the clerk is exposed and all other marks hidden and deliver the same to the official who shall place the same in the identification envelope and seal the same." The voter then subscribes to the oath printed on the identification envelope, giving many facts about his age, occupation, residence, etc., and the official then places the same in the identification envelope and seals the envelope under his official seal. Section 32-808 provides: "Upon receipt of such return envelope the clerk shall keep same unopened

until the canvassing board called by the clerk meets as provided by law. Such canvassing board shall constitute an election board * * * and shall receive, count and return said votes in like manner as near as may be as other election boards receive, count and return the ballots of present voters. * * * At least forty-eight hours prior to the sitting of said board of canvassers as an absent and disabled voters' election board, the clerk shall post in a conspicuous place in his office a notice stating the day and hour when such canvassing board will sit as such election board."

Section 32-810 provides: "After the canvassing board meets but before proceeding to the canvass, it shall sit as an absent and disabled voters' election board as above provided, and as such election board shall publicly open such return envelopes as have been by the clerk received and allow public inspection of the identification envelopes but without the same leaving the custody of the board, and shall compare the identification envelopes with the absent and disabled voters' poll list * * * (32-804), and if the names appearing thereon agree and if the signature of the voter on the identification envelope agrees with that on the application retained by the clerk * * * and if the ballot have the clerk's indorsement thereon the same shall be placed unopened in a ballot box to be provided and known as the absent and disabled voters' ballot box." It is also provided in section 32-811: "If it do not appear to said absent voters' election board that an absent or disabled voter's ballot has been issued to the voter whose name appears on the identification envelope, or if the signature on such envelope is not that of the voter on the corresponding application, * * * the board shall reject the vote, and in such case shall not open the identification envelope, or if the rejection be after the opening thereof and because of the absence of the clerk's indorsement of the ballot, shall forthwith return said ballot to such envelope and seal the same up and such rejected ballots, with all envelopes and other papers, shall be held in like manner

and for same time as other ballots and papers pertaining to such election."

The last section of the law relating to absent or sick electors provides in section 32-816: "The county clerk of the county in which said absent or disabled voter resides shall receive said ballot and shall safely keep and preserve the same unopened in his office until the board of county canvassers canvass the vote according to law, at which time the said board of canvassers, in the presence of the said county clerk, and no other person, shall open said envelope and record the said ballot upon a special poll book showing the proper precincts or wards of each voter and in the same manner as clerks of election record votes; and in so canvassing said vote, the board of county canvassers shall count the votes of all absent or disabled voters taken as herein provided and add the same to the total abstract of voters the same as if a separate precinct."

An election commissioner is appointed by the governor in Douglas county for the term of two years under the provision of the law relating to registration and elections in counties of over 150,000 population. Comp. St. 1929, sec. 32-1801. This election commissioner is required to perform all the duties in reference to elections of a county clerk in the other counties of the state. Section 32-1805, Comp. St. 1929, provides that said commissioner is responsible for the enforcement of the election laws.

We have set out in some detail the simple but effective requirements to grant this new right to cast a ballot to an absent or disabled voter.

The entire argument, as well as brief, of special counsel for the city of Omaha, John P. Breen, was directed to the violations of the many sections of the election laws in the issuance, acceptance and counting of these absent voters' ballots, which numbered 260 "yes" and 208 "no" mail votes.

Let us examine carefully the facts as set out in the report of the referee. He finds that the election commissioner did not personally sign his name and his official designa-

tion or title on the back of a single one of said ballots for the purpose of identifying said ballots, as required by law, nor was his signature and title placed thereon by any one else for him, but that said election commissioner appointed a Mrs. Thomas to have charge of such absent and disabled voters' ballots, and while there is no record of her being sworn in, her name is on the pay-roll in his office. The commissioner, when first called to the witness-stand, testified under oath that Mrs. Thomas had selected two other ladies to assist her in this work, but several days later permission was given to withdraw the rest and to change this testimony, and the election commissioner then testified, touching this matter, that Mrs. Thomas had suggested to him the names of two other ladies to assist her, and that he had appointed them, and that the names of such ladies were Mrs. Neilsen and Mrs. Shumaker, and that only one of these three ladies signed simply her last name, to wit, "Mrs. Thomas," "Mrs. Neilsen," or "Mrs. Shumaker," on the back of all the ballots which were mailed out to absent voters in this election, with no other mark or designation except such last name.

It is strenuously argued by the counsel for the appellant, the city of Omaha, that the right of those voters who cannot be present in person to vote is a purely statutory right or privilege, and that all statutory provisions relating to this privilege extended to such voters to cast a vote by mail are to be strictly followed and are mandatory provisions.

It is further insisted in the brief that section 32-812, Comp. St. 1929, when applied to Douglas county, would require that before issuing ballots to such mail voter the election commissioner shall identify the same by indorsing his name and official title on the back of the ballot, and it may be assumed that the legislature had the power to choose and fix the exact form of indorsement that must appear on the back of these mail ballots; and can it be said that the election commissioner, by choosing not to

sign his name 468 times with his title thereunder, but directing some woman in his office, as "Miss Jones," for instance, as appellant suggests in his brief, to write her name on the ballot, complies with the requirements of the law? It is admitted that her name might identify the ballot, but the legislature in its power and wisdom has determined just what name and title must appear on the back of the ballot for identification purposes, and it is admitted that this provision was not followed.

If in *Orr v. Bailey*, 59 Neb. 128, this court decided that ballots would be rejected where the voter was present and placed a ballot in an election box himself, which had on the back of it the name of one judge instead of two, as the law required, can it be argued that a "Miss Jones" indorsement, for instance, on the back of a mail vote would allow such ballot of an absent voter to be legally cast or counted?

A set of instructions is provided and sent out with these mail votes to the voter who desires this especial privilege, and as this can be sent to him several weeks before election, by examining the instructions he can ascertain for himself that the ballot sent him does not bear the indorsement of the election commissioner nor his title on the back, as by law required, and can call attention to this defect and secure a new ballot in time to vote.

In Indiana the statute requires that each absent voter's ballot shall bear the signature of the clerk of the court and the impression on the ballot of the seal of the court. In discussing a case in which five ballots did not bear the impression of such official seal before being sent to absent voters, the court observes: It is the duty of the voter on receipt of the ballot to examine it to see if it is official, in the sense that it has everything done to it which is prescribed by law. If it lacked in some one or more of the things which are required to make it an official ballot, the voter should have returned it and asked for a properly prepared official ballot. "Inasmuch as it has been held that

a ballot is invalid and void and cannot be counted when voted personally within the election room if it lacks the initials of either one or both of the poll clerks on the back thereof, it follows that the identification of the absent voters' ballots in question was incomplete and such ballots ought not to have been voted by the persons who voted them, and, for want of proper identification, are illegal and void and ought not to be counted." *Werber v. Hughes,* 196 Ind. 542.

The Illinois court held that the requirement that one of the judges shall indorse his initials on the back of a ballot before giving the same to the voter is not satisfied by the use of a rubber stamp bearing the initials of one of the judges. *Choisser v. York,* 211 Ill. 56.

The law, as set out in section 32-811, Comp. St. 1929, requires that after the identification envelope is opened the ballot shall be returned to such envelope and sealed up with the rejected ballots if the indorsement of the name of the election commissioner and his title do not appear thereon, so that such ballot must not be allowed to be placed in the ballot box provided for mail votes if it is not indorsed as the law plainly directs.

As stated in *Orr v. Bailey, supra:* "The elector is charged with a knowledge of the law, and he can hardly escape the discovery that the signatures are or are not on the back of the ballot when he folds it and that it is or is not a ballot which can be used." Such absent voter, upon examining his ballot, and especially upon folding it up in the presence of the notary public, can see at once that it does not have the name and title of the election commissioner indorsed thereon, and so knowing and discovering at the time of folding his ballot, he must know that the ballot which he holds is not one which is authorized as an official ballot, and that he has no right to vote it.

It is contended by the appellee that the election commissioner possesses ample power to appoint deputies and also many assistants, and that he is not required to do the

work himself, and if this is admitted, yet it is the well-settled law of the land that such work done by deputies must be done and performed in the name and title of the official required by law to perform the duty, and that this rule is not met by the signature of a clerical employee not a deputy.

A ballot, before being sent to a mail voter, is required under section 32-812, Comp. St. 1929, to be identified by the clerk (or election commissioner in counties having 150,000 population) indorsing his name and title on the back thereof. A voter receiving a ballot indorsed simply "Mrs. Thomas" should at once return the same, as it is not a legal indorsement and such ballot cannot be counted.

6. The referee further finds that said ballots were not counted in the manner required by law by the canvassing board of Douglas county, which the pleadings show consisted of F. W. Pruitt, Samuel Greenberg, and William D. McHugh, the election commissioner.

