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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1931, AND JANUARY TERM, 1932

VOLUME CXXII

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

SUPREME COURT

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NEBRASKA

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UNITED STATES

CONSTITUTION

Amendment XIV, sec. 1 626

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1931

HENRY J. LINDEMAN, APPELLANT, V. CALAMUS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 10, 1931. No. 27922.

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

Ritchie, Swenson & Arey, for appellant.

Guy Laverty and *Morsman & Maxwell, contra.*

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

PER CURIAM.

This was an action to recover damages for fraud. One of the defendants, Roy M. Harrop, was served with summons in Douglas county, while the Calamus Irrigation District, George T. Tunnicliff, J. C. Bristow, and R. B. Miller, as trustees of said district, were served in Loup county. The defendants served in Loup county filed a special appearance challenging the jurisdiction of the district court for Douglas county, which special appearance was sustained for that neither the petition nor the substituted and amended petition filed by the plaintiff alleged facts sufficient to charge any joint liability on the part of said defendants with the defendant who was served with summons in Douglas county.

The rule is well established in this jurisdiction that, in a personal action for the recovery of money only, where a resident of the county where the action is brought is

joined with a resident of another county, to authorize service upon the latter in the county of his residence, there must be an actual right to recover against the former. *McKibbin v. Day,* 71 Neb. 280; *Morearty v. Strunk,* 118 Neb. 718. This cause of action is based upon the false and fraudulent representations of the defendant Roy M. Harrop, as an officer of said irrigation district. The false representations were concerned with the validity of the bonds which were to pay for the construction work. The plaintiff alleges that as a result of the false and fraudulent representations he was induced to commence construction work or works for the irrigation district, to his damage. In this state irrigation districts are public corporations and the powers of its officers and directors are limited by statute under which it is created. It is admitted by the appellant that he cannot recover against the irrigation district either upon the contract or in *quantum meruit.* The irrigation district concerned was dissolved by *quo warranto* proceedings for that it was never organized as provided by statute. The plaintiff had no valid contract and was without authority to do any work on behalf of the district. The plaintiff was charged with notice of the want of authority on the part of the board and in dealing with them he was required to act with reference to the authority or the limitations and restrictions imposed by legislation. *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613. The petition of plaintiff shows on its face that he was aware of the imperative necessity of a judgment of validity in the district court for Loup county and he also knew there was a contest in these validity proceedings. The question of the validity of the bonds from which the money was to come to pay for the works was a matter of public record. It was a matter concerning which neither the district nor Roy M. Harrop, secretary and universal agent, had authority to make, since neither the Calamus Irrigation District nor those acting as officers and directors had any power to bind the district by a valid contract. The plaintiff was bound to take notice of such lack of authority, and therefore the district could not be responsible for the

false and fraudulent representations in respect to such power. There was therefore no joint or common liability against the defendants, Roy M. Harrop, the Calamus Irrigation District, George T. Tunnicliff, J. C. Bristow, and R. B. Miller, as trustees of the Calamus Irrigation District.

The judgment of the district court is

AFFIRMED.

FRED SCHLEUNING ET AL., APPELLANTS, V. KATE TATRO ET AL., APPELLEES.

FILED NOVEMBER 10, 1931. No. 27933.

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

G. W. France and *Charles F. Stroman,* for appellants.

Elmer E. Ross, Donald F. Sampson and *W. W. Wycoff, contra.*

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

PER CURIAM.

This is an action brought pursuant to sections 20-2001 and 20-2002, Comp. St. 1929, by Fred Schleuning and George Schleuning, by E. Robinson, their next friend, to vacate a judgment in partition and the sale of premises thereunder, entered in, and made by, the district court for York county, wherein Kate Tatro, Steven Tatro, her husband, and John C. Schleuning were plaintiffs, and Fred Schleuning and George Schleuning (plaintiffs and appellants in the present proceeding) and Otto Schleuning and Lizzie Schleuning were defendants. The final order of confirmation of the referee's sale made in this partition proceeding was entered on the 9th day of December, 1929.

From appellants' brief we learn: "Prior to the 10th day of January, 1902, Catherine Schleuning and her husband, Adam Schleuning, mother and father of the appellants, Fred Schleuning and George Schleuning, and of the appel-

lees, Kate Tatro, John C. Schleuning, Lizzie Schleuning and Otto Schleuning, were living upon the land involved herein (here follows description of land), the record title thereof standing in the name of the mother, Catherine Schleuning.

"On or about the 10th day of January, 1902, the said Catherine Schleuning died, testate, leaving surviving her the said husband, Adam Schleuning, and the six children designated and named above, the said Kate Tatro being the only child ever married, and all now and at times herein mentioned living.

"Her estate was duly probated in York county and, as provided by the terms of her will, the husband, Adam Schleuning, was given a life interest in the said land (the premises here in suit) *and at his death it was to be divided share and share alike between the six children.*

"The father, Adam Schleuning, died in March, 1917, and thus the title to said quarter section of land became vested in the said six Schleuning children or heirs herein named share and share alike.

"From the date of the purchase of the land herein involved, many years prior to 1902, the year of the death of Catherine Schleuning, the mother, until about March, 1931, this land was lived upon, occupied, cultivated by the Schleunings. During said long period of years Kate Schleuning married Steven Tatro and now is and for many years has been living at Central City, Nebraska, and John C. Schleuning, the youngest of said six children, left the family home many years ago and now is and has been for a long time living in Los Angeles, California; after the death of the father and mother, Fred, George, Otto and Lizzie remained upon said land; some time in 1929 Otto and Lizzie moved off the said home place, leaving Fred and George thereon, and they remained there until March, 1931, when they were forcibly removed by the sheriff of York county, Nebraska, under a writ of restitution, arising out of and from the partition suit, the judgment in which action this suit is brought to vacate and set aside."

To the amended petition of the plaintiffs herein separate demurrers were filed by the defendants based on the reasons that the amended petition "does not state facts sufficient to constitute a cause of action," and that "several causes of action are improperly joined" therein. These demurrers were sustained by the district court, and the plaintiffs electing to plead no further, the action was dismissed. From this order of dismissal, appellants, plaintiffs below, prosecute this appeal.

The express provision of our statute governing the matter before us is: "The proceedings to vacate or modify the judgment or order on the grounds mentioned in subdivisions four, five, * * * seven (on which appellants rely) * * * of the last preceding section, shall be by petition verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant." Comp. St. 1929, sec. 20-2002. The amended petition of appellants, to which demurrers were sustained, did not contain a "defense to the action." The facts conceded in this pleading entitle the defendants to a decree in the partition action confirming the shares and directing sale. Indeed the prayer of this amended petition is an implied admission of this fact. It is, in part, that a mortgage on the premises executed by the purchaser at the partition sale "be ratified and confirmed;" that then the "referee be ordered and directed again to offer said land for sale," etc. The gist of appellants' complaint may be said to be: (a) That Fred Schleuning was at all times material to this action a man of "weak mind and low mentality;" that George Schleuning was in like manner "an imbecile" and "actively psychotic and notoriously insane;" (b) that the plaintiffs in the partition case well knew these facts, but failed to advise the court by appropriate allegations, and failed to have a guardian *ad litem* appointed for the appellants; (c) that as a necessary consequence the land was sold for $12,008, instead of $13,008, which it otherwise would have brought, and a loss was caused of certain buildings which have been erected on the premises by them, and all of which

might be removed without damage to the land, and appellants were also deprived of 65 acres of wheat planted by them on the premises subsequent to the commencement of the action in partition. It may be said in passing that neither size, plan, material or value of any of the improvements is alleged by the pleaders, nor is the condition or value of the planted wheat set forth by them.

In answer to the basic contention of appellants, it may be said that the general rule is that failure to appoint a guardian *ad litem* for an insane defendant is, at most, only erroneous, for which the appropriate remedy is by a proceeding in error, and not by an original action to vacate the judgment. *McAllister v. Lancaster County Bank,* 15 Neb. 295; *Kuhn v. Kilmer,* 16 Neb. 699; *McCormick v. Paddock,* 20 Neb. 486.

It seems, however, that the express provisions of the statute governing partition in this state are controlling in this controversy. Appellants' amended petition expressly admits that appellants "were served with summons." This language, in view of total absence of allegations to the contrary, as well as the rule that allegations of a pleading are construed against the pleader, justifies the inference that appellants were properly served with summons as provided by law. In this connection it is expressly provided: "The defendants (in an action for partition) may be served in the same manner as in ordinary civil action by summons, or by publication as provided in this Code, and when all the parties in interest have been duly served, any of the proceedings herein prescribed shall be binding and conclusive upon them all." Comp. St. 1929, sec. 20-21,106. Also: "Upon report of the referee or referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever." Comp. St. 1929, sec. 20-21,105. And further: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." Comp. St. 1929, sec. 20-21,107.

In addition to the statutes quoted, whose express terms apparently control, this tribunal is committed to the view that "District courts have jurisdiction under the Constitution and the Code to partition real estate; and, when all of the parties interested in a tract of land are before the court in such suit, its judgment fixing the shares of the parties, directing partition, and later confirming a sale of said real estate is final, and the parties thereto, in the absence of fraud upon the face of the proceedings, are estopped thereby, although said judgment is erroneous and would have been reversed on appeal." *Kazebeer v. Nunemaker*, 82 Neb. 732. Also, see *Federal Land Bank v. Tuma*, 116 Neb. 99; *Manfull v. Graham*, 55 Neb. 645; *Security Abstract of Title Co. v. Longacre*, 56 Neb. 469; *Citizens State Bank v. Haymes*, 56 Neb. 394.

The allegations of the petition with reference to the purchaser, carefully considered, wholly fail to allege facts supporting the conclusion that the purchaser in any manner participated in the fraud alleged, or that in any manner affected his character as a *bona fide* purchaser. Therefore it appears that he is within the rule that a *bona fide* purchaser under a decree of partition will be protected by section 20-1541, Comp. St. 1929, even though the judgment is thereafter reversed. *Kazebeer v. Nunemaker*, 82 Neb. 732; *Federal Land Bank v. Tuma*, 116 Neb. 99; *Pauley v. Knouse*, 109 Neb. 716; *Coates v. O'Connor*, 102 Neb. 606.

It follows therefore that the proceedings had and orders entered in this cause, after service of summons duly made on the appellants, were binding and conclusive upon them, and that the action of the trial court in sustaining demurrers to their petition in the instant proceeding was right, and it is

AFFIRMED.

SIDNEY A. TROBOUGH V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1931. No. 27975.

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

F. L. Carrico, for plaintiff in error.

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

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

PER CURIAM.

Sidney A. Trobough was informed against in Adams county and there charged with having committed murder in the first degree, in that on November 23, 1928, he purposely and of his deliberate and premeditated malice shot his wife with a revolver, as a result whereof she died the same day.

This is the third appearance of this case here. At the first trial the defendant was sentenced to serve 18 years in the penitentiary, and at the second trial he was sentenced to 25 years of servitude. On appeal, both sentences were reversed. *Trobough v. State,* 119 Neb. 128; *Trobough v. State,* 120 Neb. 453.

In the present trial a change of venue was granted and thereupon the action was removed to Webster county. Upon submission there the jury found the defendant guilty of manslaughter and he was thereupon sentenced to serve a term of 10 years in the penitentiary. From the judgment so rendered the defendant has brought the record here for review.

The following facts appear to be fairly established: The defendant and his wife had been married almost two years when the tragedy occurred. The defendant was 17 years of age and his wife was 19 when they were married. They had one child and at the time of the trial he was about 16 or perhaps 18 months of age.

On the night of November 23, Vern Tooley, a married man who roomed at the Trobough home, and Lulu Claus, who also at one time roomed there, and two other guests were at the defendant's home for the evening meal. During the meal the defendant left the table and, upon his return a few minutes thereafter, he ruffled his wife's hair. Thereupon Lulu Claus made a reproving remark in respect of

this action, to which the defendant replied, "Keep still or I will slap you." Thereupon Tooley and the defendant both started for the door, the defendant having first taken his revolver down from the wall near the kitchen door. They were induced to return to the table, however. During the course of the evening it appears from the record that the defendant "playfully" discharged his revolver into the floor to "scare" certain of the persons that were present. When the Claus girl left the Trobough home later in the evening, the defendant told her she need not return to his home. Tooley accompanied her to a taxicab and he then went into the room which he occupied at the Trobough home. Thereupon it appears that the defendant's wife remarked, with reference to Miss Claus' departure, that she, Mrs. Trobough, "didn't see why she couldn't have her friends out there," when the defendant had his friends there. The defendant testified that he then went into the kitchen, and that, just as he reentered the dining-room where his wife was seated in a chair, he heard a shot. According to his evidence, his wife then suddenly arose to her feet and he caught her in his arms, but he was too weak to hold her and he laid her down on the floor. It appears that Tooley entered the dining-room almost immediately after the shot was fired, and very shortly thereafter a physician was called. The defendant meanwhile saw the gun on the floor near his wife, and he testified that he "grabbed it off of the floor and broke it and threw the shells down the register."

Tooley testified that, after he retired to the bedroom which he occupied at the Trobough home, and while he was sitting on the edge of the bed, he heard a shot, and Mrs. Trobough cried out and said: "Vern, he shot me." Tooley also stated that he subsequently inquired of the defendant if he knew the consequence of his act, and the defendant replied: "My God! no." According to Tooley's evidence it also appears that the defendant and he had been engaged in bootlegging. And shortly before the sheriff arrived, Tooley, the defendant, and the defendant's brother-in-law hid a collection of jugs and bottles.

Dr. Green, the physician who was called by the defendant, testified that Mrs. Trobough was dead when he arrived. He testified that the left common carotid artery had been punctured, thereby causing a hemorrhage from which Mrs. Trobough died.

It appears that Dr. Green, after ascertaining that Mrs. Trobough was dead, probed the wound to locate the bullet. The defendant contends that, had his wife been alive when the physician arrived, the probing, and not the bullet, caused the hemorrhage. But we think the evidence conclusively discloses that the bullet was the direct cause of Mrs. Trobough's death.

Dr. Green was a witness in both of the former trials of the defendant and his testimony at the second trial was read into the record of the present trial. The defendant contends that this constituted reversible error, and that the court therefore erred in overruling his motion for a continuance to the end that he might procure Dr. Green's presence as a witness at the present trial. The court, however, granted leave to the defendant to obtain a deposition of the physician, but the defendant did not avail himself of the offer. However, the evidence of two other physicians appears in the record before us and, in view of this fact and of the fact that the defendant did not avail himself of the opportunity granted by the court to obtain Dr. Green's deposition, we do not think the defendant was prejudiced in respect of the court's ruling. Nor do we find that the court abused its discretion in overruling the defendant's motion for a continuance.

Objection is also made to the fact that the court permitted the testimony of Lulu Claus at a former trial to be read into the record at the present trial. But it appears that this witness could not be found and, in view of this fact, we do not think the court erred in the premises. It is elementary that the evidence of a witness at a former trial may be read at a later trial, where such witness cannot be located to testify at a subsequent trial of the same case. *Koenigstein v. State,* 103 Neb. 580; *Meyers v. State,* 112 Neb. 149.

Nor do we find reversible error in the admission of the evidence of certain other witnesses of which complaint is made. And after an examination of the various instructions complained of, we do not find that the defendant was prejudiced by those given nor by those refused by the learned trial judge.

The record in the present trial is voluminous and considerable variance appears in the testimony of the defendant and Tooley, as well as some other witnesses. But from the defendant's own evidence it appears that he carelessly shot into the floor of his home in the early part of the evening of the tragedy; that there was liquor in his home; and that, just before he went into the kitchen, before his wife was shot, the gun in question was hanging on the dining-room wall which was immediately adjacent to and near the kitchen door. And Tooley, at that time, was in his bedroom preparing to retire.

Three juries have heard the evidence and each jury found the defendant guilty. And, besides, the defendant was granted a change of venue from Adams county, the county of his residence, to Webster county in the present case. The jury, as triers of fact, having heard the evidence and having observed the demeanor of the witnesses while they were testifying, found that the defendant was guilty. Under the circumstances and under the record before us, we decline to reverse the finding so made by the jury.

The judgment must be and it hereby is

AFFIRMED.

MAURICE CASEY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 10, 1931. No. 27865.

1. Negligence: ACTION: DISMISSAL. In an action for negligence, plaintiff is not entitled to relief, where undisputed evidence shows that he brought upon himself the injuries of which he complains.
2. Trial: DIRECTION OF VERDICT. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error to overrule a motion to direct a verdict in favor of defendant.

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

Byron Clark, Jesse L. Root, J. W. Weingarten and *Sidney T. Frum,* for appellant.

McCarthy & McCarthy and *M. F. Harrington, contra.*

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

ROSE, J.

This is an action to recover $574 in damages for alleged negligence of defendant in so constructing embankments and waterways on its railroad right of way as to flood portions of the lands of plaintiff in Otter creek valley, Dixon county, thus causing the destruction or loss of oats, barley, potatoes, chickens and lumber owned by him.

In Otter creek valley plaintiff owns a farm consisting of a dwelling-house, other farm buildings, and 160 acres of land, except land for defendant's railroad right of way, land for a right of way for a public highway and land for a right of way for a ditch. These right of ways are on parallel lines, extend east and west and intersect the land of plaintiff, leaving the larger portion on the south and the smaller portion and the farm buildings on the north. The railroad right of way is contiguous to the right of way for the ditch, which is north of the railroad, and the railroad right of way is also contiguous to the right of way for the highway, which is south of the railroad. The general course of Otter creek is eastward. The current of the stream in the original channel approached plaintiff's farm buildings from the northwest, passed near them, turned south about 500 feet from them, crossed all the right of ways on the west side of a loop south of them, meandered eastward and, turning north, recrossed the same right of ways on the east side of the loop 800 feet from the west side of the loop. Before the right of ways for the highway and the ditch were granted, defendant's railroad crossed Otter creek on a bridge 130 feet long over

the west side of the loop. Under the same railroad track there was a similar bridge 800 feet further east over the east side of the loop. In 1926 the state department of public works and the county of Dixon constructed the public highway on plaintiff's land south of the railroad on a fill 17 feet high across the natural channel of Otter creek near plaintiff's farm buildings, filling the old channel at the crossing, cut off the loop of the creek south of the right of ways and dug on the north side of the railroad a cut-off ditch into which the waters of the stream were turned. Afterward defendant made fills where the bridges had been and increased the capacity of the ditch.

Personal property of plaintiff was injured by flood waters October 15, 1928, and in his petition he pleaded in substance that defendant failed to provide an adequate cut-off ditch, filled the openings in its right of way under the bridges without leaving adequate openings in the embankments for the passage of flood waters, dammed them up, and turned them back on the premises of plaintiff, thus causing the damages of which he complains.

In addition to a general denial, defendant answered in effect, among other things, that plaintiff, for his own benefit, knowingly participated in the acts upon which his claim for relief is based and brought the damages upon himself.

Upon a trial of the issues, the jury rendered a verdict in favor of plaintiff for $520. From a judgment therefor defendant appealed.

The principal assignment of error is directed to the overruling of a motion by defendant for a peremptory instruction in its favor on the ground that the evidence is insufficient to prove a cause of action in favor of plaintiff and against defendant.

Plaintiff sold to Dixon county the land for the right of ways for the highway and the ditch. He filed his claim against Dixon county April 28, 1926. This claim and his own testimony prove that he sold to Dixon county 5.04 acres of land for the right of way for the highway through his farm and 98/100 of an acre on the north side of defendant's railroad through his farm for the right of way

for the cut-off ditch. His claim for the land, fence and incidental damages amounted to $1,304.25, which the county paid. On the face of his claim he imposed on the county the following conditions:

"This claim is filed with the understanding that a cattle pass is furnished to meet a point opposite railroad pass; also a culvert of 18 inches in diameter to carry natural flow of water.

"This claim is to be void unless cattle pass is furnished and culvert provided and maintained for natural flow of water."

Acting under plaintiff's grant and terms, the county and the state department of public works constructed the highway on a fill or embankment 17 feet high across the natural channel of Otter creek on the west side of the southern loop described, without any openings in the solid wall except the cattle pass and an 18-inch pipe. The channel on the east side of the loop was also filled by the state and Dixon county except for an 18-inch pipe. The entire southern loop of the natural channel south of the highway was thus cut off, the west fill being near plaintiff's buildings. The distance between the center of the highway and the center of the railroad was 83 or 84 feet. North of the railroad the state and county also cut a ditch on the right of way purchased from plaintiff. The purpose of this ditch was to carry the waters of Otter creek eastward north of the railroad track to the natural channel of the stream. Plaintiff did not notify or consult defendant in regard to these plans or to this work. Defendant had no part in the undertakings except to voluntarily increase the carrying capacity of the ditch north of and adjacent to its right of way. There is nothing to show that the state or Dixon county consulted defendant in respect to the contemplated changes. After the state and county constructed the highway, filled the old channel as indicated, and dug the ditch, defendant made fills where its bridges crossed the abandoned channel of Otter creek, leaving in the new railroad embankment a cattle pass and pipes corresponding in size, elevation and location to the openings left in the highway embankment

pursuant to plaintiff's specifications. Plaintiff stood by without objection or protest until all these changes had been made, though he had owned his farm for ten years.

The facts outlined are established by, or necessarily inferred from, undisputed evidence. Prior to the shifting of the channel of the creek to the cut-off ditch north of the railroad, the openings under the railroad bridges permitted the free passage of the stream. They could not serve that purpose after the highway embankment filled the natural channel of Otter creek a few feet below the bridges. Plaintiff's property was not damaged by floods before the channel was changed. The change from natural conditions which did not injure plaintiff was the enterprise of the state, the county of Dixon and plaintiff, not defendant. After the southern loop of Otter creek had been cut off and the channel of the stream changed to the north side of the railroad, the railroad bridges were unnecessary. As already stated, the openings in the new railroad embankment corresponded to the specifications for the openings in the parallel highway embankment a few feet further south —terms exacted by plaintiff himself as conditions of granting the right of ways for the highway and the ditch. The better view of the undisputed evidence seems to be that, as to defendant, plaintiff brought upon himself the injury of which he complains. The conclusion is that the motion to direct a verdict in favor of defendant should have been sustained. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

CAROLINE WARD, APPELLEE, V. WILLIAM J. HISLOP ET AL., EXECUTORS, ET AL., APPELLANTS.

FILED NOVEMBER 10, 1931. No. 27953.

1. **Quære.** Whether an oral contract of a married woman to devise realty and bequeath personalty is valid as to after-acquired property, *quære?*
2. **Specific Performance: PAROL CONTRACT FOR DEVISE AND BEQUEST: PROOF.** A parol contract, devising realty and bequeath-

ing personalty, can be established only by evidence that is clear, convincing and satisfactory.

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

Battelle, Travis & Strehlow, for appellants.

Wear, Moriarty, Garrotto & Boland, contra.

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

GOOD, J.

In this action plaintiff seeks specific performance of an alleged oral contract to devise realty and bequeath personalty to her. Defendants are the next of kin of Mary Ellen Voorhees, deceased, executors of her last will and testament, and legatees mentioned in said will.

Plaintiff alleged that in December, 1900, Mr. and Mrs. Voorhees requested of plaintiff's parents the privilege of taking the plaintiff with them to live as their child, and that plaintiff's parents consented to such request and allowed Mr. and Mrs. Voorhees to take the plaintiff on the following expressed conditions: That plaintiff's parents would give to Mr. and Mrs. Voorhees her custody, care and control, in consideration and on agreement that Mr. and Mrs. Voorhees would receive said child as their own, care for her, rear and educate her, and that at their death the plaintiff should receive their entire estate, including all the real and personal property of which they might die possessed. Plaintiff averred that she went to live with Mr. and Mrs. Voorhees at the time and on the terms mentioned aforesaid, and continued to live with them uninterruptedly until they died; that Mr. Voorhees died on the 5th of February, 1925, and Mrs. Voorhees on the 27th of April, 1930.

Defendants denied the making of the oral contract and denied that plaintiff had performed her part of the alleged contract by continuously living with the Voorhees family as a daughter. The trial court found for plaintiff and entered a decree awarding plaintiff one-half of the estate of Mrs. Voorhees. Defendants have appealed.

At the outset it may be observed that, if the contract was made, as alleged, it is of doubtful validity. Mrs. Voorhees was at that time a married woman. There is no showing that she then possessed any separate estate, and the evidence fairly shows that the bulk of the estate which she left came to her under the will of her husband 25 years later.

This court has frequently held: "The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract." *Kocher v. Cornell,* 59 Neb. 315. See *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Marsh v. Marsh,* 92 Neb. 189; *Giltner State Bank v. Talich,* 115 Neb. 236. However, since that question was not raised or discussed in the briefs or on oral argument, we refrain from determining the question in the instant case.

At the date of the alleged oral contract, plaintiff was 16 years of age, and Mr. and Mrs. Voorhees had no children of their own. The only witness who testified to the alleged contract was a sister of the plaintiff. According to her testimony, plaintiff, for about two weeks prior to the date of the alleged contract, had been staying in the Voorhees family. With their mother, plaintiff and witness went to the Voorhees home, when, as testified by her, the following occurred: Mrs. Snyder (plaintiff's mother) "wanted Carrie (the plaintiff) to come home with her." The mother said: " 'You know Dad and Carrie don't get along,' and Mrs. Voorhees spoke up and said, 'Let her stay with us, make her home with us;' and she turned to Mr. Voorhees, whom they called Dad, and said, 'We would like to have her stay with us, wouldn't we?' and he said, 'We sure would.' " Mrs. Snyder said: "I would like very much to have Carrie come home with me, but if she does not want to, and you will promise that you will take care of her, she can stay." Mrs. Voorhees answered: " 'Dad, when we are gone,' she said, 'everything we have will be left to Carrie and Lester, and I will leave one dollar to my brother,' to which Mrs. Snyder said, 'All right, then, I will trust that you take care of Carrie, and I will leave her.' "

The foregoing constitutes the direct evidence of the contract. A number of witnesses testified to subsequent conversations with Mrs. Voorhees, in which she referred to plaintiff as her daughter, and to statements that when she was gone everything would belong to plaintiff. At another time, when the home was being repaired, Mrs. Voorhees is alleged to have said to plaintiff: "You go ahead and fix the house to suit yourself, as it is going to be yours." There is considerable evidence on behalf of plaintiff to the effect that thereafter plaintiff stayed and made her home with the Voorhees family.

On the other hand, there is evidence that the Voorhees home, at that time and for several years subsequently, was a bungalow, with six rooms, and having three bedrooms; that two young men, or boys, for one of whom Mr. Voorhees was guardian, were staying in the Voorhees home; that Mr. and Mrs. Voorhees occupied one of the bedrooms and each of the boys occupied another; that plaintiff did not stay at the Voorhees home, but was there occasionally, working and helping Mrs. Voorhees with the housework. There is evidence that plaintiff worked out as a seamstress, and spent considerable time in Sioux City, Iowa, but made occasional visits to the Voorhees home; that she worked at other times, earning wages, and purchased her own clothing. Mr. Voorhees died in 1925, and left a will, dated two or three years after the date of the alleged contract, in which he devised and bequeathed all of his property to Mrs. Voorhees. Mrs. Voorhees made a will in 1926, in which she devised to plaintiff the residence property, in which she was then living, valued at, perhaps, $3,000, together with some articles of personalty, and devising and bequeathing the remainder of her property to charitable institutions and various persons. Two or three years later she made another will, in which she left nothing to the plaintiff, but did make a substantial bequest to plaintiff's daughter, and bequeathed the remainder of her property to charitable institutions, relatives and various other persons. It also appears that Mrs. Voorhees was rather close in money matters. It may be said that the statements,

which would constitute the oral agreement, if made, were without any deliberation; were made upon the spur of the moment, and would cover all the property which Mr. and Mrs. Voorhees possessed, amounting in value to from $40,000 to $60,000. The time consumed during the conversation would be less than two minutes. It would be a remarkable and very unusual circumstance for one of Mrs. Voorhees' disposition, with reference to finances, to make such an agreement, without any deliberation or consultation about it with her husband or with any one else, other than as shown above. Moreover, the evidence of the witness who testified to the contract was contradictory in several respects, and it is noticeable that, although more than 30 years had elapsed, she purported to give the exact conversation that occurred, even stating particularly where in the house each of the persons was, and what each was doing, but, upon subsequent events, her memory was rather vague and uncertain. It would seem improbable that one of Mrs. Voorhees' disposition would make such a contract under the circumstances as detailed in the testimony; but, taken together with all the other evidence in the case, it falls far short of meeting the requirements of the well-established rule in this state. This court has frequently held that contracts of this character may be sustained only when the evidence thereof is clear, convincing and satisfactory. *Labs v. Labs,* 92 Neb. 378; *Overlander v. Ware,* 102 Neb. 216; *Powers v. Norton,* 103 Neb. 761; *Remaly v. Sweet,* 106 Neb. 327; *McEntarffer v. Payne,* 107 Neb. 169; *Young v. Gillen,* 108 Neb. 311; *Hajek v. Hajek,* 108 Neb. 503; *Smith v. Raubach,* 121 Neb. 703. Moreover, the evidence clearly falls short of proving full performance of the contract by plaintiff. The weight of the evidence is that she did not stay at the Voorhees home except at intervals, in the daytime, and occasionally at night when Mr. Voorhees was absent. The evidence given by plaintiff's witnesses does not substantiate the contract alleged in the petition. It also appears that after the death of Mrs. Voorhees plaintiff procured her attorney to write to Lester Dunlevy, seeking to enlist his aid in establishing a contract

whereby the Voorhees property was to be devised to them jointly. There are other acts of plaintiff, as shown by the testimony, that are wholly inconsistent with the existence of the alleged contract.

It follows that the judgment of the district court is erroneous. It is hereby reversed, and the action dismissed.

REVERSED AND DISMISSED.

FRANK BARRY, APPELLANT, V. KENNETH D. HORTON, APPELLEE.

FILED NOVEMBER 10, 1931. No. 27892.

1. **Execution.** "The right of a judgment creditor to take out an execution on his judgment is a substantial right; and this right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law." *Halmes v. Dovey*, 64 Neb. 122.
2. ———. A judgment creditor has the right to have an execution levied upon the goods and chattels of the debtor, but if no goods or chattels can be found the officer shall indorse on the writ of execution "no goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor which may be liable to satisfy the judgment, and is entitled to have the lands and tenements sold on execution sale, subject to all liens prior to the lien of the judgment on which the execution was made.
3. ———: SALE. Where an execution sale is had and the lands and tenements of the debtor are not sold subject to prior liens thereon, it is not error for the trial court to overrule a motion to confirm such sale.

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

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

Burkett, Wilson, Brown, Wilson & Van Kirk, Sterling F. Mutz and *F. J. Patz, contra.*

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

MESSMORE, District Judge.

This is an appeal from the action of the district court for Lancaster county overruling a motion to confirm an execution sale had upon a judgment at law and sustaining objections to the confirmation of such sale.

The facts disclose that upon the 7th day of August, 1929, Frank Barry, appellant, recovered a judgment in the sum of $305.40 against Kenneth D. Horton, appellee, in the municipal court of Lincoln, Lancaster county, and on the 8th day of August, 1929, a transcript of said judgment was filed in the office of the clerk of the district court for said county and recorded in the execution docket; that at the time of the filing and recording of said judgment appellee Kenneth D. Horton was the owner in fee simple of lot 3, block 13, Martin Heights Addition to Lincoln, in said county, against which there was of record a mortgage in favor of the American Savings & Loan Association in the sum of $3,700, which was duly filed and recorded in the office of the register of deeds of Lancaster county on the 25th day of April, 1929. There were also two mechanics' liens of record, one in favor of the Holland Lumber Company in the sum of $1,345.93 and one in favor of the Reimers-Kaufman Company in the sum of $150.04, both of which were first liens against the real estate above described.

On August 10, 1929, the Holland Lumber Company filed its petition in the district court for Lancaster county against Kenneth D. Horton et al. to foreclose its mechanic's lien. In June, 1929, the United States Supply Company filed its mechanic's lien with the register of deeds of said county and on the 9th day of September, 1929, filed its petition in the district court for Lancaster county against the said Kenneth D. Horton to foreclose said lien. By order of said court the said two actions were consolidated and known as Holland Lumber Company v. Kenneth D. Horton. The American Savings & Loan Association was made a defendant in said actions and filed its answer and cross-petition in said action as consolidated for the purpose of foreclosing its mortgage bond of $3,700. A decree was

entered in said action on the 9th day of June, 1930, by the terms of which it was decreed that the Holland Lumber Company had a lien against said property in the sum of $1,345.93 and that the Reimers-Kaufman Company had a lien against said property in the sum of $150.04, both of which were first liens as against said property, and by order of the court the bond and mortgage of the American Savings & Loan Association were left undetermined because service had not been obtained by said association upon the defendant Kenneth D. Horton; that thereafter said property was sold under the terms of said decree by the sheriff of Lancaster county to the Holland Lumber Company and the Reimers-Kaufman Company, which companies later duly conveyed said property to said association, said association paying therefor to the Holland Lumber Company the sum of $1,369.43 and to the Reimers-Kaufman Company the sum of $152.66; that there was due said association from the said Kenneth D. Horton on the mortgage aforesaid the sum of $3,838.38 with interest thereon at the rate of 10 per cent. per annum from January 1, 1930, which was a lien against said property subject only to the liens of said Holland Lumber Company and the Reimers-Kaufman Company. The judgment creditor, Frank Barry, was not made a party to the foreclosure proceedings above set out.

On October 8, 1930, Frank Barry, the judgment creditor, caused an execution to be issued out of the district court for Lancaster county, directing the sheriff to levy upon the real estate above described. Accordingly, the sheriff levied upon said real estate, which was advertised for sale as provided by law and sold on November 11, 1930; the said Frank Barry bidding $171 for the same.

On November 12, 1930, a motion to confirm said sale was filed in behalf of the said Frank Barry in said court. The American Savings & Loan Association filed objections to the confirmation of sale, setting up that the property heretofore described was theretofore sold at a judicial sale under an order of court in the case entitled "Holland Lumber Company v. Kenneth Horton," the sale being on liens

on which there was due $1,495.97 which were prior to the lien of the said Frank Barry, and that thereafter the purchasers at said sale transferred their interests in said property under said decree to said association, which is now the owner and holder of said property; that said association had set up its bond and mortgage by cross-petition in that action, showing the sum due it to be $3,838.38, which lien is a prior lien to the lien of the said Frank Barry; that said action of the Holland Lumber Company v. Kenneth Horton was left open for further determination of the amount due said association, it having failed to obtain service on the said Horton, the mortgagor; further objecting, said association sets up that there is an action pending in the district court for Lancaster county to determine the rights of the said Frank Barry and to compel him to redeem from the liens set up in case of Holland Lumber Company v. Kenneth Horton, and upon failure to redeem to have the title quieted in said association as against the lien of the said Frank Barry; further objecting to the confirmation of sale, said association states that the property involved herein was not, at the time of the sale and the issuance of the execution herein, subject to sale as the property of the defendant Horton, the title to said property having divested from the said Horton prior to the time of the issuance of the execution herein; that the sheriff had no authority to sell said property under execution, as it did not belong to the said Horton; that the said Horton had no interest in said property, and that the American Savings & Loan Association is entitled to be subrogated to the rights of its mortgage and the mechanics' liens.

The court below overruled the motion to confirm the sale and the judgment creditor, Frank Barry, appeals.

From this statement and history of facts the question raised by appellant is whether or not he lost his right to enforce his judgment lien by execution and levy because of the foreclosure proceedings and the acquisition of title to the property by the American Savings & Loan Association after the attachment of the judgment lien.

On August 8, 1929, when the transcript of the judgment

of the judgment creditor, Frank Barry, was filed in the office of the clerk of the district court for said county, the lien of his judgment then attached. Prior to that lien were two mechanics' liens and a mortgage, all of record.

On October 8, 1930, when the execution on appellant's judgment was ordered out, we find that the Holland Lumber Company and the Reimers-Kaufman Company had foreclosed their liens, their actions for such foreclosures having been consolidated in one action, and that said lienors had purchased the property in question for the amounts of their liens. Subsequently said lienors conveyed their interests in the property to the American Savings & Loan Association, the association paying therefor the amounts of said liens. Therefore, the association had the record title, with the fact that Frank Barry, the judgment creditor, was not made a party to the foreclosures of the mechanics' liens.

"The right of a judgment creditor to take out an execution on his judgment is a substantial right; and this right can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law." *Halmes v. Dovey,* 64 Neb. 122.

Had said judgment creditor been made a party to the foreclosures of the mechanics' liens, his judgment lien would have been subsequent to said liens and the mortgage of the American Savings & Loan Association. The fact that he was not made a party to such foreclosures does not in any sense expunge or do away with the prior liens against the property in so far as the judgment creditor is concerned. The judgment creditor had the right to issue out an execution on his judgment and sell any interest the judgment debtor may have had in the property subject to all prior liens. The real estate was not sold on execution sale in behalf of the judgment creditor subject to all the prior liens thereon.

In case of *Hibbard v. Weil & Kahn,* 5 Neb. 41, this court said: "A sale upon execution vests in the purchaser all the rights of the judgment debtor to the property, but that right is subject to all liens prior to the lien of the judgment on which the execution sale is made." This has been the law of this state for many years.

In the objections of the American Savings & Loan Association to the confirmation of sale, we find that said association had started an action in said district court against appellant Frank Barry, judgment creditor, to require him to redeem said property from said liens or have the title to said premises quieted in the association as against the said Barry. This action we will not discuss nor the rights of the parties thereunder.

We are committed to the rule, as heretofore set out, that a judgment creditor has the right to take out an execution on his judgment and under it to sell the property and take whatever interest the judgment debtor may have therein by virtue of said sale under execution, provided the property was sold under execution subject to all prior liens thereon. In this case under the execution sale the property was not sold subject to the prior liens thereon and the trial court was correct in refusing to confirm the sale thereunder. The judgment of the trial court is therefore

AFFIRMED.

MAY GROSS, APPELLANT, V. WILLIAM F. GROSS, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27825.

1. Divorce: CUSTODY OF CHILDREN. Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action.
2. ———: ———. Under facts outlined in the opinion, *held*, the mother is a proper person to have the custody of her three minor children.

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

Frost, Hammes & Nimtz and *Howard Saxton*, for appellant.

John A. McKenzie, contra.

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

PER CURIAM.

On the 9th day of December, 1921, the plaintiff, May Gross, by constructive service, obtained a decree of divorce from the defendant, William F. Gross, in the district court for Douglas county, Nebraska. Said decree was obtained on the grounds of extreme cruelty, adultery, and desertion of the plaintiff and their minor children. Plaintiff was also given the sole care and custody of their four minor children, two girls and two boys. On the 14th day of June, 1930, the defendant filed a petition to modify the above divorce decree, alleging that plaintiff was not a fit person to have the care and custody of their three minor children, and praying that he be given said children. The plaintiff filed an answer and cross-petition to the petition of the defendant, denying that she is an unfit person to have the care and custody of said children, and alleging that the defendant is an unfit person to have the custody of said children; that she be allowed $6,160 for past maintenance of their said children, and $75 a month support money and $500 suit money. Upon these issues, said cause was tried by the district court, and on the 30th day of September, 1930, the court entered a decree modifying the former divorce by giving the defendant the custody of their two boys. Plaintiff's cross-petition was dismissed as to past maintenance and future support. It is from this decree that said cause comes to this court for review.

We have carefully examined the evidence in this case with regard to whether or not the plaintiff is or is not a proper person to have the care and custody of the three minor children of said parties, and we find that there is much evidence received which is hearsay and cannot be of benefit in the determination of the case.

The evidence discloses that the defendant deserted the plaintiff when the youngest child was about two months old and took up with his present wife, and that she was no doubt the cause of the separation and the divorce action. For years the defendant failed and neglected to support his children until the death of a daughter in 1930. During this period his children needed his financial assistance very much.

There is much in the record regarding the death of the oldest child, Bernice, most of which is incompetent. The evidence discloses that at the time of the death of Bernice Gross she was at the head of her class and well respected in the community. There is much testimony received in regard to the plaintiff taking her children several times to Mexicali, a city 25 miles from Brawley, California, the home of the plaintiff. The trips to Mexicali were few, of short duration, and if they had a tendency to reduce plaintiff's children morally should have been avoided; but this, taken into consideration with all the other evidence in the case, was not sufficient to justify the taking of plaintiff's children from her.

The evidence in this case discloses that the plaintiff is a hard-working woman, who has not been able to provide and care for her children as she would like, but she has done the best she could. She sought employment outside the home to earn additional money to care for her family. We do not find that the best interests of the three surviving children require that they be taken from their mother, but rather that they remain with her until the further order of the court. The custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interest require such action.

We find that if the plaintiff had had the financial assistance of the father, she could have better cared for her children, and that such financial assistance would have avoided most of the ills about which the defendant complains; that the defendant has been able and should have contributed to the support and maintenance of his children; that he is now able to contribute and should contribute the sum of $25 a month for their support.

It is urged by the appellant that the trial court erred in dismissing her claim against the appellee and father of her four children for the fair and reasonable value of their support from November 1, 1923, to April 1, 1930. The trial court was not in error in finding that the evidence

was not sufficient to support a finding in favor of the appellant upon this claim.

For the reasons above mentioned, it is ordered that the decree heretofore entered, modifying the original decree, be reversed and set aside and the original reinstated, and that a further decree be entered requiring the defendant to pay the plaintiff $25 a month for the support of these children until the further order of the court; first payment due when the mandate is filed in the district court; that the part of the decree dismissing the plaintiff's claim for past maintenance of her children be affirmed. The appellant is allowed an additional sum of $250 as attorney's fees in this court. The judgment is reversed and the cause remanded, with directions to enter a decree in conformity to this opinion.

REVERSED.

FRED CHAPPELL, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27932.

Master and Servant: ASSUMPTION OF RISKS. "As a general rule an employer owes no duty to warn an employee of mature age of the extent of his lifting ability, and one who attempts to perform a task of this nature, requiring exertion beyond his physical strength, assumes the risk of injury therefrom." *Culver v. Union P. R. Co.*, 112 Neb. 441.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

O'Brien & Powers and *John A. McKenzie*, for appellant.

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz, contra.*

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

PER CURIAM.

This is an action brought to recover damages for personal injuries sustained because of the alleged negligence

of the defendant railroad company. Plaintiff claims to have been injured while engaged in loading old steel rails on a flat car. The negligence alleged and relied upon is the claimed failure of the employer to provide a sufficient number of competent employees to perform the work, in reasonable safety, in which plaintiff was then engaged. Plaintiff, at the time the alleged injuries were said to have been sustained, was a man, mature and experienced at hard labor. He had previously been employed in railroad work, though never in the capacity in which he claims the injuries sued for were sustained. His evidence is to the effect that on or about the 18th of October, 1929, he and the party of which he was a member were engaged in loading old rails on a flat car; that after somewhat more than three hours of labor plaintiff and those cooperating with him, in loading this car, had received a rail from the employees who were transferring the old rails from a pile near the track to the flat car on which they were being loaded; that plaintiff, together with his fellow workmen, employing tongs, had carried this rail over to the proper place where it was to be piled upon this flat car, and while bending over it to "set it down" plaintiff experienced what he then described to the fellow workmen as a "kink in his back;" that immediately preceding this there had been no untoward incident affecting plaintiff or his fellow workmen, nor had there been any unexpected movement of the burden then in process of transportation. No complaint or notice was given by the plaintiff to the defendant company for more than six months after this incident.