The referee's report discloses that the oral evidence proved that the canvassing board of Douglas county did not sit as an election board for the purpose of counting the mail votes, but that after the application and envelope had been examined and the mail votes placed in a ballot box such box was turned over to an unnamed and unidentified group of office employees to count; that all the canvassing board did was to accept the totals from the other group, and that the canvassing board did not sit as an election board, as required by law, and did not count or canvass any of such mail votes.

Granting that the signature of the election commissioner and his title could have been indorsed upon the ballot by one of his deputies, yet such a defense cannot be interposed as the reason for turning over the ballot box holding the mail votes to unnamed employees and clerks in the office to canvass, for the law, as hereinbefore set out, specifically directs that this counting shall be done only by the board of county canvassers in the presence of the election commissioner and no other person.

This provision of the law is a very wise enactment of our legislature to guarantee that mail votes shall be personally canvassed only by persons who have been duly appointed to this responsible position, and that no other person shall be in the room to interfere while they canvass these votes.

This court is charged with the duty of construing the law as passed by our legislature, and in the absence of any showing that the plain mandates and requirements of the law were followed we are compelled to hold that the district court erred in overruling the motion for a new trial, in that the evidence clearly shows that no one of the mail votes was issued with the signature of the election commissioner and his title, as required by law, and for the reason that the mail votes were not canvassed as required by law, and therefore the mail votes, of 260 "yes" votes and 208 "no" votes, must be rejected; and as the referee found a majority of 21 votes in favor of the proposition, this leaves a majority of 31 votes opposed to the proposition, and the court therefore finds that it failed to carry at the special election held November 4, 1930. If another special election is thought desirable, all of these errors can be avoided by the officials in handling the ballots. Costs taxed to appellee. Reversed in accordance herewith.

REVERSED.

NATIONAL SURETY COMPANY, APPELLANT, V. S. J. LARSON ET AL., APPELLEES.

FILED JUNE 18, 1931. No. 27676.

APPEAL from the district court for Knox county: DEWITT C. CHASE, JUDGE. *Affirmed.*

Mapes, McDuffee & Mapes, for appellant.

Peterson & Barta and *Fred S. Berry, contra.*

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

PER CURIAM.

This is an action on an indemnity bond, alleged to have been executed to indemnify plaintiff from loss by reason of its having signed a county depository bond for the First National Bank of Wausa, hereinafter called the bank. At the date of this indemnity bond defendants were directors or stockholders of the bank. One of the defenses relied upon is that the bond in question is without consideration and was never acted or relied upon by the plaintiff. Trial was had to a jury, resulting in a verdict and judgment thereon for defendants. Plaintiff has appealed.

Plaintiff for reversal argues that two of the instructions given by the court are erroneous, and that the verdict is not sustained by the evidence and is contrary to law.

The following facts are reflected by the record: Plaintiff signed a county depository bond for the bank, running to Knox county, in the penal sum of $10,000, to protect the county, for a period of four years, from loss by reason of deposit of its funds in the bank. The bond bears date December 20, 1922. In October, 1924, the bank appeared to be in financial difficulties, and about the 1st of November was, in effect, reorganized, at which time the defendants became stockholders and some of them directors of the bank. Before reorganization of the bank, plaintiff, becoming alarmed at the prospect of liability upon the depository bond, had considerable correspondence with the officers of the bank relative to a reduction of county deposits in the bank, and to a reduction in the amount of its bond. After the bank was reorganized the deposits were increased so as to exceed the amount of the original depository bond. There were negotiations then for an additional bond.

It appears that none of the defendants had any knowledge of the existence of the depository bond, given in 1922, until this action was begun. There is evidence from which it might be inferred that defendants, when they signed the indemnity bond sued on, were doing so with respect

to a new bond to be furnished by the plaintiff. No such new bond was ever furnished. That question was submitted to the jury. They found for the defendants.

We think there was sufficient evidence to justify the submission of the question to the jury. Clearly, if the indemnity bond in this suit was signed by the defendants for the purpose of securing a new bond, to be thereafter issued, and no such bond was ever issued, then there was no consideration for the bond, and defendants would not be liable thereon because of the fact that plaintiff had, two years previously, signed a depository bond.

We have scrutinized the instructions criticized and find that they properly submitted the issues to the jury.

No error prejudicial to plaintiff has been found. The judgment is therefore

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. CHRIS ELSEMANN ET AL., APPELLANTS.

FILED JUNE 18, 1931. No. 27795.

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

Benjamin S. Baker, Ralph T. Wilson, Edward Shafton and *Lower & Sheehan,* for appellants.

Lawrence I. Shaw and *Albert S. Ritchie, contra.*

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

PER CURIAM.

This action was begun in the district court for Douglas county by the Federal Land Bank of Omaha, plaintiff, against Chris and Mathilda Elsemann, defendants, to foreclose a mortgage given by the defendants to plaintiff as security for two promissory notes for $7,500 and $2,000,

respectively. The court found that, pursuant to the terms of the notes, $9,382.21 was due the plaintiff. The defendants have appealed.

The errors mainly relied on by the defendants, as grounds for reversal, have not been set out in their brief pursuant to the requirements of section 20-1919, Comp. St. 1929, which, among others, contains this provision:

"The supreme court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous."

Under Rule 12 of this court, provision is also made for the preparation of briefs. See 94 Neb. XI. We have held that failure to assign errors, as provided by section 20-1919, Comp. St. 1929, and Rule 12, both above cited, constitutes grounds for the affirmance of the judgment. *Gorton v. Goodman*, 107 Neb. 671. We conclude that the rule above noted is applicable to the facts before us. It follows that the judgment must be and it hereby is

AFFIRMED.

EDYTHE J. KELLY, APPELLEE, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLANT.

LUCRETIA KELLY, APPELLEE, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLANT.

FILED JUNE 18, 1931. Nos. 27851, 27852.

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

G. E. Hager and *Leon Samuelson*, for appellant.

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

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

PER CURIAM.

Actions at law upon two insurance policies, consolidated by agreement of the parties. Jury was waived, and trial had to the court, resulting in judgments for plaintiffs as prayed. In addition, attorney fees were taxed to defendant in these cases in the sums of $125 and $50, respectively. Defendant appeals.

An examination of the bills of exceptions discloses that the controlling question presented in each case is one of fact, and that the judgments entered by the district court are supported by ample evidence, and should be affirmed. Additional attorney fees of $125 for services in this court are taxed to defendant in the case brought against it by Lucretia Kelly. It is conceded that the attorney fees of $125 taxed in favor of Edythe J. Kelly in the trial court is erroneous, but the error is one to be corrected by motion to retax costs filed in the district court.

The action of the trial court, in so far as presented by the issues here considered, being correct, the judgments presented for review are

AFFIRMED.

LEN J. DAVIS V. STATE OF NEBRASKA.

FILED JUNE 18, 1931. No. 27775.

1. **Embezzlement:** INFORMATION. For the purposes of an information in a criminal prosecution, the charge that accused embezzled money is not a sufficient charge that he embezzled notes.
2. **Criminal Law:** PRELIMINARY EXAMINATION. Where defendant in a prosecution for a felony does not waive a preliminary examination but properly demands that right and preserves it in the record, a sentence against him on a verdict of guilty after trial is erroneous and may be set aside in a proceeding in error.
3. **Embezzlement:** INFORMATION. An information for embezzlement must inform accused with reasonable certainty of the particular property involved in the felonious act charged and for that purpose the words "funds and credits" alone may be insufficient to describe notes.

4. ———: ———: INTENT. In a prosecution for embezzlement, the intention of accused to defraud the owner of the property described in the information is an element of the felony and must be charged and proved.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Waring & Waring, Stiner & Boslaugh and *Edmund Nuss*, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Fillmore county, Len J. Davis, defendant, was convicted of embezzling on July 8, 1927, 41 notes and $7.76 in money, property of the Citizens State Bank of Geneva of which he was at the time vice-president and manager. The debts evidenced by the notes aggregated $7,897.42. The interest on the notes amounted to $204.04. These two items and $7.76, or $8,109.22, made the amount of the entire embezzlement charged. Defendant pleaded not guilty. Upon a trial the jury rendered a verdict against him and the district court sentenced him to serve in the penitentiary a term of not less than five nor more than ten years. As plaintiff in error he presented to the supreme court for review the record of his conviction.