At the close of all the evidence the district court, on motion of the defendant, directed a verdict against the plaintiff, from which he prosecutes this appeal.

We find that no error was committed by this action of the district judge. The facts in this case, as disclosed by the plaintiff's evidence, bring it squarely within the doctrine announced in *Culver v. Union P. R. Co.*, 112 Neb. 441: "As a general rule an employer owes no duty to warn an employee of mature age of the extent of his lifting ability, and one who attempts to perform a task of this

nature, requiring exertion beyond his physical strength, assumes the risk of injury therefrom." See, also, *Baker v. Sterrett Operating Service*, 40 Fed. (2d) 790; *Schweig v. Chicago, M. & St. P. R. Co.*, 216 Fed. 750.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

WENCEL H. KIRCHMAN V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1931. NO. 27940.

1. **Criminal Law: CHANGE OF VENUE.** "A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and unless there has been an abuse thereof, its ruling on the motion cannot be disturbed." *Goldsberry v. State*, 66 Neb. 312.
2. **Evidence** examined and *held* sufficient to support the verdict.

ERROR to the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

O'Sullivan & Southard and *Harlan A. Bryant*, for plaintiff in error.

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

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

GOSS, C. J.

This defendant, tried separately, was charged jointly with Frank J. Kirchman, with making use of a bank to defraud. The indictment had four counts. During the trial the court dismissed the last two counts. The jury found defendant guilty on the first two counts. He was sentenced on each count to ten years' imprisonment and to pay a fine of $1,500, the sentences to run concurrently.

The indictment was drawn under section 8-165, Comp. St. 1929, and is referable to that clause denouncing any officer or agent of any bank "who makes use of the bank

in any manner with intent in either case to injure or defraud the bank or any individual person, company or corporation."

The defendant, Wencel H. Kirchman, was cashier, and Frank J. Kirchman was president, of the Nebraska State Savings Bank and of the Saunders County National Bank, operated at Wahoo. Count one charged intent to defraud the savings bank and Esther Anderson, and count two charged intent to defraud said "banking corporations" and Selma Edoff, in both counts, by use of the savings bank and in a manner fully set forth in the indictment. Briefly stated, funds of these parties having been invested in a certain mortgage loan taken in the name of the savings bank, it was charged that defendants, as officers of the savings bank, assigned the bonds and mortgages to the national bank and later sold and assigned these instruments to the First National Bank of Lincoln, an innocent purchaser.

The first error assigned and relied on is that the court overruled defendant's application for a change of venue to some adjoining county. The defendant filed affidavits of 67 persons, residing in various precincts, reciting that Wencel H. Kirchman has been made defendant in 13 criminal cases instituted in the county, growing out of bank failures in six banks named and known as the chain of Kirchman banks, with deposits of over $3,000,000 at the time they were closed; that there were many prosecutions of others arising out of these failures; that there had been much discussion among the people generally and a great amount of news items and editorial comment in prominent newspapers in the county; that the affiants know there is a very bitter feeling and strong prejudice against the defendant in every part of the country, by reason of which he cannot have a fair trial in the county. These affidavits, each about five pages of typed matter, seem to be identical except that blank spaces were left so as to vary the name, residence and length thereof, of the individual signer. In addition thereto the showing indicates matter published in various papers in the county. The showing of the state,

in resistance, contains 157 affidavits attempting to disclose the other side of the shield and indicating the belief that citizens eligible to jury service in the communities in which the respective affiants live are good, fair-minded, upright citizens, well disposed toward justice and to a fair and impartial trial; and that the affiants believe there is no appreciable feeling, if any, against defendant. These affidavits are likewise almost identical in language.

Under the Constitution, defendant was guaranteed a fair trial by an impartial jury. Whether such a jury was obtainable in the jurisdiction must, of course, first be decided by the trial court. It is the rule that "A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and unless there has been an abuse thereof, its ruling on the motion cannot be disturbed." *Goldsberry v. State,* 66 Neb. 312; *Sweet v. State,* 75 Neb. 263; *Clarence v. State,* 89 Neb. 762; *Lucas v. State,* 75 Neb. 11.

The basic question to be passed on by the jury in this case was very simple. It did not depend on the wrecking of any bank or banks. It was whether the defendant used the bank to defraud these women out of their mortgage and notes secured thereby. There is nothing in the general banking situation in Saunders county, as shown by the record, indicating with legal certainty that it made a fair jury unobtainable. The answers of the jury upon their *voir dire* examination do not show on their face any bias or prejudice of the jurors chosen. Only 23 were examined as prospective jurors. Out of the 12 selected none had lost money in bank failures. The trial judge observed these jurors and heard their examination. We find in the record no cause for concluding that he abused his discretion. The ruling refusing a change of venue will not be disturbed.

Defendant filed a motion to quash the indictment and, when it was overruled, filed a demurrer based on the same points, which was likewise overruled. We have carefully examined the indictment. Without taking space to analyze the allegations, suffice it to say the first count is thoroughly good as against these legal attacks; while the second count

contains an erroneous date of a certain assignment of the mortgage—which date was correctly stated in the first count—and charges an intent to defraud the banks as well as Mrs. Edoff, we think that, even if these were material, the defendant has not been prejudiced by failure to sustain the motion or demurrer as to the second count. For the evidence as to the correct date was properly received in proof of the first count; the Edoff note and the Anderson note were secured by the same mortgage; and the sentence on the second count was made to run concurrently with that on the first count. Evidence received on the second count was not prejudicial to defendant on the first count. The defendant can serve in the penitentiary only once by reason of the conviction under this indictment.

Defendant argues that the evidence was insufficient. He was administrator of the estate of Carl J. Edoff from his appointment in 1922 until its settlement in the spring of 1927. On May 2, 1927, he paid Selma Edoff, the widow, $5,718.55, and Esther Anderson, the daughter, $1,906.20, pursuant to the decree of distribution. They separately deposited these amounts in the Saunders County National Bank and requested defendant to negotiate loans for their money on farm lands near Mead, where they lived. On September 10, 1927, $1,500 of Esther Anderson's money and $4,000 of Selma Edoff's money was loaned to Otto B. Tegelberg and Janet M. Tegelberg on a mortgage on their farm, securing two notes or coupon bonds for the above amounts. The notes and mortgage ran in favor of the Nebraska State Savings Bank. Neither the mortgage nor the notes were ever assigned to the true owners. When they were informed that their money was loaned on this security they asked for the papers. Defendant told them they were the owners of the bonds but that the bank would keep the papers for them. The notes and mortgage were not turned over to them. As the interest coupons became due the interest was paid by the mortgagors to the bank and each of the owners received her interest until the banks closed. Under date of September 10, 1927, defendant gave them receipts generally describing the loans and reciting

that the mortgage and securities were "held by this bank in trust for the benefit" of the respective owner. He executed this receipt in the name of the Saunders County National Bank, by himself personally. On October 2, 1929, the Nebraska State Savings Bank, without authority from or knowledge of the real owners, assigned the Tegelberg mortgage to Saunders County National Bank. Defendant, as cashier of the savings bank, joined in the execution of the instrument and acknowledged it as such officer. Fifteen days later the national bank duly assigned this mortgage and others (totaling $24,000) to the First National Bank of Lincoln. Defendant, as cashier of the grantor, joined in the execution of the instrument, and duly acknowledged it. The two notes for $1,500 and $4,000 were assigned in blank by the savings bank by Frank J. Kirchman, president. They were negotiable by delivery and went to the First National Bank as an innocent purchaser and holder for value, when they were delivered with the assigned mortgage. The two banks have been closed. The trusts in favor of Esther Anderson and Selma Edoff were violated. They have been defrauded out of their money. The defendant made use of the savings bank at the time he joined in the assignment of the mortgage to the national bank and when the notes were transferred to it. The court (among other elements) strongly instructed the jury that the state must have proved by the evidence beyond a reasonable doubt that the defendant had "the intent wilfully, knowingly, unlawfully, fraudulently and feloniously to injure and defraud." Applicable to defendant's testimony that he merely joined in the executive act of the assignment of the mortgage at the request of Frank J. Kirchman and did not know the import of his signature and acknowledgment, the trial court further instructed the jury that they must acquit the defendant unless they found from the evidence that, when he signed the assignment, and when the transfer of the bonds was made to the Saunders County National Bank, he "wilfully did the same, knowing that said mortgage and bonds at the time were the property of Selma Edoff and Esther Anderson or either of them."

The issues were those of fact for the jury. The evidence was amply sufficient to support the verdict.

Some other assignments relate to instructions. We have considered them and find there was no prejudicial error. To discuss them would be of no value to the parties and would unduly extend this opinion.

The judgment of the district court is.

AFFIRMED.

OMAHA ROAD EQUIPMENT COMPANY, APPELLANT, V. THURSTON COUNTY, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27825.

1. **Judgment**: RES JUDICATA. To come within the rule of *res judicata*, it must appear that the same facts were or, in the exercise of due diligence, might have been presented or litigated in a former action, but where the court held that it was without jurisdiction to hear and determine certain facts in the former action the rule does not apply.
2. **Counties and County Officers**: CONTRACT IN ANTICIPATION OF LEVY. "It is not unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the Constitution and the statutes." *Austin Mfg. Co. v. Brown County*, 65 Neb. 60.
3. ———: CONTRACT: IRREGULARITY. A county is liable for the reasonable value of road machinery which it purchases, retains and uses, provided such county was clothed with power to purchase such machinery, notwithstanding the fact that the contract of purchase is unenforceable because the power was irregularly exercised.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

Andrew M. Morrissey and *Arthur F. Mullen*, for appellant.

Robert G. Fuhrman and *Harold R. Jordan, contra.*

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

DEAN, J.

From an order of the Thurston county board of commissioners disallowing a claim of the Omaha Road Equipment Company, in the sum of $11,838.50, for road machinery alleged to have been furnished and delivered to the county, the plaintiff company appealed to the district court. Upon submission the court found generally in favor of the county and against the company and decreed that the evidence was insufficient to prove that the company had offered to accept a return of the money and equipment and take back the machinery alleged to have been sold to the county. The court also found that section 1040, Comp. St. 1922, now section 26-734, Comp. St. 1929, does not contravene any constitutional limitations placed upon the legislature, nor does the act limit the jurisdiction of the courts in the premises. From the judgment so rendered the plaintiff company has appealed.

The record discloses that the following machinery was delivered by the plaintiff company to Thurston county, namely, on or about March 28, 1927, one caterpillar 60 tractor engine, designated P. A. 1206, valued at $5,000; one caterpillar 60 tractor engine, designated P. A. 1651, valued at $5,000; and, on or about August 9, 1927, one caterpillar 60 tractor engine, designated P. A. 2007, and also valued at $5,000; and, on or about May 16, 1927, one Russell elevator grader, valued at $1,840. Upon all of the above machinery the freight charges were paid by the plaintiff. The value of the property so delivered to the defendant county totals the sum of $17,438.50, and it is conceded that the county has made the following payments to the plaintiff upon the machinery, namely: Three old tractor engines, valued at $1,800, were accepted in trade; two county warrants, each in the sum of $1,250; a county warrant for $600; and another county warrant for $700, making a total sum of $5,600 which was paid by the defendant to apply on the machinery so delivered by the

plaintiff. And the company contends that a balance of $11,838.50 remains unpaid.

It appears that the defendant county has retained the machinery so delivered by the plaintiff and that such machinery has been used by the county in working on the public roads therein. In respect of the machinery sold by the plaintiff and purchased by the defendant, the president of the company testified that he "offered them (the county commissioners) any kind of a proposition to get" a return of the machinery, but that the county refused to make such return to the company. The president also testified that his company received no commission or profit whatsoever, arising from the sale of the machinery to the county, but that the machinery was sold to the county at the regular established factory list price.

The contention of the county is that the facts and the parties in the present action are identical with those in a former action wherein the action was dismissed, and that the judgment dismissing the action is a bar to the present action. But we do not agree with this contention. In the judgment entered in the former action, the court found that only $3,031.50 of the aggregate amount sought had then been presented to the county board and by the board disallowed, and the court held that it was without jurisdiction to hear and determine the amount due, if any, in excess of the $3,031.50, above named. We think that, to come within the rule of *res judicata,* it must appear that the same facts were or, in due diligence, might have been presented or litigated in the former action, but where, as in the present case, the court held that it was without jurisdiction to hear and determine certain facts the rule does not apply.

The county contends that at the time the road machinery was delivered the amount of money on hand in the county treasury was less than the amount due on the machinery and that the annual estimate and appropriation of the board for the year 1927 was insufficient to pay for the material. The county also contends that the contracts under which the machinery is alleged to have been pur-

chased are void from the fact that such action is an apparent attempt to bind the county to the payment of instalments out of future levies and that the orders for the machinery were the acts of individual members of the board and not that of county commissioners as such officials.

We think the county had authority to enter into the contracts for the purchase of the machinery here in question. As noted above, the machinery was purchased on or about the following dates, namely, March 28, May 16, and August 9, 1927. From the record it appears that, on or about January 6, 1927, before the purchase of the machinery, an estimate of expenses for the year 1927 was made by the board of county commissioners. Among the items listed in the minutes of the above meeting are estimates for "Supplies, $8,000," "Bridges, $40,000," "Commissioner Districts, $12,000," and "Road Districts, $12,000." And from the minutes of a subsequent meeting held July 5, 1927, it is disclosed that the following levies, among others, were made by the board, namely, "General Fund, $28,785.90," "Bridge Fund, $16,192.63," "Commissioner Districts, $8,096.32," and "Road District Funds, $8,096.32." No express provision is contained in the statute designating from what funds certain amounts as in the present case shall be paid. And we have held: "It is not unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the Constitution and the statutes." *Austin Mfg. Co. v. Brown County*, 65 Neb. 60.

In *Argenti v. City of San Francisco*, 16 Cal. 255, it is held that where a "plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition

to pay: Held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them."

And in *International Harvester Co. v. Searcy County*, 136 Ark. 209, the court, in commenting on a section of the statute there, holding that the county court had no power to let a contract to construct a bridge without an appropriation having been made therefor, made this observation: "If that was all there was in the present case, the judgment disallowing the claim would be right, because the contract for the purchase of the machinery was made by the county judge before an appropriation therefor was made by the levying court. After the appropriation for the road machinery was made the county retained the machinery and continued to use it. The county could not keep the machinery and use it for the benefit of the public and still defeat the claim for its purchase price."

In *Brown v. City of Atchison*, 39 Kan. 37, wherein a contract and certain bonds were held to be void, it was nevertheless held that the city must account for all benefits received and for which no equivalent had been rendered, "and this as nearly in accordance with the contract as the law and equity will permit."

To substantially the same effect is *Scott County v. Advance-Rumely Thresher Co.*, 288 Fed. 739, wherein the court likewise held that where certain road machinery was purchased without an appropriation having been made therefor, but where the county nevertheless used such machinery for a period of four years, such county "cannot escape liability therefor on the plea that the contract was made without authority." And it has been held that "Con-

tracts formally executed by the proper officers of the city by authority of its council, and not necessarily beyond the scope of its powers, will, in the absence of proof to the contrary, be presumed to have been made by lawful authority." *City of Lincoln v. Sun Vapor Street-Light Co.*, 59 Fed. 756.

In the present case the county is liable for the reasonable value of the road machinery which it purchased, retained, and used, where the county was clothed with power to purchase such machinery, notwithstanding the fact that the contract of purchase is unenforceable because the power was irregularly exercised. We think the county, in view of the facts, is estopped to deny liability in respect of the purchase of the machinery. Other assignments of alleged error have been urged in the brief of plaintiff; but, in view of our conclusion, we do not find it necessary to discuss them.

The judgment is reversed, with directions to enter a judgment in favor of the plaintiff in conformity with the views set forth herein.

REVERSED.

OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. EUGENE BEAL ET AL., APPELLANTS.

FILED NOVEMBER 20, 1931. No. 27961.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon the appellants to show affirmatively that the judgment of the trial court is erroneous.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Halligan, Beatty, Halligan & Maupin, for appellants.

L. A. DeVoe and *T. F. Wiles, contra.*

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

PAINE, J.

The Occidental Building & Loan Association, plaintiff and appellee, filed its petition on April 9, 1928, for the foreclosure of a mortgage on certain town lots in Ogallala, Keith county, Nebraska. On May 17, 1929, a decree of foreclosure was entered, finding the amount due the plaintiff $3,159.98, with 10 per cent. interest. A stay of nine months was granted, and on June 17, 1930, the Occidental Building & Loan Association bid in the property for $3,550. Objections to the confirmation of the sale were heard on October 13, 1930, and the sale was set aside for the reason that the property did not sell for a fair value under all the conditions, and a new sale was had November 18, 1930, at which the appellee raised its former bid to $3,700.

Objections to the confirmation of this second sale were based principally upon the ground that the property did not sell for its fair and reasonable value under the circumstances and conditions, and also that if it was again offered for sale it would bring a larger amount. On February 4, 1931, a hearing was had and the objections were overruled, and the court, being satisfied with the legality of the sale, confirmed the same and directed that the sheriff execute a deed therefor to the appellee.

It is contended by the appellants that there was an abuse of judicial discretion, which deprived the appellants of their property without due process of law, and the only case cited in support thereof is *Lindberg v. Tolle,* 121 Neb. 25, but in the text of that case we find this statement:

"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."

The court in this case considered the evidence in the form of exhibits and affidavits and the oral evidence in court, and before the court confirmed this sale it must have been satisfied that, under all the conditions existing in Ogallala at the time, the property brought the best price that was obtainable, or that a subsequent sale would not

bring a better price. Comp. St. 1929, sec. 20-1531. Two sales were held, at each of which the plaintiff was compelled to bid in this property. Several years had passed from the time of the filing of the petition for foreclosure until the final confirmation, and this court is of the opinion that no new question is presented in the transcript or bill of exceptions submitted in this case. *Wilson v. Wilson*, 94 Neb. 192; *McDonald v. Lessmann*, 113 Neb. 274; *In re Estate of Landon*, 98 Neb. 706; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb. 601.

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

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. AMERICAN STATE BANK, APPELLEE: WILLIAM E. FRANK, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27944.

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

Wright & Wright, for appellant.

I. D. Beynon and *Mothersead & York, contra.*

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

PER CURIAM.

At the public sale of the American State Bank building in Scottsbluff, Nebraska, a bid of $7,625 was made, objections made thereto by a depositor, and the district court on the day fixed for confirmation directed that a resale be held then and there in open court, whereupon a new bid of $9,000 was made for the said building, which was confirmed by the court. The original bidder filed objections to setting aside the original sale made by the receiver and the refusal of the court to confirm the same and appealed to this court for review.

The American State Bank of Scottsbluff, Nebraska, became insolvent in 1928. H. C. Peterson was duly appointed receiver and A. E. Torgeson was in active charge of the bank under the receiver. On December 11, 1930, upon application of the receiver, the district court entered an order directing the receiver to sell all of the remaining assets of said bank at public auction at the front door of said bank building on January 6, 1931, and notice was given by publication in the Star-Herald for three weeks. At the sale William E. Frank and Louise Frank, of Grand Island, Nebraska, were the highest bidders for the bank building, being lot 12, block 11, original town of Scottsbluff, together with the furniture and fixtures therein, consisting of all of the furniture in the bank at that time except the Burroughs adding machine, their bid being $7,625, and the auctioneer declared said property sold to them, subject to the confirmation of the court. On January 21 the receiver, in making his report of the sale to the Franks, set out that the sale had been fairly conducted and that in his opinion no higher bid could be obtained for the property, and January 26, 1931, was set as the date of hearing upon the objections to the confirmation of said sale. C. H. Westervelt, a depositor in said bank, objected to the sale on the ground that the property did not sell for its fair value and that more money could be obtained for the same. On January 24, 1931, Beach Coleman and three others made an offer to the district court to bid $15,500 for the bank building together with the notes and judgments owned by the bank, which latter had been sold to George A. Carpenter for the sum of $7,400, making the offer of the Coleman associates $475 in excess of the amounts bid at the sale by the Franks and Carpenter upon the two items, and said original bidders were directed by registered mail, sent under order of the district court, to appear on January 26, 1931, and show cause why the bid of the Coleman associates should not be accepted. On the date fixed all the parties were present and the Franks moved for a confirmation of the sale to them. At said time Coleman and his associates offered to raise their bid upon the two items to $16,000, but refused

to bid separately upon the two items. Evidence was taken and said C. H. Westervelt, when asked about the statement made by the auctioneer at the public sale, answered: "Why he made the statement that these bids would be registered and if any one wished to raise the bid they could do so with the district judge any time before confirmation. These bids were all registered; he never announced the sale or any bid; it was all registered bids."

William E. Frank, J. L. Moore, George A. Carpenter, and Herb Moore testified for the appellant that they had not heard statements made at the sale that higher bids could be made before confirmation. It is not denied that the statement was made that the bids taken at the sale were subject to the approval and confirmation by the court, and the court ordered that a resale be then and there held in court, at which time all former bidders were present in court and represented by counsel; the said Torgeson, as assistant to the receiver, reopened the sale, and J. E. Scott bid for the two items $18,201, which was an excess of $3,176 over the original bid for the building and furniture made by the Franks in the sum of $7,625, together with the bid of $7,400 made by Carpenter for the notes and judgments, which made a total of $15,025 for the first two separate bids, the high bid upon the banking house and furniture and fixtures being in the amount of $9,000. The court thereupon declared all of said items were sold to J. E. Scott for the sum of $18,201, and the court upon motion ratified and confirmed said sale. Upon said William E. Frank announcing his intention in open court to appeal from the order refusing to confirm his bid, it was ordered by the court that, upon payment of $9,201 to the receiver, assignment be made to J. E. Scott of all notes, claims and judgments, and that the said J. E. Scott be directed to pay to the receiver the sum of $1,350, or 15 per cent. upon his bid of $9,000 upon the banking house and fixtures, and that the same be held by the receiver to insure the compliance with the bid of J. E. Scott therefor, and that upon the termination of the appeal of the Franks the residue of the purchase price shall be at once due and payable. Cost bond

in the sum of $100 having been filed by the said Franks, said order of confirmation of the district court was brought to this court for review.

The appellant insists that the high bidder at a judicial sale acquires the right to have such sale confirmed, and may appeal from an order setting aside this sale, and gives as his authority *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659, which holds that an order of the district court setting aside such a sale and ordering a resale is a final order affecting a substantial right of the purchaser, from which he may appeal. This case clearly sustains the right of the appellant to bring the case to this court, and in several cases it has been held that a judicial sale 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 or to shock the conscience of the court. *First Nat. Bank v. Hunt*, 101 Neb. 743; *Frederick v. Gehling*, 92 Neb. 204; *Lindberg v. Tolle*, 121 Neb. 25. In the latter case it was said: "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."

In the sale of the assets of a failed bank, it is the duty of the receiver and of the district judge who passes upon the acts and doings of the receiver to exhaust their best efforts in securing the highest price possible for the assets of a failed bank, to the end that the depositors may secure the largest percentage possible on their deposits. It is argued that the court cannot refuse to confirm a sale made by a receiver except for fraud, mistake, collusion, or gross inadequacy of consideration, so gross as to shock the conscience of the court, and several Nebraska cases are cited in support thereof. It is also advanced in support of the position of the appellant that judicial sales lose their value and the ardor of bidders will be dampened if bidders feel that the high bid is to be considered but an offer, and that

receivers will continue after said sale to secure new bidders who will raise the bid made at the public sale.

We call attention to the case of *Saunders v. Stults*, 189 Ia. 1090, which was the sale of land at receiver's sale, and in the text we find this statement, which is very much to the point: "The appellants' contention overlooks material facts; that is, that the receiver was simply the officer or agent of the court; that this sale was not a completed sale; that it was not in the power of the receiver to make a completed sale which would bind the court to its confirmation; and that those who buy at a receiver's sale, such as we have in this case, take with knowledge of the fact that the contract of sale is not binding on the receiver until the same is presented to the court and approved by the court; that a sale such as we have here is a sale without the right of redemption." See *State Bank v. Green*, 11 Neb. 303.

In the case of *State v. Farmers & Merchants Bank*, 114 Neb. 378, this court said: "The receiver is at all times an officer of the court, subject to its orders and directions, an agent, the scope of whose authority is limited by law. *State v. Bank of Hemingford*, 58 Neb. 818; 23 Cyc. 1065. Thus every one dealing with such receiver knows of the limitations, or lack of limitations, to his power to transact the business of the institution. He cannot without the approval of the court relinquish any of the rights of the trust."

In the case at bar, an offer of $7,625 had been made, and this was raised in open court at the time of confirmation to $9,000, which meant an additional sum of $1,375 could be secured for the benefit of the depositors in this bank. The high bidder at such a sale acquires certain rights which must be protected, and he is entitled to a confirmation of the sale if there is no good reason why it should not be confirmed, and the court is faced with the equities due to the one who has made this high bid on the one hand and with the rights of the depositors and the obligations of the officers in charge of the affairs of the bank on the other hand, and this court holds that the district judge, when all the parties were before him in open court, and when it was evident that more money could be received for the

depositors, acted within his rights in refusing to confirm the high bid made some days before at the public sale and in confirming the higher bid received in open court for this bank property, and the action of the district court is in all things

AFFIRMED.

ELMER DOHLIN ET AL., APPELLANTS, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLEE.

FILED NOVEMBER 24, 1931. No. 27966.

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

Max V. Beghtol, Glen H. Foe and *James L. Rankin,* for appellants.

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

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

PER CURIAM.

Elmer Dohlin and Mrs. Ellen McKinney brought suit in the district court for Lancaster county against the Dwelling House Mutual Insurance Company of Lincoln to recover on an alleged oral agreement to renew certain insurance policies upon which there was a loss. After the plaintiff's evidence was taken, the district judge directed a verdict for the defendant.

The plaintiff, Elmer Dohlin, carried fire insurance in the defendant company upon a dwelling and flour and feed building and contents, located in Palmer, Nebraska, which insurance expired in March, 1930. The plaintiff, Elmer Dohlin, claims that he applied to E. E. Johnson, a soliciting agent of defendant company, residing at St. Paul, Nebraska, to renew said insurance, which is absolutely denied by said agent. Upon April 3, 1930, the dwelling and flour and feed building were destroyed by fire. Notice of said loss was given to the said E. E. Johnson and to the de-

fendant company, but no part of said loss has been paid. The other plaintiff was named in the mortgage clause which had been attached, making the insurance in case of loss payable to her.

The defendant admitted that E. E. Johnson was its authorized agent and had solicited and received applications for insurance upon the frame building and the hatchery and the contents of the flour and feed building, which insurance was issued but had expired prior to the date of the loss in question, and that said insurance was not renewed, and that no policies of insurance were outstanding on the date of the fire and that defendant was not liable for the loss that occurred.

The evidence discloses that a special agent of said company examined the property insured in March and advised the company not to renew the policies as the risk was undesirable. The agent, Johnson, testified that he had been working for the defendant company for some ten years, and that during that time he had solicited and received applications for insurance, which he sent in to the company, and all policies of insurance were written by the company in Lincoln, and usually returned to him, and he delivered them and collected the premium. He testified positively that after delivering the policies and collecting the premiums thereon, which policies had expired prior to the fire, that he had never again talked with Mr. Dohlin regarding insurance until after the fire, and that Mr. Dohlin had never told him that he wanted the policies renewed; while, on the other hand, Mrs. Ellen McKinney testified that when Mr. Johnson was there he stated in her presence: "I always take care of renewals, unless otherwise ordered I will take care of your renewal."

In January of 1930, Mr. Dohlin wrote Johnson a letter in regard to a slight change in the tenancy of the building, which letter was forwarded to the defendant company at Lincoln and an answer made by Frank Mills, secretary, in which he uses this language: "Replying to the letter from Mr. Elmer Dohlin, regarding the change in occupancy

of the old restaurant building, that will not make any difference in the insurance, and when we renew these policies in March we will make the change accordingly."

It is contended by the appellant that this was a promise to renew these policies over the signature of the secretary of the company, but the statement, "when" we renew these policies, may mean "if" we renew these policies, or "provided" we renew these policies. *Van Brunt & Wilkins Mfg. Co. v. Kinney,* 51 Minn. 337; *State v. Huston,* 21 Okla. 782; *Atlantic Coast Line R. Co. v. Jones,* 132 Ga. 189.

The contention of the appellants that the agent, Johnson, promised to renew the policies when they expired would not necessarily bind the defendant company, for "where the agent of an insurance company undertakes to act for and on behalf of the assured, as to such acts, he is to be regarded as the agent of the assured and not of the company." *Parker v. Knights Templars & Masons Life Indemnity Co.,* 70 Neb. 268.

All parties knew that the policies must be written in the home office at Lincoln, and that Johnson, the agent, had no apparent authority and was not authorized to make a contract of renewal of the policies upon said property. *Bridges v. St. Paul Fire & Marine Ins. Co.,* 102 Neb. 316.

There was no policy of insurance in force with the defendant company at the time of the fire. Such policies expire according to their terms, and the district court was right in sustaining the appellee's motion for a directed verdict in this case, and the judgment of the district court was right and is

AFFIRMED.

HATTIE STUMPFF V. STATE OF NEBRASKA.

FILED NOVEMBER 24, 1931. No. 28032.

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

J. H. Grosvenor and *Garlow & Long,* 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.

PER CURIAM.

In this case Hattie Stumpff, plaintiff in error, was convicted of unlawful and felonious possession of intoxicating liquors "on or about the 3d day of January, 1931." In this error proceeding she presents to this court six questions, all of which, in view of the evidence before us, we answer in the affirmative.

We are convinced that the verdict of guilty returned by the jury in the instant case, in view of this record, may not be adversely affected by a verdict in a distinct and separate trial finding plaintiff in error's husband, Alfred William Stumpff, guilty of illegal possession of the "same intoxicating liquors," though such verdict be wholly based "on the identical evidence" on which Mrs. Stumpff was found guilty in the instant case. Nor can we admit the contention on behalf of Mrs. Stumpff that the fact that the premises on which the liquors were found at the time of the commission of the offense were the homestead of herself and her husband, Alfred William Stumpff, and in which both were then residing, requires the acquittal of Mrs. Stumpff of the charge of which she was convicted.

To the contrary, it is admitted that the legal title to the real estate comprising this homestead was, at all times, in Mrs. Stumpff. It is undenied that on the 3d day of January, 1931, the date of the alleged offense, just prior to the service of the search warrant embracing this home in its description, two persons had been served with intoxicating liquor in this house, and had paid for the same. Mrs. Stumpff, plaintiff in error, was present at this transaction. True, the persons thus served with liquor "do not remember" whether they were served this time by the husband or the wife. It is unquestioned in the record, however, that they laid 35 cents on the table for some one for what

they then received. There is evidence in the record that in the previous October, and within the period of the statute of limitations, one of these witnesses had purchased similar liquor from plaintiff in error and paid her for it. It also appears that when the officers entered this home on the 3d day of January, in serving the search warrant, Mrs. Stumpff was just inside the door near where they entered, and from this place "she went back in the room toward the closet or sink;" and at this time she picked up a jug containing intoxicating liquor. It was then taken away from her by the officers. Without quoting the evidence further at length, it may be said that, while her counsel now contends this act of actual possession of the liquor was wholly due to the excitement of the occasion, still the evidence is such that we cannot say, as a reviewing court, that the jury were not justified in the conclusion of fact that it was an attempt made by Mrs. Stumpff to assist her husband in his illegal business, and for that purpose make away with incriminating evidence. In this light Mrs. Stumpff's act would amount to a plain attempt to aid and conceal the illegal possession of her husband, if we accept the contention of Mrs. Stumpff to be true that it was her husband's liquor and not her own. However, the finding of intoxicating liquor on the premises owned by her created the presumption of unlawful possession. This is not changed or obviated by the fact that husband and wife are occupying the same house. *Grosh v. State,* 118 Neb. 517.

Even if we accept plaintiff in error's contention that the intoxicating liquors, which were discovered by the sheriff and his posse situated in her house on the 3d day of January, 1931, were wholly the property of her husband, still we are confronted by the fact that the inference is fully sustained by the record that on the day in question she was not only present and had full knowledge of the situation, but was actively aiding and abetting her husband in maintaining and concealing said illegal possession, especially from the officers who made the search of the premises. If this be true, then it would seem that she was

squarely within the provisions of section 28-201, Comp. St. 1929, which reads as follows: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." *Jahnke v. State,* 68 Neb. 154; *Dixon v. State,* 46 Neb. 298; *Williams v. State,* 91 Neb. 605. This statute applies to felonies created by subsequent legislation. *Lamb v. State,* 69 Neb. 212. Under the present statute above quoted the information in the instant case embraces and includes the view of the facts here suggested. *Scharman v. State,* 115 Neb. 109; *In re Resler,* 115 Neb. 335; *State v. Girt,* 115 Neb. 833. It would seem that in every aspect of the evidence before us it amply supports the verdict of the jury and the sentence of the court in the instant case.

We have also carefully examined the objections of plaintiff in error to the competency of the district judge who presided at the trial and find them wholly devoid of merit. The trial, verdict and sentence being in conformity with law, the conviction is in all things

AFFIRMED.

JOHN CHERPINSKY ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 24, 1931. NO. 28073.

1. **Robbery**: PROOF. The offense of robbery from the person may be established by testimony of one credible witness, if believed by the jury.
2. ———: "ROBBERY FROM THE PERSON." To constitute the crime of robbery from the person, it is not essential that the money or property be actually taken from the person of the victim. It is sufficient in that respect if it be taken from his personal presence or personal protection by force or by putting him in fear.

ERROR to the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

H. F. Barnhart and *Bernard A. Brown,* for plaintiffs in error.

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

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

PER CURIAM.

Plaintiffs in error, hereinafter called defendants, were convicted of the offense of robbery from the person, and were sentenced to imprisonment in the state penitentiary for a term of 23 years. Defendants bring to this court for review the record of their conviction.

Defendants contend that the evidence is insufficient to sustain the verdict, on the ground that they were not sufficiently identified as the perpetrators of the robbery. The following pertinent facts are established:

August Tews was the assistant manager of Paramount Publix Corporation and, as such, was a custodian of money and property of the corporation to the extent of $1,232.55, which funds were kept by him in a safe in a building in Norfolk, Nebraska. In the forenoon of the day of the robbery, the janitor of the building was attacked by two men, bound with wire, forced to go into the room in which the safe was situated, and a rain coat was thrown over his head. Shortly thereafter Mr. Tews arrived. He was also attacked and forced, at the point of pistols, held by each of the men, to enter the same room, open the safe, take therefrom the said funds, and hand them over to the robbers. The janitor testified that defendants were the persons who committed the robbery. There was other evidence to the effect that he had stated to other persons, outside of court, that he was unable to identify defendants, or was uncertain as to whether they were the persons. However, Mr. Tews was positive in his testimony and identified defendants as the robbers.

The question was one of fact for the determination of the jury. The positive testimony of one credible witness, identifying defendant as the perpetrator of a crime of this character, is sufficient, if believed, to support a conviction. *Schultz v. State,* 88 Neb. 613; *Buckley v. State,* 79 Neb. 86. The evidence was sufficient, if believed by the jury, to establish the identity of the defendants as the perpetrators of the crime.

It is contended that the verdict is contrary to law, in that it was not supported by testimony that the money was taken directly from the person of Mr. Tews. It is not essential to a conviction for robbery that the money or property be actually taken from the person of the victim of the robbery. It is sufficient in that respect if it be taken from his personal presence or personal protection by force or by putting him in fear. *Hill v. State,* 42 Neb. 503; *People v. Covelesky,* 217 Mich. 90.

In 23 R. C. L. 1142, sec. 7, it is said: "It is often stated that an essential and distinguishing characteristic of robbery is the fact that the felonious taking must be from the person of another, but, by the great weight of authority, the words 'taking from the person of another,' as used in connection with the common-law definition of robbery, are not restricted in application to those cases in which the property taken is in actual contact with the person of the one from whom it is taken, but include within their meaning the taking by violence or intimidation from the person wronged, in his presence, of property which either belongs to him or which is under his personal protection and control. And where such words have been incorporated into statutes defining robbery, they have received the same construction. In this connection the preposition 'from' does not convey the idea of contact or propinquity of the person and property. It does not imply that the property is in the actual or immediate presence of the person. The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it. If it is away from the owner, yet under his control, for instance in another room of the house, or in another building on his property, it is nevertheless in his personal possession; and, if he is deprived thereof, it may well be said it is taken from his person. Goods are called personal property in the law, and presumed to accompany the person. If taken from the owner, this relation of owner

and property is sundered, and the goods are separated from the person, and this essential element of the offense is established."

In 54 C. J. 1015, it is said: "At common law it is not necessary that the property should be taken from the physical person of the victim, the requirement that it be taken from his 'person' being satisfied if it is taken from his 'presence.'

"The requirement of a taking from the person is satisfied by a taking from the presence under statutes defining robbery as a felonious and forcible taking from the 'person.' * * * It is not necessary that the property taken should have been in actual contact with the person of the victim."

In the present case, the money was actually taken from the person of Mr. Tews. By violence and threats he was forced to open the safe, to take therefrom, with his own hands, the money, and to hand it to defendants, or put it in an open receptacle in defendants' possession. The evidence is sufficient to show that the crime, as charged, was actually committed by the defendants.

It is further argued that the sentence is excessive, and this court is asked to reduce it in the event that a new trial is not granted. The statute provides a maximum penalty of 50 years for the offense. It is a well-known fact that criminals, engaged in committing crimes of this character, are potential murderers. Defendants were armed with deadly weapons, prepared to use and doubtless would have used them, had it been necessary to carry out their evil designs. No mitigating circumstances are shown. One of the defendants had been previously convicted of a felony. While the sentence is severe, the offense was one demanding severity of punishment. Under the facts disclosed, we are unable to say that the sentence imposed is excessive.

No error has been found in the record. The judgment is

AFFIRMED.

ISABELLA SCHMIDT ET AL., APPELLEES, V. SALINE COUNTY, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27928.

1. Taxation: REALTY: VALUATION: NET INCOME. The net income derivable from real estate, prudently used for the purpose for which it is best adapted, is a proper factor to consider in determining its actual value.
2. ———: TANGIBLE PROPERTY. While, under the statute, all tangible property should be assessed at its actual value for the purpose of taxation, if assessed at less than actual value, then all should be assessed at the same proportion of actual value.

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

John E. Mekota and *Thomas J. Dredla,* for appellant.

F. L. Bollen, contra.

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

GOOD, J.

This appeal involves the assessed valuation for taxation of certain lands in Saline county. Plaintiffs, who are the owners of 18 tracts of land situate in school district No. 68, in Saline county, complained to the board of equalization that their lands were assessed 20 to 25 per cent. higher than other lands of the same value, and higher than the lands, of like value, generally in the county and state. The board of equalization denied relief. Plaintiffs appealed to the district court, and that court reduced the assessment of plaintiffs' lands to the extent of 15 per cent. The county of Saline has appealed.

Upon a careful examination of the entire record, it clearly appears that plaintiffs' lands are not assessed for more than their actual value. It further appears that the lands in Saline county and in the state generally are assessed at not more than 70 per cent. of their actual value, and that the lands of plaintiffs are assessed at a greater proportion of their actual value than other lands in Saline county and in the state.

It was formerly the rule in this court that one could not complain that his lands were assessed too high, unless assessed at more than their actual value, and that he could not have his assessment reduced because other lands generally were assessed at less than their actual value. It was held that his only relief was to complain of the properties that were assessed too low. *Lincoln Telephone & Telegraph Co. v. Johnson County*, 102 Neb. 254; *Sioux City Bridge Co. v. Dakota County*, 105 Neb. 843. The latter case was taken to the United States supreme court on writ of certiorari and the judgment of this court there reviewed, wherein the holdings of this court were reversed (*Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 67 L. Ed. 340), following which this court overruled its former decisions and now holds that one whose property is assessed at less than its actual value may complain if it is assessed at a higher proportion of its actual value than other property in the state. *Sioux City Bridge Co. v. Dakota County*, 110 Neb. 597.

The principal controversy here is with reference to the cause which affects the value of plaintiffs' lands. It appears that for many years school district No. 68, in Saline county, has levied a tax, for school purposes, running from 14 to 17 mills annually on the dollar of assessed valuation, and that a like levy will be necessary and will continue in said district for years to come. It also appears that the tax levy for school purposes on lands of the same character and quality, situate outside of and adjacent to the district, is from 4 to 5 mills on the dollar of assessed valuation. This has resulted in imposing a tax on an average quarter section of land within district No. 68, for several years last past, of about $350 per annum, while on a quarter section of land of the same quality and character, lying adjacent to but outside the district, the tax is about $175 per annum. This situation has caused a decrease in the actual value of the lands within the district, for sale and loan purposes, of 20 to 25 per cent.

It is earnestly and strenuously contended by the defend-

ant county that the question of school taxes cannot be taken into consideration in fixing the value of the lands; that the value of lands within the district, of the same quality and character as those immediately without and adjacent thereto, should be assessed on the same basis. We cannot agree with this contention.

Section 1, art. VIII of the state Constitution, is in part as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises." It will thus be seen that taxes must be uniformly and proportionately levied upon property on the basis of valuation.

Section 77-201, Comp. St. 1929, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Pursuant to this statute, all tangible property should be assessed at its actual value for purposes of taxation, but, if tangible property is generally assessed at less than its actual value, then all of it should be assessed at the same proportion of its actual value.

In 26 R. C. L. 365, sec. 322, it is said: "By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied."

It is urged by defendant county that the value of the land should be determined by the fact that the land within the district will produce as much in crops as land of the same character without the district. This, however, calls for the application of the gross income principle in determining the value. The better rule and the one generally recognized is: "If the property is devoted to the use for which it was designed, and is in a condition to produce

its maximum income, one very important element for ascertaining its present value is the net profits derived therefrom." 26 R. C. L. 367, sec. 324. See, also, note to *Wells Fargo & Co. v. Johnson,* L. R. A. 1916C, 529, 532; 3 Cooley, Taxation (4th ed.) 2308, sec. 1146.

In *Railroad & Telephone Cos. v. Board of Equalizers,* 85 Fed. 302, it was held, in effect, that, under a constitutional provision requiring that all property shall be taxed according to its value, the earnings of railroad and telephone companies may be considered in determining the value of the property for purposes of taxation, but earnings of such companies furnished a safe basis on which to estimate values only when net earnings are considered. Gross receipts do not constitute a proper basis for determining the value of such companies.

The same principle is applicable to real estate prudently used for the purpose to which it is best suited and adapted. The lands in question are agricultural and are used for that purpose. The net income which they will produce to the owner is a factor in determining their actual or market value. The fact that a tract of land is subjected to an annual burden of $350 for taxation, while another tract, of like character and quality, lying adjacent thereto, is subjected to an annual burden of but $175 for taxation, has a tendency to, and no doubt does, affect the respective market or actual value of the two tracts. The one having the greater burden produces the smaller net income and, naturally, would be of less market value. Since taxes must be levied according to actual value, the taxing authorities are only concerned in determining what the actual value is, regardless of the causes which produce it, and to see that taxes are levied proportionately, according to the actual value, on all property.