The first assignment of error for consideration is that defendant was deprived of his fundamental right to a preliminary examination. By proper pleas, objections and exceptions the question thus raised is properly presented by the record for review and requires an examination of a previous charge against defendant, his conviction thereunder and the reversal of his former sentence. The history of the earlier prosecution is published in *Davis v. State,*

118 Neb. 828. The opinion therein shows that defendant was first accused in the following language of embezzling money of the Citizens State Bank of Geneva:

"That on or about the said 8th day of July, 1927, the said Len J. Davis, in said county and state aforesaid, did fraudulently, unlawfully and feloniously abstract, convert to his own use, and embezzle certain moneys, funds and credits, the property of said bank, in the sum of $8,101.46, said property being in his possession as such vice-president of said bank, without authority of the directors of said bank, and with the intent on the part of the said Len J. Davis to injure and defraud said Citizens State Bank of Geneva, Nebraska."

The amount of embezzled "moneys, funds and credits," as stated in the first made charge, was $8,101.46, or $7.76 less than the amount stated in the second and present information. Embezzlement of money only was first charged. At the former trial evidence adduced by the state was directed to embezzlement or abstraction and conversion of 41 notes. Embezzlement or abstraction and conversion of notes were not stated with sufficient particularity to protect defendant's constitutional right to be informed before trial with reasonable certainty of the property involved in the felonious act charged, since the words "funds and credits," in the connection used in the first information, were insufficient for that purpose. In the former prosecution the state failed to prove embezzlement of money; failed to charge embezzlement of 41 notes or any note; failed to prove defendant embezzled or abstracted and converted 41 notes or any note. For these fatal defects in the former prosecution the first sentence was reversed. *Davis v. State,* 118 Neb. 828.

After the case was remanded to the district court, defendant was accused in another information of embezzling 41 particularly described notes and $7.76 in money. The two informations did not charge one and the same felony. For the purposes of an information in a criminal prose-

cution, the charge that accused embezzled money is not a sufficient charge that he embezzled notes. *Stowe v. State*, 117 Neb. 440; Davis v. State, 118 Neb. 828. Defendant did not have or waive a preliminary examination on the charge in the second information that he embezzled or abstracted and converted 41 notes, though he demanded that fundamental right which he preserved throughout the trial. The embezzlement of $7.76 in money was not proved. The sentence for the embezzlement of notes therefore was prejudicially erroneous for want of a preliminary examination and cannot be permitted to stand.

Owing to the insufficiency of the evidence to sustain a conviction for the embezzlement or abstraction and conversion of any note or notes, the case will not be remanded for a new trial. The evidence herein shows that the 41 notes described in the second information were taken out of the Citizens State Bank of Geneva in a banking transaction approved by its board of directors for the bank's benefit without any intention of defendant to defraud the bank. The state was unable, in two trials, after long preparation, to disprove this defense. The judgment of the district court is therefore reversed and the prosecution dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF WILLIAM LINSLEY DAYTON. ANN MEDUNA, APPELLEE, V. ESTATE OF WILLIAM LINSLEY DAYTON ET AL., APPELLANTS.

FILED JUNE 18, 1931. No. 27797.

1. Gifts: DELIVERY. Where 10 Nebraska state fair bonds, in the sum of $1,000 each, were registered by a donor in the name of a donee, when purchased, but such bonds were kept in the safety-deposit box of the donor for his convenience in collecting accruing interest thereon so long as he lived, *held*, that a complete delivery of such bonds to the donee was thereby effected.

2. Evidence: GIFTS: DELIVERY: DECLARATIONS OF DECEDENT. The delivery of certain Nebraska state fair bonds may be established by the declarations of the donor, since deceased, that such bonds were a gift to the donee.
3. Gifts: RESERVATION OF INTEREST. "The mere reservation of interest to the donor during his lifetime does not invalidate the gift." *In re Estate of Sides*, 119 Neb. 314.

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

C. C. Flansburg, for appellants.

Sterling F. Mutz, contra.

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

DEAN, J.

Dr. William Linsley Dayton, for many years a resident of Lincoln, died testate February 28, 1930, leaving an estate of upwards of $100,000 in value. A son, Frank T. Dayton, and a daughter, Mary Helen Dayton, the defendants herein, are the joint executors of the Dayton estate. Ann Meduna, the plaintiff herein, began this action in the district court for Lancaster county to establish ownership in and to 10 Nebraska state fair bonds in the sum of $1,000 each, and for an order requiring the defendants to relinquish to her the possession of the above bonds. The bonds were registered under date of July 2, 1929, in the plaintiff's name. The contention of the defendants, however, is that the delivery of the bonds to the plaintiff was incomplete and that they are a part of the decedent's estate and should be administered as such.

The trial court found that the bonds were purchased by the decedent and that delivery of the bonds to the plaintiff was fully completed during the lifetime of the decedent. The court also found that the decedent kept the bonds in his safety-deposit box to enable him to collect the interest thereon and that the plaintiff is entitled to the possession

of the bonds and also of the interest accruing thereon subsequent to the death of the decedent. The defendants have appealed.

In his practice, Dr. Dayton was a specialist in the treatment of diseases of the ear, eye, nose and throat, and, as his assistant and nurse, the plaintiff was in his employ for almost 14 years. The salesman, from whom the doctor purchased the bonds in suit, testified that the bonds were registered shortly thereafter in the plaintiff's name.

A witness testified that she had been acquainted with the decedent and his family for many years and that she has also been acquainted with the plaintiff for many years. This witness testified that the decedent told her about the bonds in suit and that he had purchased and registered them in the plaintiff's name. She also testified that the doctor informed her that he purchased the bonds as a gift to plaintiff in recognition of her long and faithful service as his assistant.

Another witness, also a long time acquaintance of the Dayton family, testified that the doctor, in the course of a conversation with her, informed her that he had remembered the plaintiff's services in a former will, but that he was not satisfied with the provision he had made therein in her behalf, and that the bonds were therefore purchased and presented to her instead. And this witness also testified that the doctor informed her that when he died he did not want any trouble over his property. She also testified that Dr. Dayton then, in view of the foregoing, obtained a promise from her that, in event trouble did arise over his estate, she would relate the circumstance of this gift to the end that the plaintiff would receive the bonds intended for her.

And another witness testified that Dr. Dayton talked with the witness in respect of a one time prospective purchase of certain land owned by the witness. Dr. Dayton then informed the witness that he did not care to purchase land for himself, but that he would consider purchasing

some for the plaintiff. It may be noted, however, that the sale of the land was never consummated. This witness also testified that, in the course of their conversation, the doctor informed her that the plaintiff "took nearly full charge of his office, and many of his personal affairs."

Certain physicians who were professionally associated with Dr. Dayton testified that he informed them that it was his intention that the plaintiff was to be amply repaid by him for services she had performed in his practice and in his private affairs. Another witness testified that the doctor told him that he desired "to do something for Ann (the plaintiff) but didn't want to leave it in his will." He also testified that he was informed by the doctor that it was for this reason that the bonds were registered in the plaintiff's name. From the evidence it appears that the plaintiff at one time accompanied Dr. and Mrs. Dayton to Michigan, apparently as a nurse, when Mrs. Dayton was ill, and that she assisted in caring for the doctor's wife without remuneration other than the payment of her fare. And from certain correspondence between the decedent and the plaintiff, it is apparent that the plaintiff had charge of the rental of property belonging to her employer.

There is a receipt in the record which the plaintiff testified was delivered to her by Dr. Dayton after he had purchased the bonds. This receipt acknowledges the purchase of the 10 state fair bonds in the sum of $1,000 each, and bears the pencilled notation: "Nos. 136 to 145 inclusive registered in name Ann Meduna." In *Kaufmann v. Parmele*, 99 Neb. 622, this statement appears:

"In an action for conversion, proof of facts showing that the owner of bonds deposited with defendant for safekeeping delivered the receipt therefor to plaintiff with the intention of making a gift thereof may establish plaintiff's title thereto, though the receipt was transferred without indorsement or assignment."

From a resume of the evidence it appears that it was the intent of the decedent that the 10 bonds in suit should be

the sole property of the plaintiff. It does not appear that the plaintiff at any time exercised undue influence over the decedent, nor has such fact been pleaded or proved.

In *Dinslage v. Stratman,* 105 Neb. 274, we held: "The mere fact that actual enjoyment of the gift by the donee is, by the declaration of the gift, postponed until the death of the donor, does not render the gift either conditional or testamentary, or in any way invalid. In such a case, the stipulation that actual enjoyment of the gift is to be deferred until the donor's death only marks the time when enjoyment begins, and is not a condition, since the donor's death is inevitable." And in *Tyrrell v. Judson,* 112 Neb. 393, we said: "A person having property may give the same in his lifetime directly to the donee, or by any suitable declaration to a third person for the use of the donee, authorizing such person to make delivery of the subject of the gift after the donor's death." And we have likewise held: "The mere reservation of interest to the donor during his lifetime does not invalidate the gift." *In re Estate of Sides,* 119 Neb. 314. See *Novak v. Reeson,* 110 Neb. 229. In the present case, where 10 Nebraska state fair bonds, in the sum of $1,000 each, were registered by Dr. Dayton in the name of the plaintiff, when purchased, but such bonds were kept in the safety-deposit box of the decedent for his convenience in collecting accruing interest thereon so long as he lived, we think that a complete delivery of such bonds to the plaintiff was thereby effected. And the delivery of the bonds may be established by the declaration of the decedent that such bonds were a gift to the plaintiff.