The record justifies the reduction made by the district court in the assessment of plaintiffs' lands, and the judgment is

AFFIRMED.

EBERLY, DAY, and PAINE, JJ., dissent.

PAINE, J., dissenting.

I desire to state the reason for my dissent from the opinion of the majority of this court.

The appellees are the owners of 18 parcels of farm land within the school district of Friend, Nebraska, also known as school district No. 68. The school levy in this district during the past few years, of 14 to 15 mills, required to pay for the excellent schools in that school district, is very much higher than the 4 or 5 mills levied upon adjoining farm land by rural school districts. It is contended that the owners of this farm property derive no benefit from the superior school advantages afforded in this school district. Yet, a school district has the right to fix the levy of taxes for school purposes upon all the property within its boundaries. And it may be granted that for such taxes it may render little or no return to the owners of this rural property, upon the same principle that every citizen is required to pay school taxes upon his property to the same extent, whether he has children attending school or not. 26 R. C. L. 38, sec. 23.

The assessing authorities are required to make valuation once in four years of all real estate as of April 1 (Comp. St. 1929, sec. 77-1601) and such authorities can have no information at that time of the amount of tax which will later be levied for a particular school district. It will be supposed that the taxes of the previous year have all been paid prior to the first Monday in June, when the county board meets as a board of equalization to equalize valuations as of April 1 preceding. The relief demanded by the appellees, i.e., that the valuation upon their farms be reduced 20 to 25 per cent. because of their school taxes, in effect asks the county board of equalization to reduce the valuation of their lands as of the date of April 1 because of the fact that the necessary school taxes of district No. 68, which are certified to the county clerk on or before the first Monday in July (Comp. St. 1929, sec. 77-1803) will show that a levy of 14 to 15 mills will be required for that year, and no one can know what the school levy may be for the following three years of the valuation period.

Upon a hearing before the county board of equalization, the appellees were refused relief upon July 14, 1930, and the valuation of their farm lands was not reduced because it happened to be located in the school district of the city of Friend and thus subjected to high taxes for school purposes.

It may be presumed the appellees demand this relief upon the theory that such school district taxes constitute, in effect, an incumbrance which diminishes the actual sale value of their lands, yet the law has been definite that no owner is allowed to deduct any incumbrance from the value of his real property except such as may be allowed by statute, and by special enactment, section 77-1502, Comp. St. 1929, it is provided that the value of outstanding real estate mortgages shall be deducted and paid by the mortgagee, but I can find no mention in the statute of allowing a deduction because the school taxes in a certain district are continuously higher than in an adjoining district.

If the school tax burden upon real estate in this district is so heavy as to decrease its sale value, can this not be easily remedied by having the officers of this district adopt more economical plans for the administration and conduct of their public schools, rather than to reduce the valuation of this farm land 15 per cent., thus cutting down the state and county taxes paid thereon? If farm property lying within this school district is to have its valuation reduced, why should not town property similarly affected be likewise reduced? Is this to be a precedent for reducing values in all highly taxed school districts in this state?

The Constitution, art. VIII, sec. 1, says that state taxes shall be levied by valuation uniformly and proportionately upon all tangible property. Does this opinion not violate this provision as to farm lands within and without this district, and release the farm land within the district from paying its proportionate share of state taxes by this reduction of 15 per cent. of its valuation?

A case not directly in point, but bearing thereon, is *Donovan v. City of Haverhill*, 247 Mass. 69, in which it

was held that the fact that long-term leases carry rent which reduce the market value of the property below what it would be in their absence does not prevent the assessment of the property for taxation at its full value, as compared with other property in the neighborhood, or what it would be if free from the leases.

In the opinion of Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 28 A. L. R. 979, he says, toward the close of the opinion, that there must be something which, in effect, amounts to an intentional violation of the essential principles of practical uniformity. If the farm property in this district is fairly and uniformly taxed, the mere fact that adjoining farm property lies in rural districts which do not care to maintain expensive schools does not violate Judge Taft's pronouncement.

In the recent decision of this court in *Meridian Highway Bridge Co. v. Cedar County*, 117 Neb. 214, this court, speaking through Chief Justice Goss, said: "We are loath to interfere with the sound discretion reposed in boards of equalization to value real property at its actual value. Where the action of such a board does not appear to have been exercised arbitrarily nor to have omitted to take into consideration the proper and necessary elements to be considered in fixing the value, its action ought not to be disturbed. Here the valuation might have been rather high for the particular year, and yet we do not feel disposed to find, on what evidence was submitted to us, that it was. We think the proper rule is that the sound discretion reposed in the board of equalization to hear complaints and determine on the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon."

It is suggested that the county board of equalization of Saline county gave every phase of this question the most careful consideration, and that its action in this matter should not be disturbed.

VIVIAN I. MAYFIELD ET AL., APPELLEES, V. NORTH RIVER INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27899.

1. Insurance: FORM OF POLICY: STATUTE. The adoption of our insurance code of 1913 (Comp. St. 1929, ch. 44) evidences the legislative intent that the provisions of the New York standard form of fire insurance, as then existing and as then construed by the courts of that state, should be adopted as the basis of the Nebraska insurance contract, expressly subject, however, to all other provisions contained in such insurance code which are inconsistent with or modify the provisions of such New York standard form.
2. ———: POLICY. By construction section 44-322, Comp. St. 1929, is to be regarded, in legal effect, incorporated in and forming a part of the policy in suit.
3. ———: ———: BREACH. Under the statutes of Nebraska, the violation of the conditions or the breach of the warranty in a fire insurance policy expressed in the words, "while located and contained as described herein, * * * and not elsewhere," by the removal of the property insured from the place described in the policy, does not invalidate the insurance contract, unless such breach of contract contributed to the loss. Comp. St. 1929, sec. 44-322.

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

Montgomery, Hall, Young & Johnsen, for appellant.

F. A. Hebenstreit and *J. C. Mullen, contra.*

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

EBERLY, J.

This is an action at law on a policy of fire insurance. It was concededly issued by the appellant, hereinafter designated as defendant, to the appellees, hereinafter referred to as the plaintiffs, doing business as a partnership under the name and style of Richardson County Hatchery. Its terms insured the copartners "against all direct loss or damage by fire, * * * to an amount not exceeding Fifteen Hundred ($1,500) Dollars (for a definite period), to the

following described property while located and contained as described herein, and not elsewhere, to wit: $1,500 on stock of merchandise * * * all only while contained in the one-story, metal roof, ironclad building, occupied as a Hatchery and Poultry Supply Store, situated on lots 23 and 24, block 90, of Falls City, State of Nebraska."

It was alleged in plaintiffs' petition that on or about the 1st day of July, 1929, the plaintiffs removed the stock insured from the location as above described to a building located on lot 12, block 221, Falls City, "with the full knowledge, oral authority and consent of the defendant company by and through its agent, C. A. Johnson, and at which place" the property covered was thereafter totally destroyed by fire.

The defendant company's answer contained, first, a general denial; second, admitted the execution of the policy of insurance in suit; quoted the language of the description hereinbefore set forth; denied the authority of its agent to waive any provision of the policy except in writing; and further alleged that the fire involved in this action was "not at the location covered by the policy, and defendant is not liable for any loss which may have resulted therefrom."

To this the plaintiffs filed a reply which, in addition to a denial of the new matter contained in the answer, set forth additional facts which they allege amounted to an estoppel.

By agreement a jury was waived and the case was tried to the court, which resulted in findings and judgment for the plaintiffs as prayed. From an order overruling defendant's motion for a new trial this appeal is prosecuted.

Defendant in this court challenges the sufficiency of the evidence, and alleges that the district court erred "in failing to hold, as a matter of law, that the policy provision (heretofore quoted) constituted a coverage condition or risk limitation, which, in the absence of an express consent equivalent to the making of a new contract, covered the property only at the location described in the policy."

From the foregoing it is evident that the determining words in this controversy are, "the following described property while located and contained as described herein, and not elsewhere, to wit:" and, "all only while contained in." Considered without reference to context, these provisions constitute an essential part of, and are identified with, the New York standard fire insurance policy form. Of this policy form this court has said: It is "a definite and well-known form of contract. Its characteristics, terms and conditions are known and recognized by the legislature of New York and other states, and are familiar to all carrying on the business of fire insurance." *State v. Howard,* 96 Neb. 278, 287.

It may be said in addition that this standard form, first enacted substantially by the legislature of New York in 1886, has, with passing time, received a definite and settled judicial construction by the courts of New York. This is especially true as to the controlling words hereinbefore quoted. Thus in 1894 we find the following language employed in *Bahr v. National Fire Ins. Co.,* 80 Hun (N. Y.) 309: "The action was to recover $200, the insurance on a carriage * * * 'while located and contained as described herein, and not elsewhere, to wit: * * * while contained in the frame building (here follows the precise description).' The carriage was burned in a livery stable and horse shoeing shop, * * * a block and a half away from the place named in the policy. This judgment cannot stand. The location of the insured property was a warranty, a breach of which avoided the policy. *Bryce v. Lorillard Fire Ins. Co.,* 55 N. Y. 240." This construction has continued unchanged to the present time. In *American Surety Co. v. Patriotic Assurance Co.,* 242 N. Y. 54, 63 (January, 1926), we find the New York court of appeals adhering to the view thus expressed, and employing the following language: "The provisions of the New York standard fire insurance policy of which we may take judicial notice provide that the insurer insures against damage by fire to the property described in the policy 'while located and con-

tained as described herein * * * but not elsewhere.' The description is a warranty, the truth of which is a condition precedent to any liability on the part of the insurer. *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; *Bahr v. National Fire Ins. Co.*, 80 Hun, 309; *London Assurance Corporation v. Thompson*, 170 N. Y. 94."

Thus, it must be conceded that under the terms of the New York standard fire insurance policy form, as construed by the courts of that state, unmodified by legislation, the controlling words of this policy in suit must be deemed a warranty, the truth of which at the time of this loss is a condition precedent to recovery thereon.

It would appear, however, that the legal effect of the language quoted, assuming its character as a warranty in the technical sense of that term to be unquestioned, has been in legal effect modified by Nebraska legislation. In 1913 the legislature of that year adopted an insurance code which appears as chapter 154, Laws 1913. It was approved April 18, 1913. It was passed for the purpose of providing "for the organization and government of insurance companies and to regulate, supervise and control the business of insurance in Nebraska," etc. The provisions of this enactment with amendments thereto are now carried as chapter 44, Comp. St. 1929. This legislation provided in part: "No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on a form prescribed by the department of trade and commerce as nearly as practicable in the form known as the New York standard as now or may be hereafter constituted, except as follows." Comp. St. 1929, sec. 44-601. The proper construction of this insurance code was determined by this tribunal in the case of *State v. Howard*, 96 Neb. 278. In that opinion it was expressly determined that "that portion of the section referred to which provides that the New York form shall be used as it 'may be hereafter constituted' is invalid;" but "that it was the intention of the legislature that the New York form should be adopted as the basis of the in-

surance contract, and that the words 'as nearly as practicable' should be construed to mean 'as nearly as practicable' considering all other provisions contained in the insurance code which are inconsistent with or modify the provisions of the New York standard form."

In this connection it is also to be noted that on this subject, and with special reference to section 44-601, Comp. St. 1929, this insurance code expressly provides: "A policy issued in violation of this article shall be held valid, but shall be construed as provided herein, and when any provision in such a policy is in conflict with any provision hereof, the rights, duties and obligations of the company, policy holder and the beneficiary shall be governed by the provisions of this article." Comp. St. 1929, sec. 44-608. It was also determined in the case last cited that, in the preparation of a form as required by such section 44-601, the duties enjoined thereby on the department of trade and commerce were "ministerial or administrative, and not legislative, and the section imposing the duty is not an unconstitutional delegation of legislative power."

The New York standard form of fire insurance at the time of the adoption of the Nebraska insurance code existed solely by virtue of a New York statute. The adoption of the New York form as the basis of the Nebraska insurance contract was in effect the adoption of the New York enactment. This situation renders proper and requires the application of the rule of construction that, where the legislature adopts the statute of another state, judicial construction which it has already received in such state is also adopted. *Coffield v. State,* 44 Neb. 417; *White v. State,* 28 Neb. 341; *Forrester v. Kearney Nat. Bank,* 49 Neb. 655; *Goble v. Simeral,* 67 Neb. 276; *Gentry v. Bearss,* 82 Neb. 787; *State v. Martin,* 87 Neb. 529. The authorities above enumerated support the view that this court is committed to the doctrine that the rule of construction applied in the cases referred to is proper to be applied in the interpretation of the controlling provision of the policy in suit, which we have already quoted, excepting only where such pro-

visions in the policy are necessarily repugnant to the insurance code provision enacted for the purpose of modifying the provisions of the New York standard insurance form. It necessarily follows that the language of the policy in suit, including the words which are quoted at the commencement of this opinion and on which the defendant bases his defense, must be construed as a technical warranty and given the same effect as accorded by the courts of New York, except in so far as such construction may not be in harmony with other provisions of our insurance code "which are inconsistent with or modify the provisions of the New York standard form." *State v. Howard*, 96 Neb. 278. In this connection section 44-322, Comp. St. 1929, becomes important. It reads as follows: "No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." In the interpretation of the statutory provision just quoted this court in *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, by Rose, J., said: "These provisions are by construction a part of the policy. * * * The legislation must be considered as a whole. To the enactment in the first sentence on the subjects of misrepresentation and warranty in preliminary negotiations, the second sentence adds a provision on the existence of breach of condition in the policy itself. The statute declares that the breach of a condition in the policy shall not avoid it, 'nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss.' "

In *Westchester Fire Ins. Co. v. Norfolk Building & Loan*

Ass'n, 14 Fed. (2d) 524, the circuit court of appeals of the eighth circuit, in construing the statutory provision now under consideration, employed this language: "This provision of the Compiled Statutes of Nebraska constitutes a part of the insurance contract. *Home Fire Ins. Co. v. Weed*, 55 Neb. 146; *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194; *McPhee v. Millers' Nat. Ins. Co.*, 198 Mich. 215. There is no evidence in the record tending to show that any purported change in title by reason of the foreclosure proceedings contributed in any way to the loss, and it has been held by the supreme court of Nebraska in construing the uniform Nebraska fire insurance policy that a breach of conditions in a fire insurance policy does not invalidate the insurance policy unless the breach of conditions contributed to the loss. *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126. This construction of a Nebraska statute by the highest court of the state is binding upon the federal court."

So by this rule of construction section 44-322, Comp. St. 1929, is to be regarded as, in legal effect, incorporated in and forming a part of the policy in suit. We therefore still regard the words of the policy in suit, upon which the defendant bases its defense, as in the nature of technical warranties as denominated by the courts of New York. Even so, they must be deemed modified as to force and effect by the statutory proviso providing that breach thereof "shall not avoid the policy * * * unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." It is to be noted also that the existence of the breach of warranty at the time of the loss and its contribution to the loss must concur or coexist as a prerequisite to avoiding the policy. This conclusion the Nebraska cases fully sustain.

Indeed, while the facts which were involved did not present the precise question for determination here, nor was the language of the policy in suit identical with the policy now before us, still in view of section 44-608, Comp. St.

1929, the words of the fourth paragraph of the syllabus in *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, express the exact principle controlling in the instant case, and, as a precedent, is binding on this court. In the case last referred to this court, in a unanimous opinion, construing what now appears in the Compiled Statutes of 1929 as section 44-322, announced the unanimous conclusion of the court that, "Under the statutes of Nebraska, the violation of a condition in a policy of insurance on live stock, by the removal of insured chattels from premises of owner, does not invalidate the insurance, unless such breach of contract shall exist at the time of the loss and contribute to the loss."

As to waiver and estoppel, on which plaintiffs in part rely, the evidence in the record, if believed, establishes that, after the removal of the insured stock from the place described in the policy to the place where it was subsequently destroyed by fire, the local recording agent of defendant was in and through the entire building in which this stock was then contained, saw and inspected the building, and had personal knowledge of the removal of the stock; that he was expressly informed by plaintiffs that the entire insured stock had been removed from the old location to the new one; and also that negotiations were had with him based on the fact that upon the arrival of certain newly purchased property additional insurance would be wanted by plaintiffs in the new location. It may fairly be said that, assuming the evidence in behalf of the plaintiffs to be true, this agent of the defendant, long prior to the fire, knew or should have known that the assured had not only removed their stock from the old to the new location, but were proceeding on the belief, engendered by transactions had with such agent, that the insurance had been likewise transferred and covered the stock in the new location. At this point we do not overlook the defendant's contention that no legal waiver or transfer of insurance under the terms of the policy were effectual until indorsed in writing upon the same. Nevertheless this court is committed to the doctrine that notice to a local agent of insurer who has

authority to issue the policy is notice to the insurer. *Hunt v. State Ins. Co.*, 66 Neb. 125; *Echols v. Mutual Life Ins. Co.*, 106 Neb. 409; *Arendt v. North American Life Ins. Co.*, 107 Neb. 716; *Cooper v. German-American Ins. Co.*, 96 Minn. 81; *Cummings v. National Fire Ins. Co.*, 251 Mich. 105. The defendant, therefore, was chargeable with the knowledge possessed by its agent of the real situation with reference to the risk prior to the fire that destroyed the property in question. So, too, the business of insurance was and is "public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business." Comp. St. 1929, sec. 44-101. But whether the facts established by the evidence are sufficient to show a legal waiver or binding estoppel we need not determine. It must be conceded that the record as an entirety fails to establish that the removal of the stock from the old to the new location, of which the insurer had imputed knowledge long prior to its destruction, in any manner contributed to the loss. This, in view of the express terms of the statute, is vital.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

ANTON A. TRESNAK, APPELLANT, V. JOHN J. PAULSEN ET AL., APPELLEES.

FILED NOVEMBER 24, 1931. No. 27950.

1. Payment: APPLICATION: ESTOPPEL. Where a debtor, with knowledge that certain payments were credited on his chattel mortgage debt and not on real estate mortgage instalments owed by him, accepts the benefits of these credits over a period of years, renews his chattel mortgage, less the credits, and, with knowledge for several years that amortization assignments were being taken for liens upon his real estate for said payments, makes no complaint or objection until the creditor has sold and

transferred his chattel mortgage debt, as so reduced, and parted with all security he had given therefor, *held*, that said debtor has ratified said transaction and is estopped to deny the propriety of the application of his payments and to deny the validity of the creditor's liens on his real estate for the real estate mortgage instalments.

2. ———: ———. Where payment made has been credited to a particular note, and that note subsequently renewed by a payer in reduced amount, payer cannot subsequently insist that payment was applied contrary to his directions.

APPEAL from the district court for Wayne county: DE WITT C. CHASE, JUDGE. *Reversed, with directions.*

Fay H. Pollock, for appellant.

Davis, Hendrickson & Davis and *John Gross, contra.*

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

BEGLEY, District Judge.

Action to foreclose seven assignments of interest amortization instalments on a mortgage held by the Federal Land Bank of Omaha, Nebraska, and assigned to the Surety National Farm Loan Association, and by it in turn assigned to the Dodge Agricultural Credit Association, which association claimed the right to these amortization instalments by subrogation.

Defendant, John J. Paulsen, and wife, mortgagees, filed an answer and allege that they furnished the money by which these amortization interest instalments were made and that same should not have been assigned and denied right of subrogation. The reply was a plea of ratification. The trial court dismissed plaintiff's petition and the plaintiff has appealed.

The evidence discloses that defendant, John J. Paulsen, prior to December 5, 1923, was the owner of 232 acres of land in Wayne county, Nebraska, and negotiated a Federal Land Bank mortgage loan thereon of $19,000; same being an amortized loan upon which semiannual instalments of $617.50 became due on February 1 and August 1 of each

year, commencing August 1, 1924. These instalments included interest and a payment upon the principal. At the time of securing this mortgage loan, the First National Bank of Wayne held a first mortgage lien on the premises for the sum of $9,500, but released its lien and refiled same to permit the Federal Land Bank loan to become a first lien. The First National Bank of Wayne, by cross-petition, asked a foreclosure of its lien, which was granted by the trial court and same held to be a first lien on the premises.

After the commencement of this suit the Dodge Agricultural Credit Association was declared a bankrupt and Anton A. Tresnak, trustee, was substituted as plaintiff.

Under the Federal Farm Loan Act, the Federal Land Bank is impowered to make first farm loan mortgages through Farm Loan Associations, organized thereunder, and this loan was negotiated through the Surety National Farm Loan Association, and said association in writing guaranteed the payment of the note both as to principal and interest. Under the law, these associations cannot make second or third farm loan mortgages or chattel mortgage loans, but such loans can be made by Agricultural Credit Associations, provided for in the Federal Farm Loan Act. The same set of officers and directors which represented the Surety National Farm Loan Association organized the Dodge Agricultural Credit Association as a separate corporation entity to care for this class of loans.

At the time of making the Federal Land Bank mortgage, Paulsen needed additional funds, and borrowed from the Dodge Agricultural Credit Association approximately $5,500, giving his note and chattel mortgage security therefor. He afterwards renewed his chattel mortgage and notes, and from time to time borrowed other money, giving notes and mortgages therefor in different amounts. Paulsen made his payments in rather irregular amounts to John H. Roper, who was managing officer of both last two named associations. Roper credited the amounts paid to the indebtedness of the Dodge Agricultural Credit Association and mailed a check from the Surety National

Farm Loan Association to the Federal Land Bank in payment of the instalments due on the Paulsen mortgage in accordance with its guarantee, and took back from the Federal Land Bank these amortization assignments to said association for the same, and same were duly recorded against Paulsen's land. Paulsen had knowledge of these transactions and in writing authorized the assignment to be made to the Dodge Agricultural Credit Association for the payments of August 1, 1925, and February 1, 1926. In 1927 the Surety National Farm Loan Association in writing assigned four of these assignments, then held by it, to the Dodge Agricultural Credit Association, which gave Paulsen credit for the same on his chattel indebtedness and returned to him his notes and chattels of that value. Paulsen accepted such credits upon his notes and chattels and gave a renewal note for the increased amount. Thereafter the Dodge Agricultural Credit Association for a valuable consideration sold and transferred Paulsen's said indebtedness to the West Point National Bank, which now holds the same. Thereafter the Dodge Agricultural Credit Association advanced the money for payment of three more interest instalments and the same were in like manner assigned to it without any payment being made therefor by Paulsen.

Paulsen now contends that he expressly directed Roper to apply the money paid on his Federal Land Bank mortgage indebtedness and that Roper disobeyed instructions by crediting same to the chattel mortgage indebtedness. The record discloses that only on two instalments was such direction given, and these are not claimed as assignments by the plaintiff. On all the assignments that credit was given Paulsen on his chattel indebtedness, he accepted the same and has not offered to return the money thus received. Paulsen also claims that there are some dividends due him which are not accounted for, but James R. Hanson, an expert accountant, testified that he had examined the books of appellant association and that all money had been accounted for and full credit given on appellees' chattel indebtedness and that no fraud was discovered on the books of the association.

Where no direction is given by a debtor for the application of payments, a creditor may apply payments where he desires. *Lenzen v. Miller,* 53 Neb. 137. If the debtor has given specific direction as to where to apply the payments, the creditor is in duty bound to apply the payments in accordance with such direction, unless the debtor, with full knowledge of all the facts, adopts the transaction and accepts the benefits of such payment without complaining. 2 C.J. 696; 48 C.J. 654; 21 R.C.L. 89, sec. 94; *Johnston v. Milwaukee & Wyoming Investment Co.,* 49 Neb. 68.

In this case Paulsen, with knowledge that his payments were credited on his debt to the Dodge Agricultural Credit Association and not on his real estate mortgage instalments, by accepting the benefits of these credits over a period of years, renewing his chattel mortgage less the credits, with knowledge for several years that amortization instalments were being taken for liens upon his real estate, and by his acts and conduct over a period of several years without objection or complaint, until the the Dodge Agricultural Credit Association had sold his chattel mortgage as so reduced, and parted with all security he had given it, thereby acquiesced in the application of the payments and the taking of amortization liens, ratified same, and became estopped to deny the propriety of the application of his payments or to deny plaintiff's liens on his real estate for the instalments.

The appellant, by taking these assignments with the knowledge and in one instance under the express written direction of the appellee Paulsen, and allowing the credit to be made on Paulsen's chattel indebtedness, is entitled to be subrogated to the payment of said instalments and is entitled to a foreclosure of same as a first lien. The appellee, First National Bank of Wayne, having only a lien subject to the Federal Land Bank, is entitled to a second lien and cannot complain of the priority of the appellant's lien.

The decree of the district court is therefore reversed and the cause remanded, with directions to enter a decree of

foreclosure, awarding the appellant a first lien upon the premises described, as prayed for in the petition, and awarding the First National Bank of Wayne a second lien upon said premises.

REVERSED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. PETERS NATIONAL BANK, APPELLEE.

FILED DECEMBER 11, 1931. No. 27996.

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

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

I. D. Beynon, Battelle, Travis & Strehlow and *F. C. Radke,* for appellant.

Rose, Wells, Martin & Lane, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This action, originally instituted by the Citizens State Bank of Superior, Nebraska, against the Peters National Bank of Omaha, was based on the allegations that the latter bank, entrusted with a draft for collection on or about the 18th day of May, 1927, had wrongfuly and negligently and carelessly failed to notify the plaintiff of the nonpayment of said draft until the 3d day of June, 1927, whereby, because of such delay, the original drawers of said draft were permitted to check out their account with plaintiff, and thus prevented plaintiff from reimbursing itself for the amount theretofore advanced by plaintiff bank thereon to the drawers thereof. After the commencement of the action, the insolvency of plaintiff was judicially determined, and Clarence G. Bliss, as receiver, was substituted for it. There was a trial to the court, a jury being waived, which

resulted in a finding by the court generally in favor of defendant and against plaintiff, and specifically "no want of due diligence on part of defendant." This was followed by judgment of dismissal. From an order overruling his motion for a new trial, the receiver appeals.

This litigation arises out of a note brokerage transaction. The "Bankers Service," hereinafter referred to, is a trade name employed by one A. L. Geiselman, then engaged in dealing with negotiable instruments at Omaha. On May 17, 1927, Elliott and Myers, grain dealers at Superior, Nebraska, were desirous of obtaining a loan. Accordingly on that day they executed, as parts of a single transaction, three separate instruments in writing, viz., a promissory note in usual form, payable three months after date to A. L. Geiselman, or order; a "warehouse and grain receipt" reciting that there had been by them "received in store for A. L. Geiselman * * * twenty-five hundred bushels of No. 2 hard wheat," which instrument also contained the stipulation, "that this warehouse receipt attaches to and becomes a part of a promissory note * * * and is given as security for the attached note;" also a draft in the sum of $2,450 "for note and receipt attached, at sight pay to the order of Citizens State Bank, Superior, Nebraska," and directed to "Bankers Service, 218-222 Brandeis Theatre Building, Omaha, Nebraska, c/o Peters National Bank," as drawee. The three instruments referred to, fastened together, were by Elliott and Myers deposited "for collection" with the Superior bank. This bank indorsed the draft, and transmitted the three instruments to the Peters National Bank, with a letter of advice, which, setting forth the inclosure of the draft drawn on the Bankers Service "through you," directed that the proceeds thereof, when collected, be transmitted to the American National Bank "for our use." The evidence of the plaintiff is that the Superior bank credited Elliott and Myers' checking account, and thereafter permitted withdrawals therefrom to be made by that firm. However, it is not claimed that the Peters National Bank had any notice or knowledge of this additional

transaction. The evidence in the record on behalf of the defendant bank is that immediately on receipt of the draft they attempted to present it at the office of Mr. Geiselman, but were unable to do so because the latter "was out of town." However, immediate acknowledgment of the receipt of the draft was made to the Superior bank, and that bank notified of the absence of Mr. Geiselman, the drawee. Thereafter daily efforts were made to present the draft, which were continued without success due to the absence of the drawee. On or about the 1st day of June following, on receipt by the Superior bank of the monthly reconcilements from the American National bank, it was discovered by the Superior bank that the proceeds of the draft had not been transmitted to that institution as directed by the letter of advice.

On the 3d day of June the Superior bank telegraphed the Peters National Bank in reference thereto, and received a prompt reply that the draft was then unpaid. On June 13 the Superior bank by letter instructed the Peters National Bank: "If our collection Elliott and Myers * * * May 17th, has not been paid, present again and insist on immediate payment." On the 17th of June, at the first opportunity, the draft was presented and payment was demanded of the drawee named therein, and by him unconditionally refused. All papers were then on that day returned to the sending bank. It may fairly be said that the record before us justifies the conclusion that the warehouse receipt was fraudulent, inasmuch as it was later discovered that the grain described therein was not in storage when the receipt was issued. However, the rule applicable to the situation seems to be: "An agent to collect a debt or claim must exercise ordinary care, skill, and diligence in the performance of all the duties incident to the undertaking, and will be liable to his principal for any loss which his negligence in this respect may occasion; but if the agent has acted in good faith and with ordinary care, skill, and diligence he will not be liable, * * * nor will he be liable if the principal himself has prevented him from collecting. What

will amount to due care on the part of the agent will depend upon the nature of the undertaking and all the circumstances in the particular case, and is ordinarily a question of fact for the jury." 2 C.J. 726.

It may be suggested at this point that the Nebraska rule, in view of the facts involved in this case, is that the correspondent bank to whom the plaintiff bank transmitted the draft for collection and remittance does not become the agent of the payee thereof and thus become liable to it for negligence in making the collection. The relation of principal and agent is between the drawers of this draft and the correspondent bank, the defendant herein. *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331; *First Nat. Bank of Pawnee City v. Sprague,* 34 Neb. 318.

However, waiving for the present this question, still the fact remains that, even assuming the relation of principal and agent to have existed between the plaintiff and the defendant in the instant case, there is evidence in the record which, if believed, sustains the conclusion that the defendant in this case has, in all respects, acted in good faith and with ordinary care, skill, and diligence in the transaction. It is also true that the findings and determination of the trial court, where a jury is waived, are entitled to be given the same force and effect as the verdict of a jury. It follows, therefore, that, as the controlling question of fact involved herein has been determined against the plaintiff by the trial court, such determination must be given the same force and effect as the verdict of a trial jury, and, therefore, the judgment appealed from must be, and is,

AFFIRMED.

CHARLES COCHRAN ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 11, 1931. No. 28027.

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

John E. Lowe, for plaintiffs 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.

PER CURIAM.

The defendants were found guilty of stealing a cow. By motion to quash and by demurrer, the defendants challenged the sufficiency of the information to charge the offense. The particular criticism is that the information failed to charge a crime, in that it did not state the value of the cow. Section 28-515, Comp. St. 1929, the statute under which the information is laid, denounces "whoever steals any cow, steer, bull, heifer, or calf, of any value." Where chicken stealing was the subject-matter, under section 28-524, Comp. St. 1929, which contains the same phrase, "of any value," we held that it is not necessary to allege in the information that the stolen chickens had any value. *Halbert v. State,* 116 Neb. 1, and cases cited therein. The same principle applies here.

It is assigned as error that the evidence is insufficient to support the verdict. We have examined the evidence. It is unnecessary to detail it, but we are of the opinion that it was sufficient to submit to the jury on the state's theory of guilt and to support the verdict of the jury. While there was contradictory evidence on behalf of defendants, it was peculiarly the province of the jury and not of the court to decide the facts.

On the same day the motion for a new trial was overruled, and five days after the verdict, defendants filed an additional and supplemental motion for new trial, supported by two affidavits.

One of these affidavits was made jointly by Gladys Cochran (not described) and Gertrude Lemon (wife of a defendant). It stated that, at the noon recess before the argument ended, they saw the father of the complaining witness in conversation with one of the jurors (unnamed) in the hall of the courthouse and indicating to the juror, by

signs with his fingers, the Roman figure "V." They say "they reported the said circumstance to the attorney for the defendants as soon as they had an opportunity but which was after the submission of said cause to the jury and following the court's instructions after the jury had retired to deliberate." The father was sworn and testified, in opposition to the affidavit, that he did not know any of the jurors, and that he never talked or made signs to any one in the manner indicated. There is no rule which requires the court to believe the affidavits impeaching the verdict. *Tracey v. State,* 46 Neb. 361. Moreover, even if we believe that a juror was conversed with in the manner stated, yet the affidavit did not show diligence in bringing the alleged misconduct to the attention of the trial judge. Even defendants in criminal cases must deal fairly by the court. The matter is ruled by *Polin v. State,* 14 Neb. 540.

The other affidavit, by the defendant Cochran, charged that the juryman who was afterwards made foreman said to a fellow juryman, when the defendant Lemon took the stand (on June 11th or 12th) wearing an ill-fitting black sweater belonging to a codefendant, "I wonder where he got that sweater;" that the remark caused some others of the jury to laugh and that such ridicule was prejudicial. The foreman of the jury was sworn and denied making the above quoted remark or any similar one. He testified it was a very hot day and he said, in substance and effect, to the juror next to him that he would think it pretty hot with the sweater on. The court did not err in holding that the supplemental motion for a new trial was not grounded on facts showing prejudice of jurors or misconduct of any juror.

Other alleged errors are assigned. We find no prejudicial error committed by the trial court. For the reasons given, the judgment of the district court is

AFFIRMED.

MOSES B. TRUSSELL, APPELLEE, V. HARRY FERGUSON, APPELLANT.

FILED DECEMBER 11, 1931. No. 28014.

1. Appeal: INSTRUCTIONS. Refusal of requested instruction does not constitute error, where instruction given by the court on its own motion is to the same effect.
2. ———: ——: ESTOPPEL. A party who induces the trial court to give an erroneous instruction, by requesting one to the same effect, cannot predicate error thereon.
3. Evidence: ADMISSIBILITY. Rules and regulations made and issued by the department of public works under the authority and in accord with section 39-1416, Comp. St. 1929, are admissible, where applicable to the evidence.

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

Good, Good & Kirkpatrick, Julius D. Cronin and *Ralph M. Kryger,* for appellant.

J. A. Donohoe and *J. J. Harrington, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

GOSS, C. J.

Plaintiff obtained a verdict and judgment for damages against defendant for personal injuries. Both parties were driving west on highway number 20 and about a mile and a quarter west of Royal in Antelope county. Plaintiff was driving a team hitched to a wagon. Back of the seat was a disk. Hitched to the wagon on the rear he had a tandem tow of two mowers he had purchased at a sale. It was about sundown. There is a conflict in the evidence as to whether it was dark enough to require lights on cars. Plaintiff had no lights on his wagon or on the mowing machines behind it. Defendant, driving an automobile west, struck the rear mower. The effect was to throw plaintiff back from his seat against the disk and to injure him. Defendant testified he was driving about 30 miles an hour; the bright lights of an east-bound car blinded him so that

he slowed down a little to get his bearings; "so I was looking at the side of the road and the center of the road, and I looked up ahead of me and suddenly there right in front of me was an object, I didn't know what it was, and I whirled to the left to avoid it, but I didn't avoid it, I was too close to it and I hit it on one wheel" (parenthetically, it should be said that defendant, on cross-examination, admitted that the car with bright lights had passed him a quarter of a mile before he struck plaintiff's rig and that he was watching another car which did not arrive until after the accident); what he first saw ahead of him, he testified, looked like a team and wagon—if it had been the team and wagon alone he would have missed it; he found out afterwards it was the rear mower he struck; and he estimated he was going between 25 and 30 miles an hour. His car was overturned and damaged.

An assignment of error is based on instruction number 10, which is as follows: "In determining whether or not the defendant was guilty of negligence in driving his car, you may consider the fact that he had liability insurance, together with all the other facts and circumstances appearing in evidence. The fact that the defendant carried liability insurance of itself is not proof of negligence on the part of the defendant."

Carrying liability insurance is generally considered prudent and farsighted. Some states have made it a part of their legislative and public policy to require it. We find ourselves unable to agree that it is a matter to be considered with other facts and circumstances to determine whether or not one driving a car is guilty of negligence. If the transcript showed that the court gave this instruction on its own motion alone and that the defendant did not induce him to give it, we would say that the first sentence, at least, was clearly erroneous.

But the defendant induced the court to give the instruction by his own instruction number 5, requested by him and refused. Defendant also assigns this refusal as error. That requested instruction reads: "You are further in-

structed that the fact that the defendant carried liability insurance of itself is not proof of negligence on the part of the defendant, and the mere fact that the defendant carries insurance alone should not be considered by yourself in arriving at your findings."

In this requested instruction, by the use of the words "of itself" in the first clause and by the use of the words "the mere fact * * * alone" in the second clause, the defendant, by implication, wished the jury to be instructed and to understand that the matter of insurance might be considered in connection with other facts and circumstances bearing on negligence. The trial court accepted defendant's view of the law on this subject and merely amplified it in the first sentence of its instruction number 10 by telling the jury that the insurance (which defendant requested the court to say could not be considered "alone") could be considered with all the other facts and circumstances appearing in evidence. Where instructions given by a court have the same effect as those refused, error does not result from the refusal. *Sonneman v. Atkinson,* 121 Neb. 752; *Payne v. Clark,* 117 Neb. 238; 14 R. C. L. 815, sec. 73. If the court erred in relation to these instructions the defendant cannot now complain. Instruction number 10 contained defendant's theory of the law as expressed and implied in his requested instruction number 5. Fairness to the trial court prevents defendant from challenging now that which he himself induced the court to do then.

Defendant assigns error because the court excluded certain official highway rules and regulations printed and issued by the department of public works. The authority for the department to make these rules was provided by the legislature in 1919. Laws 1919, ch. 190, title VII, Department of Public Works, art. II, State Highways, sec. 15. This section is now section 39-1416, Comp. St. 1929. It says: "In order to promote public safety and to preserve and protect state highways and prevent immoderate and destructive use of the same, the department of public works may formulate such rules and regulations in regard to the

use of and travel upon the state highways, not inconsistent with the provisions of this article, as said department may deem proper. Such rules and regulations shall be published and issued in pamphlet form by said department and designated as the official state highway rules and regulations of the department of public works, and shall be available upon request to the general public free of charge." The offer in evidence called especial attention to paragraphs (j) and (k) of section 13, "Driving Rules and Regulations" which read as follows:

"(j) A vehicle shall not tow more than one other vehicle and no tow connection shall exceed 16 feet in length, provided special permission may be granted by the department of public works on highway construction or for other properly regulated uses for the use of more than one trailer."

"(k) A vehicle loaded with material extending more than 5 feet beyond the rear of the vehicle shall have fastened on the rear end of the material a red flag by day and a red light by night."

These rules are reasonably adapted "to promote public safety" and we are not shown nor do we find that they are inconsistent with the provisions of the article of which section 39-1416 is a part. Plaintiff's counsel, on oral argument, stated that the printed rules applied only to motor vehicles. We do not so understand them. The department was authorized by the statute quoted to make rules "to promote public safety" upon the state highways. The printed rules apply in terms to any "vehicle," which word they expressly define (p. 4) as "Any conveyance propelled or drawn by its own or other power;" and they define a "motor vehicle" as "Any automobile, truck or motorcycle." So a motor vehicle is a vehicle, and a wagon or a mower, drawn or devised to be drawn by animals, is a vehicle within the meaning of the rule. The evidence shows that plaintiff's wagon was drawn by horses and that the tongues of his mowers were elevated so as to hitch the tows closer to the wagon. So the mowers were vehicles and were towed by a vehicle within the contemplation of the rules. We are

of the opinion that the rules were admissible and that paragraph (j) was particularly applicable to defendant's theory and should have been submitted to the jury to be considered with other evidence in determining whether plaintiff was guilty of negligence and the extent thereof. We do not discover from the evidence that paragraph (k) was applicable to it. So its exclusion was not erroneous.

Instruction number 7 was complained of on the ground that it cast the burden of proof upon defendant to prove contributory negligence of the plaintiff. The words "as a cause of action" probably limited that instruction to plaintiff's proof of defendant's negligence. However, as defendant concedes that instruction number 5 correctly states the elements plaintiff is required to prove and number 15 correctly states the rule on comparative negligence, it would have been less likely to confuse the jury if number 7 had been omitted. On a retrial this will probably be done.

Other errors are assigned, but we do not find them prejudicial and think it unnecessary to consider them in view of our decision to send the cause back for another trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

RAY WARNER ET AL., APPELLEES, V. FRANK W. BERGGREN ET AL., APPELLANTS.

FILED DECEMBER 11, 1931. No. 28003.

1. Waters: DRAINAGE. Owner of land on which water is impounded by natural drainage forming a lake has no right to drain the water by artificial means upon the land of another to his damage, except as provided by statute.
2. ———: ———. Evidence in this case does not bring it within the provisions of sections 31-301 and 31-302, Comp. St. 1929, for the water collecting in the basin was not drained into any natural watercourse or into any natural depression or draw draining into a natural watercourse.

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

John Tongue and *Campbell & Campbell,* for appellants.

George F. Corcoran, contra.

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

DAY, J.

This is a suit in equity to secure an injunction to prevent individual landowners from draining a pond or basin upon their lands in such a manner that the water runs across plaintiffs' land. From a decree granting a permanent injunction, the defendants appeal.

There is no serious dispute about the facts. There is some disagreement as to conclusions drawn therefrom, arising mostly from a confusion of terms. The defendants constructed an open ditch about 15 inches deep through the rim of the basin on their lands and discharged the water into the ditch of the highway, separating the lands of the parties, where it ran through a small culvert and thence upon the land of plaintiffs. There is a gentle slope of the land in the general direction from defendants' land toward plaintiffs' land. Surface water naturally drains into this basin and can only escape by percolation or evaporation. In exceptional cases this basin has filled and overflowed toward the plaintiffs' land. The common-law rule is that no natural easement or servitude obtains in favor of the higher land to drain surface water upon lower land. In this state the common-law rule, with some exceptions, obtains. *Muhleisen v. Krueger,* 120 Neb. 380. In many respects, the situation presented in the case at bar is similar to that in the foregoing case.

The defendants, however, claim the right to drain the basin on their lands in the manner attempted, by virtue of statutory modifications of the common-law rule. They rely upon section 31-301, Comp. St. 1929: "Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse;

and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation." Section 31-302, Comp. St. 1929, defines the terms: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse."

The drainage attempted by the defendants is not such as comes within the provisions of the statute. The controversial ditch was not constructed to discharge the water from the basin into either a natural watercourse, or, as contended by defendants, into a depression or draw, whereby such water might be carried into some natural watercourse. The water in this case was diverted and drained from one water shed into another by means of a ditch dug through the rim of the basin and emptied into a borrow pit by the side of the road, where it overflowed in a somewhat diffused state upon the plaintiffs' land. In the subsequent course of drainage it did not flow in any draw or natural depression, but would slowly drain into a pond upon plaintiffs' land, where artificial drainage would be necessary to carry it to a natural draw or depression. Surely, the plaintiffs cannot be required, under the statute relied upon, to construct an artificial drain to care for the water discharged upon their land by such a ditch as the one constructed by the defendants. It is not necessary to discuss those cases cited by the defendants, which are clearly within the statute, where water was certainly drained into a natural watercourse. In *Graham v. Pantel Realty Co.*, 114 Neb. 397, the court had almost the identical situation before it, and held that, where water is impounded upon land by natural conditions and a lake is formed, the owner has no lawful right to cause such water to flow upon the land of another to his damage.