There does not appear to have been any attempt on the part of the decedent to conceal the transfer of the bonds to the plaintiff. And, in view of the fact that both of the defendants are abundantly provided for under the terms of their father's will, we hold with the learned trial court that the presentation of the bonds in suit to the plaintiff should not at all be disturbed. But, under the circumstances disclosed by the record, even if the donor had not

left a substantial estate to his son and daughter, it does not appear to us that the defendants would have been justified in an attempt to prevent the disposition of the bonds as desired by the decedent.

The judgment is right and it is therefore in all things AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. THURSTON STATE BANK: GEORGE I. PARKER, RECEIVER, APPELLANT: HEINRICH JOHNSEN ET AL., APPELLEES.

FILED JUNE 19, 1931. No. 27788.

1. **Appeal:** NOTICE: WAIVER. An appellee who, after the transcript is filed in this court and within the period when notice of appeal may be given, joins appellant in a written stipulation and thereby requests and secures an extension of brief day waives other notice of appeal.
2. **Banks and Banking:** APPEAL. The nature and qualities of the state bank receivership here involved, the final order fixing supersedeas bond and allowing time for the receiver to prepare and serve his bill of exceptions, and the settlement of the bill by the district court authorize the appeal by a receiver, at least to the extent that it is not subject to dismissal on motion of appellees for lack of authorization.
3. ———: INSOLVENCY: PRIORITIES. Under section 8-1,102 Comp. St. 1929, priority of unsecured deposits in a state bank is fixed by their status at the time of the actual closing of the bank when the court, under section 8-190, Comp. St. 1929, adjudges it to be insolvent and orders it liquidated.
4. ———: ———: ———. *Guaranty Fund Commission v. Teichmeier*, 119 Neb. 387, analyzed and modified in respect of the time when the priority of depositors is fixed.
5. ———: ———: ———: FEDERAL STATUTES. Section 3466, Rev. St. U. S., is to be liberally construed in favor of the United States.
6. ———: ———: ———: CLAIMS OF UNITED STATES. While a state bank may not be put in bankruptcy by the federal act, yet it may commit an act of bankruptcy in the contemplation of section 3466, Rev. St. U. S., so as to subject it to priorities in favor of claims of the United States.

7. ———: ———: ———: ———. The priority rights of the United States, when the conditions specified in section 3466, Rev. St. U. S., come into existence, cannot be impaired or superseded by a state law.
8. Subrogation. When no intervening equity bars subrogation, a surety on a bond given by a state bank to secure a deposit of money by the United States is subrogated to the rights of the United States to priority of payment to the extent that such surety has paid such deposit.

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

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

Ambrose C. Epperson, Charles E. Sandall, Robert Van Pelt, Edson Smith, George A. Keyser, John E. Eidam, Saxton & Hammes and *J. C. Kinsler, contra.*

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

GOSS, C. J.

This is an appeal by the receiver of Thurston State Bank from a decree ordering the United States to be paid a first preferred claim, and Johnsen and Krusemark to be paid a second preferred claim, subject only to that of the United States, out of the assets of the bank.

On January 12, 1928, the department of trade and commerce of the state took charge of the bank. The next day it placed it under the dominion of the guaranty fund commission. The commission handled its affairs until April 6, 1929, when a receiver was duly appointed by the district court for Thurston county. When the bank was taken over by the department, the superintendent of the Winnebago Indian Agency had on deposit Indian trust funds aggregating $14,250. Before these funds were deposited, the Thurston State Bank, as principal, and Heinrich Johnsen and John F. Krusemark, as sureties, gave bond to the

United States for the payment of the funds according to the terms specified.

Upon the failure of the bank, the United States pressed the sureties for payment and they paid $4,000 of the principal and $570 of interest, pending filing of claims with the receiver. The United States then filed its claim with the receiver for $10,250 and interest and later filed its petition in intervention for that sum. Johnsen and Krusemark likewise asked for the $4,570 they had paid the United States and pleaded subrogation to the rights of the United States. When the issues were tried the sureties had paid another $2,000. The judgment and decree allowed the United States a first preferred claim for $8,250, with interest, and allowed Johnsen and Krusemark $6,570, with interest, subject only in priority to the claim of the United States.

At the outset we are confronted with a motion by all the appellees to dismiss the appeal "for the reason that said receiver has not been granted directions or authority from the district court * * * to prosecute said appeal;" and by a motion by Johnsen and Krusemark to dismiss the appeal as to them for lack of jurisdiction, because there was no notice of appeal filed in the district court or served on them out of this court.

The final order by the district court, dated September 15, 1930, overruled the motion for new trial and allowed forty days from the rising of the court to prepare and serve a bill of exceptions. The bill was duly served on the appellees, and after keeping it about two weeks they made no corrections but stipulated on December 31, 1930, that it was complete. On January 6, 1931, the trial judge certified and allowed it and made it a part of the record in this case. The transcript was filed, and the appeal docketed in this court on December 1, 1930, and the bill of exceptions was filed on January 7, 1931. There is no question that these acts were all performed in proper time. The rules of this court require an appellant to file his

brief within one month from the date the appeal is docketed and within three months from the date of the judgment, decree or final order appealed from. So appellant's brief day was fixed by the rules as not later than December 15, 1930, that being three months from the date of the judgment. But, as shown above, the bill of exceptions was not yet allowed in the district court. So, on December 10, 1930, all parties filed in this court their stipulation "that the appellant may have until February 1, 1931, in which to serve and file brief herein, *without prejudice to right of appellees to move for dismissal of appeal.*" The italics are ours to indicate words that were evidently written after the stipulation was originally typed but before it was signed. We regarded this as an affirmative request to the court by all the parties to postpone the rule day for briefs on the merits and we honored it because it seemed, as it probably was, impossible for appellant to prepare briefs without the bill of exceptions, which was not filed until exactly four weeks later. The transcript shows that a proper notice of appeal had been duly filed in the district court as to the claim of the United States, and that another notice had been duly filed as to "the claim of the United States of America as a preferred claim against said Thurston State Bank, Thurston, Nebraska, for the sum of $6,570, and interest thereon." This claim originally belonged to the United States, but this exact amount had been allowed Johnsen and Krusemark because, since the bank had failed, they had paid that amount to the United States and were allowed it on the ground of subrogation. Evidently by mistake the appellant here described the United States as the claimant instead of Johnsen and Krusemark.

Assuming, without deciding, that there was technically no proper notice of appeal filed in the district court as to the Johnsen and Krusemark claim, we are of the opinion that their stipulation, affirmatively requesting this court to extend the brief day, amounted to a general ap-

pearance and was a waiver of any other or further notice of appeal. The words we have italicized in quoting the stipulation do not save Johnsen and Krusemark from jurisdiction of the appeal against them in this court. They asked an affirmative order. When they joined appellant in asking time for briefing the case, they waived other notice of appeal. Their stipulated reservation of right to move to dismiss might be invoked if they sought to dismiss on some other ground than lack of notice, such as that the appeal was frivolous, that all parties necessary to a full determination had not been brought up, that there was no necessary bill of exceptions, or that the transcript had been filed too late to give this court jurisdiction. An appellee who, after the transcript is filed in this court and within the period when notice of appeal may be given, joins appellant in a written stipulation and thereby requests and secures an extension of brief day waives other notice of appeal.

In support of the motion by all three appellees to dismiss the appeal because the receiver had not been granted directions or authority by the district court to prosecute this appeal, the appellees have presented many different propositions of law and have cited authorities on them. To review them would take time and space without being of value to the parties or to the profession. Generally, it may be said that these instant claims were prosecuted, defended and adjudicated in the same case in which the receiver was appointed and where all matters cognizable by the district court in connection with this bank and receivership were handled. Such a bank receivership differs from a sporadic case in which a receiver is appointed and acts for perhaps a single purpose. While it is true such a bank receiver is an arm of the court, yet it is peculiarly the function of such a receiver to represent the interests of all the owners of the bank property of which he is placed in charge and to see to it, so far as reasonably proper, that these bank assets go to those who are

entitled to them. Should he have reasonable grounds to be aggrieved at the assignment of rights of priorities by the court or the quality and rank of the claims allowed, and should he desire a review of the order of the court in that respect, why should he not be entitled to such review if no objection is made or no restraint put upon him by the court? But when, as here, the district court, in the final order, expressly allows the receiver time to prepare his bill of exceptions and fixes his supersedeas bond and later settles the bill of exceptions, it would seem to indicate that the district court knew it was the purpose of the receiver to appeal and that it authorized him to appeal. We are of the opinion that the nature and qualities of the receivership and the above recited acts of the court authorized the appeal to the extent, at least, that it is not subject to dismissal on motion by appellees for lack of authorization.