In conformity to the foregoing findings of fact and conclusions of law, it is determined that the permanent injunction was properly granted, and the judgment of the trial court is

AFFIRMED.

STANDARD OIL COMPANY, APPELLANT, V. JAMES O'HARE, APPELLEE.

FILED DECEMBER 11, 1931. No. 27929.

Trespass: SUIT TO ENJOIN: PETITION: SUFFICIENCY. A petition for injunction which states facts showing possession of plaintiff and threatened continuing trespass which will result in irreparable damage, or which is destructive of the leasehold or that which gives it chief value, states an action for equitable relief, even though thereafter on an application for a temporary injunction there develops some dispute as to title.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

William H. Herdman and *Cook & Cook*, for appellant.

Joseph E. Daly, contra.

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

BEGLEY, District Judge.

The appellant, being the plaintiff, filed its petition in the court below, praying that the appellee be enjoined from entering and trespassing on premises consisting of an oil station, during the plaintiff's lease, and from obstructing or resisting plaintiff's possession of said premises, and from interfering with or resisting plaintiff in operating its filling station, in carrying on its business on said premises. The court entered an order for a hearing on application for a temporary injunction and issued a restraining order pending said hearing. A hearing was had on the application for a temporary injunction, each party thereto filing affidavits. The appellee filed an affidavit alleging a defense to the petition, and alleging that the court had no jurisdiction of the subject-matter of the action, that the petition does not state facts sufficient to constitute a cause of action, and that the appellant has an adequate remedy at law. The court on the hearing denied a temporary injunction and considered the affidavit of the appellee as containing a demurrer and dismissed the petition of

the appellant on the ground that appellant had an adequate remedy at law.

The sole question for determination is the sufficiency of the petition to state a cause of action for equitable relief against the appellee. The petition, omitting formal allegations, is as follows:

"2. That on or about March 14th, 1930, the defendant, James O'Hare, and W. H. Byrne entered into a certain written lease with this plaintiff whereby they leased to plaintiff for the term of five years, beginning July 1, 1930, lot five, in block fifty-one, City of North Bend, Nebraska; that exhibit 'A' hereto attached and made a part hereof is a true and correct copy of said lease; that said lease was duly filed of record in the office of the register of deeds of Dodge county, Nebraska, at 8:40 a. m., March 26th, 1930, and recorded on page 505 in Book 'K,' of the Miscellaneous Records in said office.

"3. That pursuant to the requirements and stipulations of said lease, the said defendant, O'Hare, and Byrne erected a service station building with all necessary driveways on said demised premises, and completed the same about September 1st, 1930.

"4. That at the time of the execution and delivery of the aforesaid lease, plaintiff and said W. H. Byrne entered into a written contract whereby plaintiff appointed said W. H. Byrne as its agent to operate for it the filling station on said demised premises; that exhibit 'B' hereto attached and made a part hereof is a true and correct copy of such agency agreement.

"5. That on the completion of said service station building as aforesaid, to wit, on or about September 1st, 1930, this plaintiff entered into possession of said demised premises and service station building, placed therein a stock of merchandise consisting of gasoline, lubricating oils and greases, and installed therein as its agent to operate and manage said service station and carry on plaintiff's business therein and thereat the said W. H. Byrne, who continued to act as such agent of this plaintiff, and to operate

its said station and carry on its said business on said demised premises until about February ——, 1931; that on February 11th, 1931, said W. H. Byrne sold and conveyed all of his right, title and interest in said demised premises to the defendant herein, said deed being duly recorded on February 12th, 1931, in the office of the register of deeds of Dodge county, Nebraska, at page 182, Book of Deeds 67, of the records of said office.

"6. That on the sale and conveyance by said Byrne to O'Hare of his interest in said demised premises as aforesaid, said defendant, under arrangement and agreement with this plaintiff, became and acted as plaintiff's agent in the operation of said service station and in carrying on of plaintiff's business therein and thereat, and during all the times herein mentioned this plaintiff not only placed the initial stock of merchandise in said station, but has from time to time replenished the same and kept said station at all times supplied with an adequate stock of merchandise, consisting of gasoline, lubricating oils and greases, and during all said time both the said Byrne and the defendant herein accounted as agent to this plaintiff for merchandise sold at said service station in strict accordance with the terms of the agency agreement, exhibit 'B' of this petition; that plaintiff's business at said service station is a going business and profitable to this plaintiff.

"7. That this plaintiff has at all times promptly paid the rent according to the terms of said lease, and in strict conformity with the terms thereof, and this plaintiff has at all times paid to said Byrne, while he was acting as plaintiff's agent at said station, and to said defendant during the time he has been acting as agent for this plaintiff, the commissions earned under the said agency agreement.

"8. That said defendant, James O'Hare, heretofore advised and notified this plaintiff that after March 9th, 1930, he would not recognize the aforesaid lease to this plaintiff or continue to act as the agent of this plaintiff in the operation of said filling station and carrying on of plain-

tiff's business therein, and that he repudiated said lease and said agency agreement, and after said date would operate said station in his own behalf and carry on business therein in his own behalf; that thereupon, about two o'clock p. m. on March 9th, 1931, at North Bend, Nebraska, and in and on the aforesaid demised premises, this plaintiff notified said defendant that plaintiff terminated the agency agreement existing between plaintiff and defendant and discharged said defendant as its agent and demanded that said defendant deliver said station and appurtenances an all the equipment thereon or connected therewith, and merchandise consisting of gasoline, lubricating oils and greases to the plaintiff, said demand being in writing, and exhibit 'C' hereto attached and made a part hereof is a true and correct copy of the demand so made; that said defendant refused to comply with said demand and refused to deliver possession of said station, appurtenances, equipment and merchandise to plaintiff.

"9. That plaintiff's leasehold in said premises, by reason of its location on the Lincoln Highway, is of great value and plaintiff's business as carried on therein is a large and profitable business and of great value; that defendant's actions constitute a trespass and a continuing trespass on plaintiff's leasehold estate; and plaintiff's said leasehold estate and plaintiff's said business will be wholly destroyed, to the great damage and loss of this plaintiff, unless said defendant be enjoined and restrained, as hereinafter prayed, from interfering with plaintiff in its possession of said demised premises, and in the operation and carrying on of its said business on said demised premises.

"10. That plaintiff has no adequate remedy at law."

The appellee contends that the affidavit should be considered as an answer and the case considered as having been tried in the lower court, but the lower court held that the affidavit constituted a demurrer against the petition, and we can only consider the question of whether or not appellant has an adequate remedy at law. The merits of the case cannot be considered. *Patterson v. Morehead*, 100 Neb. 760; *City Savings Bank v. Carlon*, 87 Neb. 266.

An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Keplinger v. Woolsey*, 4 Neb. (Unof.) 282; *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94; 1 C. J. 1193. Ordinarily, a naked trespass will not be enjoined in equity, but where such trespass is destructive of the leasehold a remedy is provided in equity. Appellee contends that injunction will not lie because before the filing of the suit he, without the consent and against the will of the appellant, took possession of the premises in question. No one can found possession on a tortious trespass alone; nor can any one acquire a right by the commission of a wrong. *Carter v. Warner*, 2 Neb. (Unof.) 688; *Hornung v. Herring*, 74 Neb. 637; *Heaton v. Wireman*, 74 Neb. 817; *Meyers v. Schmidt*, 103 Neb. 475.

In the case of *Nebraska Wheat Growers Ass'n v. Norquest*, 113 Neb. 731, where plaintiff, a cooperative wheat growers association, brought an action to enjoin the defendant from violating his contract and refusing to deliver wheat thereunder, it was held that owing to the particular nature of the plaintiff organization no adequate remedy at law prevailed and the injunction was granted.

In *Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co.*, 155 Va. 249, wherein, under a lease similar to the one in this case, it was sought to enjoin the removal of an underground oil tank from the premises and there was a claim of an adequate remedy at law, the court held: "When bill states facts showing threatened trespass which will result in irreparable damage, or which is destructive to the inheritance or that which gives it chief value, injunction will be granted, notwithstanding dispute or pending litigation as to title."

It needs no argument to show that a remedy at law would not afford appellant as complete, prompt and efficient a remedy for the destruction of its business and the personal property therein contained, or the loss of its going business, as would be furnished by a court of equity

in preventing such an injury. Any defense which the appellee may have to the petition must be pleaded.

The decree of the lower court is therefore reversed and the cause remanded to the district court.

REVERSED.

OSCAR O. NEWMAN, APPELLEE, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 11, 1931. No. 27926.

1. Insurance: POLICY: ASSIGNMENT. An assignment of policy after loss transfers to the assignee the assignor's right to proceeds of the insurance.
2. ———: ———: ———: ESTOPPEL. Junior mortgagee having an insurable interest in property at time of loss, insurer thereafter making an indorsement on policy recognizing title as in such junior mortgagee was without right to claim lack of privity of contract with him, nor if actual liability existed for loss theretofore sustained that it was extinguished.
3. ———: ———: BREACH OF CONDITIONS: RECOVERY. Breach of conditions of fire policy respecting procurement of other insurance without insurer's consent, and failure of notice of commencement of foreclosure proceedings under junior mortgage, *held* not, in view of section 44-322, Comp. St. 1929, to preclude recovery, in absence of evidence that breach in any manner contributed to loss.

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

Brome, Thomas & McGuire and *G. H. Seig*, for appellant.

Mullen & Morrissey, W. J. Hammond and *Paul P. Massey, contra.*

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

LANDIS, District Judge.

Oscar O. Newman, plaintiff below, appellee here, recovered a judgment against the National Union Fire Insurance Company, a corporation, upon a policy of fire insurance. The insurance company appeals from the judgment.

There is no serious conflict as to the facts in this case. On July 16, 1927, appellant issued to one Salyers its combined farm policy insuring certain property against fire and tornado for three years and received a premium of $28.88 therefor. This policy carried an indorsement of the standard loss payable clause to the Fidelity Mutual Life Insurance Company, as mortgagee. On January 27, 1928, another indorsement was added to the policy in substance reciting that in consideration of $28.43 additional premium the insurance for Salyers on his farm buildings was increased to end July 16, 1930, the termination date of the policy. On January 11, 1929, an additional indorsement was made by appellant to the policy which recites: "Title to the property described herein is now vested in O. O. Newman. Policy is hereby transferred to cover in his name, as the assured."

On March 17, 1928, a fire occurred on the premises destroying three buildings covered by the insurance under the policy in suit as barn $750, granary $300, and hog house $200. With no claim of fraud or negligence this loss stands unchallenged as other than what is commonly called an "honest loss."

Salyers carried a policy in the State Farmers Insurance Company upon the property involved in this loss, brought an action thereon, and on April 14, 1928, recovered judgment therein which was afterwards paid, satisfied and released.

No proof of loss was ever made to appellant upon its insurance policy by either Salyers or the Fidelity Mutual Life Insurance Company. Salyers, as a party defendant, answered disclaiming any interest in or right to the policy in suit or the property insured. The Fidelity Mutual Life Insurance Company assigned its right and interest under the policy declared on to the appellee before this action was instituted.

When appellant issued its policy appellee had a second mortgage upon the property under which he had instituted foreclosure proceedings March 2, 1927. Issues were

joined, case tried, and decree entered July 23, 1927, foreclosing this second mortgage and ordering a sale of the premises. Sale was had under the decree, appellee purchased the property, sale confirmed by order of court June 11, 1928, and deed issued conveying title of the property to him. Proof of loss was furnished appellant about July 13, 1929, by appellee. The mortgage clause indorsed on the policy contains the following:

"On payment to such mortgagee * * * of any sum for loss or damage hereunder, if this company shall claim that as to the mortgagor or owner, no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's * * * right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's * * * right to sue."

Appellant contends that this provides for subrogation to it by the Fidelity Mutual Life Insurance Company, under its first mortgage, to the extent and in the amount of any payment made under its policy to said mortgagee. It asks that appellee's claims be dismissed or, in event judgment be entered against appellant, that it be subrogated to the extent and in the amount of said judgment, under the mortgage; further, that appellee be decreed to pay appellant under the mortgage, the amount it is required to pay on the policy, and in default of such payment appellant be entitled to maintain an action to foreclose its interest, as determined, under said mortgage. In effect this provision in the mortgage clause provides that whenever appellant shall pay the mortgagee any sum on account of a loss and shall claim that as to the mortgagor or owner no liability exists then the appellant is subrogated to the mortgagee's rights and securities. Appellant has paid nothing on account of the loss and by indorsement to the policy agrees that the property described therein is vested in appellee and that he be substituted as the assured. It seems clear that before subrogation could be considered according to the express terms of the loss payable clause appellant must pay something out on ac-

count of a loss under the policy and a determination had that there is no liability under the policy to the appellee. The evidence shows that the appellee paid both of the premiums on the policy; that he was not a stranger to the property, having a second mortgage against it; that he did not know until after the loss that Salyers had other insurance on the property; that he notified Mr. Welch of Omaha, who issued the policy and was agent for the appellant for the state of Nebraska, that he was starting foreclosure proceedings under his second mortgage against the property; that notice of the loss was given appellant by the Fidelity Mutual Life Insurance Company; that in response to this notice appellant sent proofs of loss to the said life insurance company; that appellee furnished proof of loss in July, 1929, and demanded payment. Appellant denied liability on its policy on grounds other than failure to give timely proof of loss. Appellant in its answer alleges that the appellee was not a party to the policy at the time the fire occurred and has no rights thereunder by virtue of any loss. But the appellant by its indorsement of January 11, 1929, says appellee is owner of the property covered by its contract, and places the policy in his name. True, a loss had occurred, but appellee had an insurable interest at the time of the loss. Also, appellant has and retains the premium consideration for the insurance under the policy. An assignment of the policy after loss transfers to the assignee the right to the proceeds of the insurance. In view of the indorsement made by appellant on the policy January 11, 1929, it cannot claim lack of privity of contract with appellee, nor if actual liability existed for the loss already sustained that it is extinguished. Discussion of cases where assignments were made after loss had occurred may be found in notes at 56 A. L. R. 1391; 3 Am. & Eng. Ann. Cas. 476; 56 Am. Dec. 749.

Appellant not only denies any liability to appellee for the loss because of lack of privity of contract with him, but contends that there are conditions in the policy

breached, as procurement of other fire insurance on the property without its consent, and failure of notice of the commencement of foreclosure proceedings under the second lien. Section 44-322, Comp. St. 1929, provides: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." There is no evidence in the record that the breaches of the policy complained of by appellant in any manner contributed to the loss. Appellant in its answer makes no such claim. In *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, where section 44-322, *supra*, was considered, the rule is announced in the syllabus as: "Under the statute, the violation of a condition in a fire insurance policy by the mortgaging of the property insured does not invalidate the insurance, unless the breach of contract contributes to the loss." This section of the statute was considered by the circuit court of appeals of the eighth circuit in *Westchester Fire Ins. Co. v. Norfolk Building & Loan Ass'n*, 14 Fed. (2d) 524, on the question of breach of the conditions of a policy of fire insurance on notice of change of title. The court say: "There is no evidence in the record tending to show that any purported change in title by reason of the foreclosure proceedings contributed in any way to the loss, and it has been held by the supreme court of Nebraska * * * that a breach of conditions in a fire insurance policy does not invalidate the insurance policy unless the breach of conditions contributed to the loss."

Below, upon motion of appellant, unopposed by the appellee, this cause was transferred to the equity docket of the district court and tried as an action in equity. Upon trial *de novo* independent of the findings and judgment of the trial court, we come to the same conclusions. Hence, the decree of the district court is

AFFIRMED.

BRONISLAWA SIEDLIK, APPELLANT, V. SWIFT & COMPANY, APPELLEE.

FILED DECEMBER 11, 1931. No. 28113.

1. **Master and Servant:** WORKMAN'S COMPENSATION ACT: INJURY TO EMPLOYEE: LIABILITY. Second accident occurring to employee while on his way to work at 6:30 a. m., *held* primary cause of death, and it was improbable that first accident, sustained at work, from which there was apparent recovery, was contributing cause.
2. ———: ———: ———: NONCOMPENSABLE INJURY. Injury to employee from stepping into hole while on way to work and before reporting therefor, *held* not compensable as not arising "in the course of employment" (Comp. St. 1929, sec. 48-152). Section 48-152, Comp. St. 1929, relating to "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

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

Anson H. Bigelow and *Anthony Zaleski,* for appellant.

George H. Winn and *Brown, Fitch & West, contra.*

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

LANDIS, District Judge.

This action arises under the workmen's compensation law. Appellant Bronislawa Siedlik seeks to recover compensation for the death of her husband Stanley Siedlik from his employer Swift & Company, appellee.

The deceased, while working in appellee's cold storage room, piling barrels of meat, and wearing shoes with thick wooden soles, jumped down from a height of about three and one-half feet onto the cement floor. He complained that he had "jumped wrong," rubbed his leg and thereafter limpingly went over to other work where he was not required to lift. He continued his work that day, but when

he got home at night bathed his ankle, which was swollen and slightly red, in hot water, and applied salve and bandages. He applied home remedies for a week; limped for at least two weeks, but continued to work for appellee, losing no time until April 9, 1929.

The date of the accident is fixed by the widow as on a Friday two or three weeks before April 9. The Friday two weeks before would be March 22, and three weeks would be March 15. No report was made of the accident to the appellee, and the exact date on which it occurred is not otherwise definitely fixed in the record.

On April 9, 1929, the deceased had a second accident which happened near the Union Pacific depot, several blocks away from the appellee's plant. He was coming to work around 6:30 a. m., and stepped into a hole near the depot. When he got to the office of appellee his leg pained him; was bloodless and cold. He was immediately removed to the hospital. The deceased was at the hospital in the care of Dr. E. C. Henry from April 9 to the day of his death on June 10, 1929. The cause of his death was septicemia secondary to gangrenous leg, which was caused by obstruction of circulation to the leg below the knee.

Appellant's physicians were of the opinion that the March accident caused a hemorrhage into the muscle, commonly known as Charley horse; that the second accident of April 9 in the same leg was a "relighting up" of the first injury, with the primary cause of the death in the March accident.

Appellee's physicians were of the opinion that the April 9 accident caused a blocking of the circulation in the popliteal artery right back of the knee joint, and that this was the primary cause of the death, and not the March accident from which deceased had apparently recovered.

On April 23 the leg was amputated above the knee; on June 4 again at the hip. The complete hospital and clinical record of the deceased is in evidence. Doctor Henry, after the first amputation, dissected the leg and found a clot on the inside of the popliteal artery at about the knee.

The first question to determine is whether the March or April accident was the primary cause of the death. As provided in section 48-137, Comp. St. 1929, this appeal must be determined *de novo*. Considering the entire record, we find that the April 9, 1929, accident occurring to the deceased before he reported for work, at a place some blocks away from the appellee's plant, was the primary cause of his death; further, that it is improbable that the March, 1929, accident, from which deceased had apparently recovered, was a contributing cause of his death.

Appellant contends that the April 9 accident should be reasonably considered as one in the course of employment and compensable, under the law. By our statute "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, sec. 48-152. The deceased was going to work on April 9, 1929, and the accident occurred before he reported at the place where his services for appellee were to be performed, and some blocks away therefrom. The record does not disclose any circumstances to base a finding that the injury of April 9 occurred other than independent of the relation of master and servant. It is clear that we are confronted here with an injured interest which does not fall within the protection of the workmen's compensation law.

In both *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, and *Speas v. Boone County*, 119 Neb. 58, the facts are dissimilar from the instant case. These cases are not authority for declaring an injury occurring independent of the relation of master and servant as compensable under our statute.

Independent of the findings and judgment entered by the district court, on trial *de novo* here we reach the same conclusions. The judgment of the district court is therefore

AFFIRMED.

BESSIE GLICK, SPECIAL ADMINISTRATRIX, APPELLEE, V. BURT POSKA, APPELLANT.

FILED DECEMBER 11, 1931. No. 27937.

1. **Trial**: VERDICT: SETTING ASIDE. A verdict should be set aside on the ground that it was arrived at by chance, or is a "quotient" verdict, only upon a clear showing that it is the result of chance or is a "quotient" verdict, instead of the result of deliberation.
2. ———: ———: IMPEACHMENT. Generally, testimony of jurors will not be considered to impeach their verdict in respect to matters which essentially inhere in the verdict itself, and as to matters resting alone in the breasts of the jurors.
3. **Automobiles**: INJURY TO GUEST: REASONABLE CARE: QUESTION FOR JURY. The standard of the duty of an invited guest riding in an automobile is the same as the driver's, but the conduct to fulfil that duty is ordinarily different because their circumstances are different. Whether reasonable care has been exercised in either case is a question of fact for the jury, unless the facts were such as to which reasonable minds would not differ in declaring such facts to constitute negligence.

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

Frederick J. Patz and *Louis B. Finkelstein*, for appellant.

Richard F. Stout, contra.

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

RAPER, District Judge.

This is an action brought by Bessie Glick, as special administratrix of the estate of Clarence T. Glick, her deceased husband, on behalf of herself and two minor children, aged eleven and seven years, respectively, and is based upon alleged negligence of the defendant. Plaintiff's petition alleges that the deceased was riding as an invited guest of the defendant in defendant's automobile, and that defendant was negligent in operation of his car, which resulted in the automobile overturning, causing the death of Clarence T. Glick. Defendant in his answer denies the allegations of negligence, denies that plaintiff was an in-

vited guest of defendant, and alleges that deceased and defendant were engaged in a joint enterprise using defendant's car, and that deceased directed and controlled the direction, course and operation of the car, and was guilty of the negligence which caused the accident. The cause was submitted to the jury, and a verdict and judgment were awarded plaintiff. Defendant appeals.