On January 12, 1928, the bank was taken over by the department of trade and commerce. On the next day the department placed the bank in charge of the guaranty fund commission, and the commission continued to handle the affairs of the bank until April 6, 1929, when the receiver was duly appointed. Between January 12, 1928, and April 6, 1929, new deposits were made by customers of the bank. These new deposits were kept separate from the old and were all paid to the depositors before the receiver was appointed. None of the deposits in the bank when the department took charge on January 12, 1928, have been paid. The question involved on the merits is one of priority. The appellant receiver claims all deposits have equal priority as a general lien on the assets as of January 12, 1928. The appellee, the United States, and Johnsen and Krusemark (sureties who have paid the United States portions of its deposits) claim priority over other depositors.

The claim of the United States is based on the provisions of section 3466, Rev. St. U. S. (title 31, U. S. Code,

sec. 191, 31 U. S. C. A., sec. 191), which reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467 provides: "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

The following pertinent part of the bankruptcy act, as amended May 27, 1926, and in force, is quoted from section 3, ch. 406, 44 U. S. St. at Large, 662 (11 U. S. C. A., sec. 21): "Acts of bankruptcy by a person shall consist of his having * * * or, while insolvent, a receiver or trustee has been appointed, or put in charge of his property."

In the brief on behalf of the receiver, who is the appellant, it is conceded that, when the receiver was appointed for the bank on April 6, 1929, an act of bankruptcy was committed. That is the settled law. But appellant claims this is immaterial because the claimants contend their right of priority attached on January 12, 1928, and because appellant asserts that the appointment of a receiver was not alleged as an act of bankruptcy. The suit of claimants is ancillary to the receivership case.

The district court ordered pleadings to be made up. The United States and Johnsen and Krusemark, claiming by right of subrogation, made up their pleadings on their separate claims theretofore filed. The United States filed its petition, setting out its deposits and their nature, including the suretyship of and payments by Johnsen and Krusemark, pleaded "acts of bankruptcy," pleaded section 3466, and prayed for priority. As an act of bankruptcy, it first set out that the bank is insolvent and on January 12, 1928, permitted the guaranty fund commission to take over its affairs, and then pleaded that the receiver was appointed on April 6, 1929. It is true the allegation as to the receiver was in the next numbered paragraph after the first above alleged act of bankruptcy. But it should be noted that the receiver did not attack the pleading by demurrer or by motion. He answered it by a plea to the merits, admitting the appointment of the receiver, and, after reply, he raised the question for the first time on the trial by oral objection to the reception of evidence. We think the objection was properly overruled. Regarded as a demurrer it searched the record. The appellees are entitled to whatever priority the bankruptcy law and section 3466 of the United States Revised Statutes allow them, as arising out of the pleadings and proofs. The appointment of the receiver was adequately alleged and proved.

The section of the banking law particularly before us for consideration is the first part of section 24, ch. 30, Laws 1925, now section 8-1,102 Comp. St. 1929, reading as follows: "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they

shall be paid immediately out of the available cash in the hands of the receiver."

The items that first challenge our attention are "at the time of the closing of the bank" and "thus under receivership." From January 12, 1928, when the department of trade and commerce took the bank and on the next day turned it over to the guaranty fund commission, until at least March 25, 1929, when the application for receiver was filed by the attorney general, the commission was examining and operating the bank. If at any time during that period its own assets would have justified its return to its officers, or if sufficient fresh money had been put into it, or if proper reorganization had been effected, the banking machinery of the state would have been withdrawn. Under our statute not the banking department but the court must adjudicate and order liquidation. In the meantime the bank had not been "closed." It had, as we have shown, received fresh deposits, had kept them separate and had paid them all out before turning the bank over to the receiver. At the trial the parties hereto stipulated that, from January 13, 1928, "said commission remained in charge of the property, business and affairs of said bank until a receiver was appointed for said bank by this court." To some extent, at least, it was run as a going concern. No depositor knew, in a legal sense, that the bank would be closed even after the receivership was applied for until by its decree the court found its insolvency, ordered the commission to liquidate the bank and appointed the receiver for that purpose. When the bank was thus closed, all "deposits, not otherwise secured, and claims of holders of exchange" had priority over all other claims, except taxes, and they continued "thus under receivership." In other words, the legislature intended that a bank would cease to be a going concern and would be closed when the court, under section 8-190, Comp. St. 1929, adjudicated it insolvent and ordered it liquidated. The status and priority of depos-

itors was fixed as of that time and continued "thus under receivership."

The appellant cites *Guaranty Fund Commission v. Teichmeier,* 119 Neb. 387, as authority for holding that the lien of depositors is impressed on the assets of the bank as of the date when the department of trade and commerce takes over the bank. That case arose in a situation where the guaranty fund commission was still in charge of a bank. No receivership was involved. A creditor had obtained a judgment against the bank while it was in charge of its own affairs. The bank appealed to the supreme court and superseded the judgment. The judgment was affirmed and the mandate issued. In the meantime, while the case was pending on appeal, the bank was taken over by the department and put under an agent of the commission. Judgment was entered on the mandate and an execution was issued and levied upon the real estate, being the banking house property. The commission sought to enjoin the levy. The district court held that the judgment creditor acquired a judgment lien upon the real estate of the bank, that the perfecting of an appeal and giving supersedeas suspended the lien but did not vacate it, and that any rights acquired in said real estate by others subsequent to the judgment and during the pendency of the appeal are subject to said lien, but that, while the real estate was in the possession of the agent of the banking department, the defendants should not be permitted to sell said real estate. We affirmed the holding of the district court to the effect that the judgment of Teichmeier was a lien against the real estate and held that the order of the district court preventing the defendants from selling the real estate while in the possession of the department was not final, but interlocutory, and therefore not appealable. In the argument in the body of the opinion, and in the syllabus, we discussed the meaning of that portion of chapter 30, Laws 1925, heretofore quoted in this opinion, and stated that the lien

of depositors is fixed as of the date when the department takes over a state bank. We would have satisfied the issues really arising in that suit had we said on that point that the lien of depositors and holders of exchange on the assets of a failed state bank is subject to valid existing prior liens upon the real property of the bank. That particular case was decided correctly on the merits and we have no cause to modify or change the result. However, we take this occasion to modify the opinion in *Guaranty Fund Commission v. Teichmeier, supra,* and particularly the second paragraph of the syllabus, so as to conform to the views we have expressed in this instant opinion in which the date when the priorities of depositors take effect is a pivotal issue.

While a state bank may not be put in bankruptcy under the federal act, yet it may commit an act of bankruptcy so as to subject it to the priorities in favor of claims of the United States, as provided in section 3466 Revised Statutes of the United States. That section is to be liberally construed in favor of the United States. *Bramwell v. United States Fidelity & Guaranty Co.,* 269 U. S. 483; *United States v. Bliss,* 40 Fed. (2d) 935; *Bliss v. United States,* 44 Fed. (2d) 909. The right to priority in favor of the United States attaches when the conditions specified in section 3466 come into existence; this right cannot be impaired or superseded by a state law. *United States v. State of Oklahoma,* 261 U. S. 253. So we are of the opinion that the district court was right in allowing the claim of the United States for its unpaid deposit as a preferred claim.

Johnsen and Krusemark, as sureties, were obligated to pay the United States its deposits in the bank. Somebody paid $6,570 on account of this obligation. There are contradictory inferences that might be drawn from the evidence as to whether Johnsen and Krusemark paid all of this. The trial judge who saw and heard the witnesses found they paid it. Giving this the consideration

to which it is entitled, aided by whatever presumptions may be indulged that a required payment is made by one bound to make it rather than by a third person, we find the payment was made by or for these sureties. They are the real parties in interest. There being no intervening equity to bar them, we find, in the circumstances of this case, under the authority of *State v. Kilgore State Bank*, 112 Neb. 856, that these sureties were entitled to be subrogated to the priority rights of the United States to a preferred claim and to be paid out of the assets in the hands of the receiver, after the claim of the United States is paid.

The judgment of the district court is

AFFIRMED.

ALICE SLATTERY ET AL., APPELLANTS, V. CLARENCE H. DOUT ET AL., APPELLEES.

FILED JUNE 19, 1931. NO. 27814.

Waters: RIGHTS OF RIPARIAN OWNERS. A patent for land upon which a perpetual spring is the fountainhead of a stream, flowing naturally in a well-defined channel in the course of drainage through other lands, grants to patentee riparian rights in the waters of the stream, but not exclusive use of such waters without regard to the rights of lower riparian proprietors.

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

Allen G. Fisher, Fern S. Baker and *Charles A. Fisher*, for appellants.

C. A. Sorensen, Attorney General, T. F. Neighbors, E. D. Crites, F. A. Crites and *Schnurr & Mumby, contra.*

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

ROSE, J.

This is a controversy over water rights. In Sioux county plaintiffs own lands upon which there are perpetual springs at the head of Jim creek, a perennial stream flowing naturally in a well-defined channel through lands of plaintiffs and lands of lower riparian owners. The action is in the form of a suit in equity to quiet in plaintiffs title to the springs and the waters flowing therefrom and to enjoin defendants from interfering with the exclusive right of plaintiffs to the use thereof for domestic purposes, for watering stock and for irrigation. The asserted right of plaintiffs to the relief sought by them is based on pleas that they acquired their lands and the exclusive right to the spring waters under United States patents which relate back to homestead entries as early as 1885, 1886, and 1889, and that this is a vested right protected by the Constitution of the United States and the Constitution of the state of Nebraska.

The only lower riparian owner named as defendant is Clarence H. Dout. The other defendants are Roy L. Cochran, secretary of the department of public works of the state of Nebraska; Robert H. Willis, chief of the bureau of irrigation under the department of public works; John J. Rasmussen, superintendent of the local water division. It is charged in the petition that Rasmussen, incited by Dout, unlawfully opened dams and head-gates on the premises of plaintiffs and permitted legally stored waters to escape and run down Jim creek.

In the answers of defendants they denied the commission of any wrongful act charged, and pleaded that Dout is a lower riparian proprietor on Jim creek, a perpetual stream of public waters of the state; that, by adjudicated state appropriations granted under the irrigation laws of Nebraska, Dout and plaintiffs acquired water rights in Jim creek; that Dout's appropriation was first in right and time and established a priority dating from May 15, 1889; that the patents procured by plaintiffs from the

United States did not convey title to the entire flow of the waters of the springs and of Jim creek; that Dout is entitled to waters from the natural flow of the stream for domestic purposes and for watering stock and is also entitled to the waters appropriated to him for irrigation; that in 1930 plaintiffs impounded in dams and reservoirs the entire flow of the stream without regard to the rights of Dout, a lower riparian proprietor and prior appropriator; that plaintiffs by acquiring and exercising the rights of appropriators, waived superior rights, if any, based on absolute ownership of the waters.

The reply of plaintiffs contained a general denial and a plea that the appropriations were void for want of power of the state to administer waters belonging exclusively to plaintiffs under their patents.

Upon a trial the district court found the issues of law and fact in favor of defendant and dismissed the suit. Plaintiffs appealed.

Upon the record presented for trial *de novo*, plaintiffs are not entitled to the relief sought by them unless their patents conveyed to them the title to, and the exclusive right to control and use, the waters which flow from springs on their lands and form Jim creek, which is shown by the evidence to be a perennial stream flowing in a well-defined natural channel through lands of Dout and other lower riparian proprietors in the regular drainage of the watershed in which the springs are located. A conveyance of land upon which a perpetual spring is the fountainhead of a stream, flowing naturally in a well-defined channel in the course of drainage through other lands, grants riparian rights in the waters of the stream, but not absolute ownership and exclusive use of such waters without regard to the rights of lower riparian proprietors. See cases cited in 55 A. L. R. 1502. In this view of the law the dismissal of the suit was free from error.

AFFIRMED.

CLARENCE PHILBROOK, APPELLANT, V. TOM M. DUNN, SHERIFF, APPELLEE.

FILED JUNE 19, 1931. No. 27913.

Criminal Law: SERVICE OF SENTENCE. Where a convict, before serving the entire term for which he was sentenced, is illegally permitted to absent himself from prison without penal restraint, for his own comfort and care during an illness, he is not entitled to credit on his sentence for the time he was absent under his unauthorized respite and may be required to serve the remainder of his term.

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

Frank A. Dutton, for appellant.

Vasey & Mattoon and *Ernest A. Hubka, contra.*

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

ROSE, J.

By means of a petition for a writ of habeas corpus, Clarence Philbrook, petitioner, applied to the district court for an order discharging him from the custody of the sheriff of Gage county. In a prosecution before the county judge, petitioner had been sentenced November 3, 1930, to serve a term of 60 days in the county jail at Beatrice. He did not appeal to the district court but began to serve his sentence the day it was pronounced. While imprisoned he became violently ill from an acute attack of appendicitis November 7, 1930, when the sheriff, county judge, county attorney and county physician permitted him to return to his home in Omaha for treatment, with the understanding that, upon his recovery, he would return December 5, 1930, to complete his sentence. He returned at the appointed time and reentered the county jail. January 2, 1931, on the grounds that his respite was void, that he was entitled to credit on his sentence for the time

he was absent and that he was unlawfully deprived of his liberty by the sheriff, he petitioned for a writ of habeas corpus.

The sheriff demurred to the petition on the ground that it did not state facts sufficient to entitle petitioner to a discharge from custody. The district court sustained the demurrer and dismissed the proceeding. Petitioner appealed to the supreme court.

There is no error in the record. The sheriff and the other county officers, though prompted by a humanitarian spirit, did not have lawful authority to discharge petitioner from custody and allow him his liberty from November 7, 1930, until December 5, 1930. Their action was a violation of the county court's unexecuted judgment. Petitioner asked for his freedom, for the comfort of his home and for a physician and a hospital of his own selection during his dangerous illness. These privileges were granted without authority. For the period of the illegal respite from November 7, 1930, until December 5, 1930, petitioner was not serving any part of the sentence lawfully imposed. He was then at liberty for his own benefit and was not under penal restraint. The county officers, like the prisoner himself, were required by law to respect the valid judgment of the county court. The emergency requiring care and medical attention or surgery for the prisoner did not authorize his discharge from the custody of the sheriff. Petitioner's unhappy situation made a strong appeal for legislation permitting the district court to grant proper relief upon reasonable terms, but did not, in absence of statutory authority, permit the sheriff to exercise either legislative or judicial power to temporarily discharge a prisoner from lawful custody.

Where a convict, before serving the entire term for which he was sentenced, is illegally permitted to absent himself from prison without penal restraint, for his own comfort and care during an illness, he is not entitled to credit on his sentence for the time he was absent under

his unauthorized respite and may be required to serve the remainder of his term. *Riggs v. Sutton,* 113 Neb. 556.

The respite in the present instance was void and did not entitle petitioner to credit for any part of the time during which he was absent without penal restraint. The district court so held and the judgment is

AFFIRMED.

IN RE ESTATE OF SUSAN F. KIERSTEAD.
CRESCENT O'CONNOR ET AL. V. ELLEN DEANE ERICKSON ET AL., APPELLANTS: OSCAR B. CLARK ET AL., APPELLEES.

FILED JUNE 19, 1931. No. 27559.

Attorney and Client. Where several attorneys were expressly employed by certain heirs of the estate of a decedent to represent their interests therein, and a settlement was reached which inured to the substantial benefit of such heirs as well as other interested parties, by whom the attorneys were not employed, *held,* that such interested parties, in the absence of an express or implied contract of employment, are not liable for attorneys' fees.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

Webb Rice and *Smith, Schall & Sheehan,* for appellants.

Otto F. Walter, Oscar B. Clark and *William Niklaus, contra.*

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

DEAN, J.

Susan F. Kierstead, late of Madison county, died testate June 16, 1927, without issue, leaving property of the value of $60,000, or about that sum. June 8, 1929, attorneys Oscar B. Clark and William Niklaus, interveners, filed a

lien for legal services in the district court for Platte county to recover $5,000 from Samuel G. Deane and Ellen Deane Erickson, defendants and heirs of their aunt, Susan F. Kierstead. When Clark and Niklaus filed their lien, the defendants had theretofore been allowed $6,127.50, as their distributive share in the Kierstead estate. Another claim was filed against the defendants September 21, 1929, by and in behalf of other heirs, designated plaintiffs, for certain expenses alleged to have been incurred by them in settling the estate. The court found, in respect of such plaintiffs, that they were entitled to be paid $291.81 by the defendants, but, no appeal having been taken from the allowance of such sum, the claim will not be mentioned further herein.

In respect of the amount due the interveners, as counsel, the court decreed that they were entitled to receive $1,878.89 for their services. And the court ordered that the remainder of the $6,127.50, which, as noted above, was the defendants' share in the estate, should be distributed to such defendants by the clerk of the court.

The defendants have appealed from the allowance of the attorneys' fee to the interveners and they insist that no agreement was entered into by them with the interveners for their services. And the interveners have filed a cross-appeal alleging that the amount allowed them by the court is insufficient.

The defendants are residents of Illinois and, with certain other heirs herein, they are Mrs. Kierstead's next of kin. Under the provisions of her will, dated December 17, 1926, Mrs. Kierstead bequeathed the bulk of her estate to churches, church organizations, certain eleemosynary institutions, and to persons unrelated to her.

The question for determination here is whether there was a contract of employment, either express or implied, between the interveners and the defendants.

Intervener Niklaus testified that he was requested by the Lincoln heirs whom he represented to go to Illinois and

confer with certain heirs there, including the defendants, in respect of the advisability of contesting the Kierstead will. According to his testimony, an agreement was reached with the Illinois heirs through a local attorney named Nelson whereby, in the event the contestants prevailed, Nelson was to receive a fee of one-fourth of 50 per cent. of the amount recovered, the remaining three-fourths of the fee to be paid over to the interveners. But it appears that, upon Niklaus' return from Illinois, objections to the probate of the will were filed by the interveners in behalf of the heirs whom they represented, but the defendants' names do not appear thereon.

The will contest was twice tried to a jury, but each jury failed to agree. Subsequently a satisfactory settlement was reached outside of court by the aid of the respective counsel. Much evidence was presented in the present case bearing upon the time spent in the preparation for the trial of the two cases, and the number of witnesses interviewed by the interveners. Both Clark and Niklaus testified that they estimated their services were worth $50 a day in the will case, and, on the cross-examination, Niklaus testified that he assumed authority to act for the defendants under power alleged to have been delegated to him by Nelson, the Illinois attorney. But the fact appears to be established that the interveners did not have a written contract with the defendants, nor did they have a power of attorney to appear for them.

Nelson testified that Niklaus called on him at his office in Illinois requesting his aid in securing the signature of the defendants, who were Nelson's clients, on a contract of employment. Niklaus desired that a contract should be signed on a 50 per cent. contingent basis, 25 per cent. going to Clark and the remaining 25 per cent. to be divided between himself and Nelson. Nelson testified, however, that he told Niklaus that he would not consider the matter, that the amount was exorbitant and he would not ask his clients to sign such a contract. And Nelson de-

nied that he had employed the interveners to act for the defendants, and, in a letter to Niklaus, Nelson informed him that the defendants had employed Webb Rice as their attorney and there was no justification for Niklaus to assume that he represented them.

Mrs. Erickson, one of the defendants, testified that she did not employ Niklaus to represent her interests, nor did she authorize Nelson, her attorney in Illinois, to employ him for her. She testified that Rice was employed by Nelson with her consent to represent her interests and that Rice and Nelson were to receive a 25 per cent. contingent fee which was to be divided between them.

Should the defendants be compelled to pay the interveners the amount found to be due them by the district court, and to pay the attorneys whom they did employ, there would be nothing remaining of their distributive share of the Kierstead estate. The rule has been stated:

"An attorney's claim for professional services against persons *sui juris,* or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent. No one can legally claim compensation for voluntary services to another, however beneficial they may be, especially where rendered without his knowledge or consent, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed. * * * So, where one of several parties, all of whom are equally interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees." 6 C. J. 730.

In *Simms v. Floyd,* 65 Ga. 719, the court made this observation:

"It is a matter of every day occurrence in our courts

where two or more parties are sued, or indicted, that one party employs one attorney and another some other, and yet it is not expected, or indeed is it true, that each of the parties renders himself liable for the fees of the others because notice is not given that he is not to be held liable." See, also, *Chicago, St. C. & M. R. Co. v. Larned,* 26 Ill. 218.

The evidence fairly discloses that the interveners herein exerted diligence in their efforts to secure a termination of the controversy and that it inured to the substantial benefit of all the heirs. But we are unable to find that the interveners obtained an implied or express contract of employment with the defendants. It clearly appears that the interveners were notified that the defendants had employed another as their attorney and that there was no justification for the interveners to assume that they represented the defendants.

In view of the evidence and the law applicable thereto, we conclude that, where the interveners were expressly employed by other of the heirs to represent their interests, and a settlement was subsequently reached which inured to the substantial benefit of all interested parties, the defendants are not liable for the payment of attorneys' fees, in the absence of an express or implied contract of employment with the interveners.

The judgment must be and it hereby is reversed and dismissed as to allowance of attorneys' fees to interveners; otherwise affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

UNITED STATES TRUST COMPANY, TRUSTEE, APPELLEE, V. KATHERINE P. COWIN ET AL., APPELLEES:
UNITED STATES TRUST COMPANY, EXECUTOR, APPELLANT: MARIAN NOBLE COWIN, INTERVENER, APPELLANT.

FILED JUNE 19, 1931. No. 27729.

Trusts: STOCK DIVIDENDS. A stock dividend, declared on corporate stock held in trust, where settlor thereof reserved to himself for life the income of the trust estate, is not income but a part of the corpus of the trust estate.

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

Morsman & Maxwell, Fradenburg & Matthews and *John R. Fike,* for appellants.

Brogan, Ellick & Van Dusen, contra.

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

GOOD, J.

Plaintiff, as trustee, brings this action, seeking direction and guidance as to the proper disposition of a stock dividend, declared upon corporate stock constituting a part of the trust estate.

April 24, 1920, William B. Cowin conveyed in trust to plaintiff 350 shares of the capital stock of the Union Stock Yards Company. Other property, which it is unnecessary to consider, was included in the deed of trust. The trust deed contained this provision: "The income from said trust fund shall be paid to me during my life at such times as I may direct. Upon my death all of the principal and undistributed income from said trust fund shall be paid to my wife, Katherine P. Cowin unless she should predecease me, then in which event all of the principal and undistributed income shall be divided among my children then living unless the youngest child shall not have attained the age of twenty-one years in which event this trust shall continue for the benefit of said children until such child shall have attained the age of twenty-one years. Should any of my children die leaving lawful issue, I then direct that the share which would have gone to such deceased child be equally distributed among the lawful is-

sue of said deceased child." The trustee accepted and has since continued to act pursuant to the trust deed.

In June, 1922, Mr. Cowin and wife were divorced. At that time instruments were executed in which Mrs. Cowin assigned to their children nine-tenths of her beneficial interest in the trust property, and Mr. Cowin assigned to his then wife, as a part of the alimony, a certain proportion of the income of the trust estate which he had reserved to himself.

In October, 1927, the Union Stock Yards Company declared a stock dividend of 50 per cent. One hundred and seventy-five shares of stock, representing such dividend, were issued to the plaintiff trustee. Subsequent to the divorce above mentioned, Mr. Cowin contracted a second marriage, and in October, 1929, departed this life, testate. His former wife and second wife both survive him. His will was admitted to probate, and the United States Trust Company was appointed executor of his will. Katherine P. Cowin, the first wife, and the children of Mr. and Mrs. Cowin claim the whole of the 175 shares, representing the stock dividend, as a part of the corpus of the trust. The second wife, who elected to take under the statute, instead of under the provisions for her in the will, contends that the stock dividend represents income and belongs to the estate of Mr. Cowin. In this situation plaintiff instituted this action for its protection seeking to obtain a decree of court directing to whom it should pay or deliver the stock dividend. By a supplemental petition the plaintiff represents that it is about to be, or has been, merged with the United States National Bank, and asks that the bank be substituted as trustee for the United States Trust Company. The trial court entered a decree finding that the stock dividend of 175 shares passed, under the trust deed, to Katherine P. Cowin and her children, and provided for the substitution of the United States National Bank as trustee. The executor and widow of the second marriage have appealed.

A number of legal questions have been ably presented both in the briefs and on oral argument. The conclusion we have reached makes it necessary to consider but one, namely, the question of whether the stock dividend is income and should be paid to the estate, or a part of the corpus of the trust and should go to Katherine P. Cowin and her children.

The question is new in this jurisdiction. It has been a fruitful source of litigation in other courts. Their holdings are not harmonious. The courts of last resort in this country which have passed upon the question have taken three distinctly divergent views. They are generally referred to as the Massachusetts rule, the Kentucky rule, and the Pennsylvania rule.

Briefly speaking, the Massachusetts rule is that, where corporate stock is conveyed in trust, reserving to the settlor the income of the trust estate for his life, a stock dividend, declared during his life, is not income but a part of the corpus of the trust. The Kentucky rule is that a stock dividend, declared during the existence of the trust, is income and belongs to the life tenant or settlor, regardless of whether the stock dividend was declared from earnings accumulated before or after the creation of the trust, or partly before and partly thereafter. The Pennsylvania rule, under such circumstances, apportions the stock dividend, holding that so much of the stock dividend as represents earnings of the corporation prior to the creation of the trust is a part of the corpus of the trust, and that such part of the stock dividend as represents earnings, made subsequent to the creation of the trust, is income and belongs to the settlor or life tenant.

Plausible arguments have been adduced in support of each of these rules. Practically all of the courts, regardless of which rule obtains, hold that the intention of the settlor, if sufficiently specific and violative of no statute or rule of public policy, shall guide the courts in the determination of the question. A similar rule has been many

times applied by this court in the construction of wills. *Stone v. Stine,* 105 Neb. 33; *Herter v. Herter,* 97 Neb. 260; *Worley v. Wimberly,* 99 Neb. 20; *Heywood v. Heywood,* 92 Neb. 72. In the instant case the settlor has not evinced by the language used any specific direction with regard to a stock dividend. It may be inferred, from the fact that the stock dividend was declared two years previous to his death, that Mr. Cowin knew of it and consented that it should remain as a part of the trust estate. However, we do not base our conclusion upon that circumstance.

In *Hite's Devisees v. Hite's Executor,* 93 Ky. 257, where that court had the question under consideration, it was said (p. 265): "It is the rule as settled by the current of authority that dividends, whether of stock or payable in money, are nonapportionable, and must be considered as accruing in their entirety as of the date when they are declared. If, for instance, the life tenancy has begun when a cash dividend is declared, it belongs to the life tenant, although it may result in part from profits previously earned. It goes to him irrespective of the time when it was earned. No inquiry will in such case be made as to what portion of the profits upon which the dividend was based was earned before or after the death of the testator for the purpose of apportioning it between the tenant for life and the remainderman." The reason given for the rule so announced is stated as follows: "The difficulty attending such an inquiry, the impossibility of attaining accuracy, and of ascertaining the many sources from which the profit has been derived, are the reasons for this rule." It may be observed that the Kentucky rule has not been generally accepted and followed by other jurisdictions.

The Pennsylvania rule appears to have been first specifically announced in *Earp's Appeal,* 28 Pa. St. 368, decided in 1857. That rule has been followed in a number of jurisdictions, but has been severely criticised, and we

think the more recent trend of authority is in favor of the Massachusetts rule. The Ohio supreme court, in the case of *Lamb v. Lehmann*, 110 Ohio St. 59, after reviewing the reasons supporting the various rules, announced its adherence to the Massachusetts rule. Commenting upon this decision in 34 Yale Law Journal, 195, it is said (p. 196):

"The apportionment rule (meaning the Pennsylvania rule) is unfortunately blessed with an implication of fairness. What could be fairer than to give the life tenant the earnings over and above the unimpaired corpus of the trust? But observation of the actual application of the rule raises some doubt as to its inherent fairness. In applying the apportionment rule the courts must preserve the value of the corpus unimpaired. Having rejected a vote of the board of directors as binding in these cases, and launching an independent inquiry, the courts apparently turn about, and, in their search for the value of the corpus, accept valuations as determined by the 'treasurer and vice-president,' or fixed in part by a vote of the stockholders. The first cases figured the value of the corpus from the market value of the shares on the day of testator's death. It was soon seen that this measure of value was inadequate, and the test in later Pennsylvania cases seems to be 'actual value.' In New York we find the courts making findings of 'intrinsic value' from the books, records, and reports of the corporation. In a very recent case the court made its findings on the basis of a report of capital and earnings furnished by the executor. Through all of the decisions one is conscious of faulty methods of valuation. To ascertain the value of the corpus the courts must order an independent and complete inventory of assets as of the time of the testator's death. In cases where the courts must find value of the assets of one of our modern industrial giants, the cost is so great as to render the rule of apportionment impracticable." In the comment it is further said: "The de-

cisions, therefore, have been based upon an approximation of 'value.' They represent, not apportionment, but a more or less arbitrary allotment of stock dividends a part to the life tenant, and at times a part to the remainderman. * * *

"Out of sympathy for the life tenant the apportionment rule might be condoned were it not for certain other legal consequences which seem to have been entirely overlooked. Valuable legal relations attach to the ownership of stock, and those legal relations have a value which is a part of the value of the corpus. This seems to have been recognized to some extent even in the apportionment states, since there, 'rights' to subscribe to additional stock of the corporation go to the remainderman. And even though these 'rights' have a 'value,' no inquiry is made as to whether that is a value resulting from earnings over and above the value of the corpus. * * *

"The fairness of the apportionment rule is only theoretical and elusory. Its application is dangerously variable, and it is really unfair to the remainderman. The supreme court of Ohio has chosen wisely in its adoption of the Massachusetts rule. The advantage of simplicity is obvious."

It seems to us that the inherent fallacy of the Pennsylvania rule is that it regards the corpus of the trust as of its value at the time the trust was created, while the fact is, where the trust property consists of corporate stock, the stock, itself, is the corpus, and it may rise or fall in value. Still, the corporate stock is the corpus or principal. If corporate stock, held in trust, greatly increases in value for a time, and a stock dividend is declared and goes to the life tenant, and thereafter the stock falls in value until it is worth much less than when the trust was created, by what process can the value of the corpus be maintained? We know of no means by which it can be maintained. If real estate is conveyed in trust the corpus is the realty. It may rise or fall in value as the market

goes up or down; so corporate stock, placed in trust, remains the corpus or principal of the trust; its value may rise or fall with the market; but because its value rises with the market it should not be reduced by declaring a stock dividend and thereby dividing the corpus.

One of the best expositions of the Massachusetts rule may be found in *Gibbons v. Mahon,* 136 U. S. 549, wherein it is said (p. 557): "The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debt. (Citing a number of cases.)

"Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property.

"Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part,

their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate, 'in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors.' * * *

"Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainderman, legal or equitable, thereof. * * *

"In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

"Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share.

"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate

property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

The rule was perhaps first clearly announced in *Minot v. Paine*, 99 Mass. 101. It is now followed by the courts of Connecticut, Georgia, Illinois, Maine, New York (by statute), North Carolina, Ohio, Virginia, West Virginia, and, to some extent, has been followed in Rhode Island.

In the case of *Hayes v. St. Louis Union Trust Co.*, 317 Mo. 1028, decided in 1927, there is a full and thorough review of all of the cases. In that case it is held: "If the trust estate consists of corporate stock, the principal or corpus of the estate consists of the corporate stock itself, and not its value at any given time; and if the corporate stock so held in trust increases in value through the accumulation of corporate earnings after the beginning of the trust, and if no dividends are declared, the whole increase belongs to the corpus, even upon a sale of the stock. * * *

"The earnings and profits of a corporation remain the property of the corporation until severed from corporate assets and distributed as dividends. They may be transferred to the corporation's fixed capital and a stock dividend declared, but if thereby the enlargement of the capital stock exceeds the limit of the corporation's authorized capitalization the laws of this state require that the consent of the stockholders to the stock dividend be obtained.

"The outstanding shares of stock are simply units of interest in the corporation, as conducted by its directors, officers and (in some matters) shareholders. The aggregate stockholdings of a shareholder represent his fractional interest in the corporation, and not a mere investment

of money. The law gives a shareholder the right to subscribe for new stock issued, the reason being that he is entitled to maintain his proportionate interest in the corporation, and the rule applies where the stock is issued as a stock dividend offsetting net profits previously earned and therefore represented by the original stock at its enhanced value.

"A stock dividend is in no true sense dividend. A dividend implies a division, a severance from the corporate assets to the amount of the dividend, and a distribution thereof among the stockholders. A stock dividend is the increasing of the fixed capital of the corporation; it takes nothing from the corporation; it gives nothing to the shareholder; the title to all corporate property remains in the corporation as before, and the proportional interest of the stockholder continues the same."

If the reader is interested in pursuing this subject further, a full discussion of all the cases may be found in the annotations to the following cases: *In re Estate of Gartenlaub,* 185 Cal. 375, 24 A. L. R. 1, annotations, p. 9; *Lamb v. Lehmann, supra,* reported in 42 A. L. R. 437, annotations, p. 448; *Old Colony Trust Co. v. Jameson,* 256 Mass. 179, 50 A. L. R. 372, annotations, p. 375; and *Hayes v. St. Louis Union Trust Co., supra,* reported in 56 A. L. R. 1276, annotations, p. 1287.

In our view, the Massachusetts rule is the more logical and based on the better reason. We therefore adopt that rule, and hold that where corporate stock is placed in trust, reserving the income therefrom to the settlor, a stock dividend, declared during the existence of the trust, is not income, but is a part of the corpus of the trust and goes to the beneficiary of the trust.

It follows that the judgment of the district court is right, and it is therefore

AFFIRMED.