At the close of the testimony defendant moved for a directed verdict in his favor because the undisputed evidence showed that the negligence of the deceased was more than slight. The court's refusal to grant the request is one of the alleged errors, and another error complained of is that the court refused to dismiss plaintiff's action because there was not sufficient evidence to support a verdict in her favor. A careful study of the evidence discloses a state of facts which adequately supports plaintiff's allegations of negligence; that deceased was an invited guest of defendant; and was not guilty of negligence, more than slight, or of any negligence. The evidence of plaintiff being sufficient to warrant a verdict for plaintiff, the court properly denied the motions.

Appellant objects to instruction No. 8, as given. This instruction outlines fully and in detail the claims of the parties respectively as alleged in the pleadings and as supported by evidence. It is claimed by appellant that one part of the instruction varies from another to the prejudice of appellant, in this: One part of the instruction states that the defendant claims "Glick directed and controlled the operation of the car in the course and route to be taken," and in another place it states "that Glick did not have or exercise control over the operation of the car." Appellant asserts that the changed phraseology gave the wrong direction to the jury. We are unable to see how this slight variation, in connection with the substance of the whole instruction, could have misled the jury. Another objection is that, after stating that if Glick did certain acts, and such acts constituted negligence, then such negligence would be imputed to Glick himself, the court should

have added "and plaintiff cannot recover." In other instructions proper exposition was given as to negligence, contributory negligence, and the rights of the respective parties to recover under certain circumstances if negligence of either party was proved, and the omission of that clause in instruction No. 8 was not error. The instruction was as favorable to defendant as the pleadings and evidence warranted.

The evidence discloses that deceased was a brakeman employed by the Burlington railroad company, and at his home about 10 o'clock in the evening a call came to him to report for duty at 11 o'clock. The deceased and defendant, with a third man, got in defendant's car, a coupé, deceased sitting on the right hand side, and started for deceased's destination, which was west of some of the railroad tracks, where defendant was cautioned to watch for trains and to not drive so fast. Near there was a culvert. Defendant drove the car, and some time before they reached the scene of the accident deceased told defendant to make a turn or turns at certain streets and cautioned defendant against driving so fast.

The defendant's car had good lights, the road and culvert were in plain view and defendant was driving from 20 to 25 miles an hour. The road made a turn near the culvert. At or about the time the car was on the culvert, the defendant, in order to make the turn suddenly, turned the car sharply (or jerked the wheel around, as the third passenger stated) which caused the car to turn sharply on the culvert. The front wheels passed over, but the hind wheel missed the edge, which caused the car to lurch and perhaps veer somewhat. After going across the culvert about half the length of the car, it stopped, apparently tilted to the right and poised momentarily, then upset on its right side. While the car was stopping, the deceased evidently opened the right door and got out of the car, for the car fell on him. There was no obstacle immediately in front of defendant which required him to turn the car so suddenly and sharply. The defendant testified he turned the car at

the request of deceased but this was not admitted by plaintiff, but plaintiff claims that defendant failed to notice the turn in the road until on the culvert, and that at the speed he was driving it was negligence to make so sharp a turn, even if deceased had suggested the turn, and the evidence is sufficient to support plaintiff's theory. It was a question for the jury to determine.

This brief résumé, which does not give accurately the full details, is sufficient to indicate in a general way the manner in which the accident occurred.

The defendant claims that deceased was guilty of negligence in getting out of the car as it stopped. This was submitted to the jury and determined adversely to defendant.

Appellant complains of instruction No. 13, which advises the jury as to the measure of damages, in that the court did not tell the jury that they must base their findings upon the evidence. In another instruction it was stated that their verdict must be based upon the evidence, and the failure to again so charge the jury in instruction No. 13 was not prejudicial.

Another objection to the instruction is that the court tells the jury that they might consider deceased's prospects for future increase of earnings, which appellant insists was without any evidence to support that part of the charge. It is shown by the evidence that the deceased was a brakeman, and was on the "call list," that is, he did not have steady employment with the railroad; that the right to steady employment was given to employees who had been longer in service, and the jury might reasonably infer that in the future he would by reason of seniority be given more steady employment. When he worked as brakeman he earned $200 a month. When not so employed he earned at other occupations about $20 to $30 a week. We are not prepared to say from the record that there was no evidence to support that part of the charge.

Further, the appellant urges that there was no proof of the physical condition of Mr. and Mrs. Glick. There

was inquiry made by defendant's counsel in cross-examining Mrs. Glick as to the physical condition of the deceased. She told of deceased having suffered an injury in an automobile accident some time prior to the time of his death, but she stated that he had almost recovered, and was able to do his work. The nature and extent of those injuries were not inquired into. There was sufficient evidence to warrant the jury in finding that deceased was in ordinary health. There was no proof of the physical condition of plaintiff, but she gave her age as 31, and tables of expectancy were received both as to her expectancy and his. The omission to show her physical condition, when first raised on appeal, may be met by the holding in *Bauer v. Griess*, 105 Neb. 381. The instruction did advise the jury that if they found for plaintiff they should take into consideration the age and the fair and reasonable earning ability as disclosed by his past actual earnings, his physical condition at the time of his death, the age and physical condition of the widow, Bessie Glick, and the probable duration of the life of both Clarence T. Glick and his wife, which placed the matter fairly to the jury, and besides no further instruction about it was tendered by defendant.

Other assigned errors are that the court erred in failing to instruct the jury not to consider the matter of insurance and in permitting plaintiff to show that defendant carried insurance. No request was made for an instruction about insurance. It is the settled policy of this state that a party may show that defendant carried insurance.

Some of the jurors gave evidence that the jury in their deliberations considered the fact that defendant carried liability insurance. Courts are slow to accept such evidence to impeach a verdict; furthermore, there is no affirmative statements by any of the jurors that he was influenced by the fact that the defendant carried insurance.

The remaining assignment of error is that the verdict was the result of chance. Six jurors made affidavit that the jury agreed to write the sum which each juror thought the plaintiff should recover, add those amounts and divide

the sum thus found by twelve, and the quotient should be given and awarded as the verdict to be returned for plaintiff, and that was the amount given in the verdict. Four of those recanted in later affidavits, and stated they had misunderstood their first affidavits, and averred that the jurors did write down the amount they believed the plaintiff should recover, and divide by twelve the sum obtained by adding those amounts, that there was no agreement before such proceeding that the quotient should be the amount of their verdict, and that such proceeding was had only to get the viewpoint of the jurors in order to see if they might adjust their differences. Two other jurors deponed to the same facts as the four above mentioned, and that after the sum so found was announced there was further discussion. None of the jurors stated that they had felt bound by or agreed to the verdict because of any agreement to abide by the proceeding. The proof is quite conclusive that there was no agreement to abide by or accept the quotient as their final verdict, and after the quotient was announced there was some objection to the amount and after further discussion the amount was voluntarily approved by all the jurors.

The mere fact that the jury during the course of their deliberations in order to get the viewpoint of the jurors, to see if they might compose their differences of opinion as to the amount that should be allowed, undertake to average their judgment may not be objectionable, unless it appears that before doing so they agree to be bound by such chance methods after such result has been reached. *Cortelyou v. McCarthy*, 37 Neb. 742; *Janesovsky v. Rathman*, 107 Neb. 165.

Appellant urges that the verdict is excessive. The verdict is for a large sum, but under the situation shown we cannot say it is excessive.

The judgment of the district court is

AFFIRMED.

TRAVELERS INSURANCE COMPANY OF HARTFORD, APPELLEE, V. WALTER J. SAWICKI ET AL., APPELLEES: CHRISTIAN C. HANSEN ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. No. 28005.

Appeal: BILL OF EXCEPTIONS. In the absence of a bill of exceptions, a finding of fact, or ruling upon a motion, based upon evidence, will be presumed to be supported thereby.

APPEAL from the district court for Greeley county: RALPH R. HORTH, JUDGE. *Affirmed.*

Badham & Pedersen, B. J. Cunningham and *Edgar B. Zabriskie,* for appellants.

Lanigan & Lanigan and *F. B. Goudy, contra.*

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

PER CURIAM.

This is an appeal from an order overruling motion by defendants to vacate an order appointing a receiver in an action for foreclosure of a real estate mortgage.

The record discloses that the decree of foreclosure was entered June 25, 1930, and that a receiver was appointed November 10, 1930. The order appointing the receiver recites:

"This cause came on for hearing in open court on the application of the plaintiff for the appointment of a receiver, and the court being fully advised in the premises finds that due and legal notice of hearing on said application has been had on the defendants. * * *

"On consideration of the pleadings and the evidence the court finds that the allegations of plaintiff's application are true and that the mortgaged premises are insufficient in value to pay said mortgage indebtedness," etc.

On January 27, 1931, defendant Hansen filed a motion to vacate and set aside the order appointing a receiver, on the grounds "that no legal service of notice of a hearing (was) had upon this defendant or his attorney of record,

provided by statute," and that the receiver was an interested party and an improper person to be appointed. The journal entry overruling the motion shows that the motion was submitted to the court upon the evidence.

There is no bill of exceptions. We are not advised as to what evidence was presented to the court either upon the application for the appointment of a receiver or upon the motion to vacate. There may have been evidence showing that defendants, at the hearing on the application for appointment of a receiver, appeared and resisted the appointment; in fact, there improperly appears in the transcript certain affidavits indicating that such was the fact; or the evidence may have indicated that defendants had been duly served with notice of the hearing or had waived such notice. We are unable to say what the fact is.

A finding of fact by the trial court, based upon evidence, cannot be reviewed in the absence of a bill of exceptions; but it will be presumed that the finding is supported by sufficient evidence.

The record presented discloses no error in the court's ruling on the motion. The order is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FIRST STATE BANK OF ALLIANCE, APPELLANT: CITY OF ALLIANCE, APPELLEE.

FILED DECEMBER 16, 1931. No. 27989.

1. **Banks and Banking: GUARANTY FUND: DEPOSITS: PREFERENCES.** A city that exacts from a state bank collateral security for deposits, receives the proceeds of the security after insolvency of the bank and presents to the receiver a claim for excess of deposits over such proceeds, is in the class of depositors "otherwise secured" and not entitled to share the assets of the bank on an equality with depositors in the class "not otherwise secured," within the meaning of the statute providing that depositors and holders of exchange in the latter class shall have the first lien, with the exception of taxes. Comp. St. 1929, sec. 8-1,102.

2. **Constitutional Law:** POWERS OF LEGISLATURE: CLASSIFICATION. The legislature has power to make reasonable classifications of persons and objects for the purposes of legislation affecting diversely the different classes.
3. ———: ———: BANKS AND BANKING: CLASSIFICATION OF DEPOSITORS. Legislative classification of depositors in state banks for the purpose of determining priority of claims in the event of insolvency *held* valid.

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

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

Boyd & Metz, contra.

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

ROSE, J.

In a proceeding by the state to wind up the affairs of the First State Bank of Alliance, an insolvent banking corporation, the city of Alliance intervened and presented a claim for deposits on an equality with all unpaid depositors having preferred claims.

The First State Bank suspended the business of commercial banking December 30, 1929, when the city had on deposit therein $14,691.56 on which there was accrued interest of $189.15, making a total of $14,880.71. As security for city deposits the First State Bank, September 20, 1929, had pledged seven 1,000-dollar 5 per cent. Federal Land Bank bonds, all of the face value of $7,000, which, for that purpose, were delivered to the Lincoln Trust Company. The bonds were sold June 4, 1930. The net proceeds were $7,158.09 which were credited on the city's deposits. For the difference between the deposits and interest amounting to $14,880.71 and a credit of $7,158.09 derived from the sale of the bonds, or $7,722.62, the city filed with the receiver a claim as a valid unsecured preferred claim against the assets of the First State Bank entitling claimant to participate in the depositors' final

settlement fund. The receiver treated the city's claim as a general one payable only from assets of the First State Bank after payment of preferred claims of depositors. Later the city intervened by petition, pleaded in detail the facts constituting its claim and asserted the right to have it adjudged a preferred claim entitling intervener to share the assets of the bank on an equality with other preferred creditors and to participate in the depositors' final settlement fund.

An answer of the receiver to the petition in intervention contained a general denial and a plea that intervener's claim was "otherwise secured" and therefore not a preferred claim within the meaning of the statute which in part provides:

"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. If the cash in the hands of the receiver available for such purposes, be insufficient to pay the claims of depositors whose deposits are not otherwise secured, and holders of exchange, not given for a previously existing debt of the bank other than a deposit, the court in which the receivership is pending, or a judge thereof, upon hearing shall determine the amount required to supply the deficiency and cause the same to be certified to the department of trade and commerce as a claim entitled to the benefits of the depositors' final settlement fund." Comp. St. 1929, sec. 8-1,102.

The facts pleaded by the receiver as defenses were put in issue by a reply.

Upon a trial of the issues raised by the pleadings the district court found that intervener had a valid preferred

claim on the assets of the First State Bank for $7,722.62; that intervener was entitled to the benefit of the depositors' final settlement fund; that the receiver had in his hands sufficient cash to pay a dividend of 45 per cent. on preferred claims, including the claim of intervener. The decree directed the receiver to pay forthwith to intervener, in common with other preferred depositors in the same class, a dividend of 45 per cent., or $3,475.18, and requiring certification of the balance of the claim, or $4,247.44, to the department of trade and commerce as an adjudicated claim entitling intervener to participate in the depositors' final settlement fund. The receiver appealed.

The appeal presents this question: Was the city of Alliance a preferred creditor of the First State Bank within the meaning of the statutes? Stated differently, did the city, by exacting bonds as security for its deposits, prevent itself from participating in the assets of the bank and in the depositors' final settlement fund for the difference between the amount of the deposits and the proceeds of the bonds, on an equality with preferred creditors or depositors "not otherwise secured?" In the briefs and in the arguments at the bar the question was skilfully presented on both sides. The solution depends on what the legislature meant by the term, "not otherwise secured," as used in that portion of the statute already quoted, when considered with all statutes relating to banks and banking, to the winding up of insolvent banks, to the distribution of assets among creditors and to the depositors' final settlement fund. There is no dispute about any material fact. The facts relating to the deposits of the city, to the bonds pledged as security and to the application of the proceeds of the bonds are as herein recited in the statement of the case.

In addition to bank assets available to creditors in case of insolvency, the legislature made provision for the creation of what is called "Depositors' final settlement fund." This fund is not the property of insolvent banks. It is a trust fund created for the benefit of unpaid depositors

"not otherwise secured" and of holders of exchange. How it shall be disbursed depends on legislation. It was competent for the legislature to make provision for the disbursement of this fund and the proceeds of bank assets. For purposes of legislation the power to classify objects and persons in different situations is undoubted. *Cleland v. Anderson,* 66 Neb. 252. In the statute under consideration the legislative intent to divide deposits into different classes seems clear. One class includes deposits of creditors who rely for security on the bank assets, on the depositors' final settlement fund and on the integrity of the bank and its officers. Another class, not relying on such security, includes deposits of creditors that exact security in the form of bonds or other obligations—a class "otherwise secured." This classification must be considered in determining the priority of claims for deposits. The legislature did not say that a depositor may have a single deposit in both classes, if the proceeds of collateral security pledged to him are insufficient to pay his claim in full. The legislative classification and the general import of the statute indicate the contrary. A depositor "not otherwise secured" cannot resort to the proceeds of bonds pledged to another depositor as security for the latter's deposits. If a depositor partially protected by collateral security were permitted to share the proceeds of bank assets as a preferred creditor on an equality with other depositors not so protected, he would have an advantage over them. The legislation as a whole does not seem to indicate such an intention. An interpretation to that effect would extend the term "otherwise secured" beyond its natural import, when the context is considered. Intervener elected to take bonds as security and afterward made deposits in double the amount of the bonds. It thus became a depositor "otherwise secured" and voluntarily kept its deposits in that class. Excess deposits over proceeds of the pledged bonds are not in the other class. Even in that situation intervener appears to have fared better than depositors "not otherwise secured." From proceeds of its security it

realized more than 50 per cent. of its deposits, while the record shows that preferred creditors "not otherwise secured" shared a dividend of 45 per cent. The record does not show that the legislative classification is unreasonable or that it is inhibited by that part of the federal Constitution relating to due process of law and to the equal protection of the laws. Between the persons and objects classified there is a substantial difference in situations. Persons in one class of depositors have security not available to the other class. There is substantial reason for diverse legislation relating to the persons and objects classified. The statute operates uniformly on all persons and objects in a class. The classification therefore was within legislative power. *Wenham v. State*, 65 Neb. 394; *Cleland v. Anderson*, 66 Neb. 252; *Althaus v. State*, 94 Neb. 780. In this view of the law intervener was "otherwise secured" and not in the class entitled to share as preferred creditors the assets of the bank and the depositors' final settlement fund. Within the meaning of the statute intervener's claim should have been allowed only as a general one and the district court erred in holding otherwise. The judgment from which the appeal was taken is therefore reversed and the cause remanded for a decree conforming to this opinion.

REVERSED.

VERNE CROMWELL, APPELLANT, V. FILLMORE COUNTY, APPELLEE.

FILED DECEMBER 16, 1931. NO. 27947.

1. **Highways: DEFECTS: INJURY TO AUTOMOBILIST: NOTICE: ADMISSIBILITY OF EVIDENCE.** In an action to recover for injuries received by driving an automobile over an alleged negligently maintained highway, evidence that, shortly before, another person driving an automobile had been injured at the same place is admissible on the question of notice to the county.
2. ———: ———: **QUESTIONS FOR JURY.** Under the facts stated in the opinion, the questions of negligence and contributory negligence were for the jury.

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

Waring & Waring, for appellant.

Thomas J. Keenan and *J. W. Hammond, contra.*

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

BEGLEY, District Judge.

Action to recover damages alleged to have been sustained by reason of the insufficiency and want of repair of a public highway. At the conclusion of plaintiff's evidence, on motion of the defendant, the court directed a verdict for defendant, and plaintiff has appealed. The parties will be designated as plaintiff and defendant as they appeared below.

The place of the accident is located at the foot of a hill where the highway is crossed by a creek over which is built a culvert and the roadway raised or filled to a height of eight or nine feet. More than a week prior to the date of the accident, a storm had washed a ditch across the fill at the point where the culvert was erected, some six or eight feet deep and about three feet wide, and also washed large circular holes from six to eight feet deep south of the culvert, which holes extended into the main portion of the highway. Prior to the accident, the county had attempted to fill the ditch that extended across the road with loose dirt, which in the course of time settled, leaving several deep chuck-holes or ruts, eight to ten inches deep, and extending practically across the highway. However, the county did nothing toward filling the holes in the side of the road and which extended into the traveled portion.

On August 28, 1930, about seven p. m., the plaintiff was traveling on this highway from the north in his automobile, at a rate of speed of about twenty to twenty-five miles an hour, with his lights on, and when within about eight to ten feet of the same, he observed some deep ruts which

threw him to the east, and in order to avoid the large holes which had been washed in the side of the road he jerked his car to the west and upset, and was severely injured. Plaintiff testified that his lights were bright and that he was keeping a lookout ahead, but that in driving down the hill his lights didn't throw their rays down the highway as they would on a level, and just as he came onto the level and when within about eight or ten feet of the ruts, his lights disclosed same; that he put on his brakes, but it was too late to avoid the accident; that there were no lights or warning signals anywhere in the road to warn him of the defect. We think there is sufficient evidence to carry the question as to the insufficiency or want of repair of the highway to the jury.

Plaintiff also offered to show by the evidence that, previous to the accident in question, another accident had occurred at this point and a claim for damages had been filed with the county commissioners. This was excluded by the trial court. This evidence should have been admitted to show constructive notice to the board of county commissioners. 65 A. L. R. 397, note.

The defendant, however, argues that plaintiff cannot recover because he was driving his automobile at a speed which prevented stopping within the length of his vision and therefore was guilty of contributory negligence. This is a hard and fast rule, and there is considerable division in the opinions of the courts regarding it. The cases are annotated and commented on in notes in 44 A. L. R. 1403, and 58 A. L. R. 1493. In the case of *Tutsch v. Omaha Structural Steel Works*, 110 Neb. 585, this question was before this court and the court refused to apply the rule contended for in all its strictness and held: "In determining whether or not plaintiff acted as a reasonably prudent man, there must be considered the surrounding conditions, such as the darkness of the morning, the uncertainties of artificial light, the suddenness with which the danger confronted him, the quality of the danger, the absence of the red light which might have better prepared him to meet

the danger," etc. In the case of *Roth v. Blomquist,* 117 Neb. 444, this court said that this was the general rule, but that there are recognized exceptions or instances to which it does not apply, among them, an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated.

In the case of *Axelson v. Jardine,* 57 N. Dak. 524, 535, on petition for rehearing the court in discussing this proposition said:

"The rule contended for by appellant does not apply in this case for the reason that the driver could have stopped the car within the distance he could see, and the question of whether the plaintiff was negligent or not in not stopping the car when he could have stopped it within the distance he could see was for the jury under the facts and circumstances.

"It is negligence to drive a car so fast that you cannot stop it within the distance you can see. It is the reckless speed that makes the negligence. That element is absent in this case and the rule does not apply. A case very much in point is the case of *Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585."

In this case it is not the negligent speed at which the plaintiff's car was driven that prevented him from stopping within the range of his headlights, but it was rather his inability to see the ruts in the road in time to stop his car. In the case of *Roth v. Blomquist, supra,* the facts showed that the plaintiff's automobile collided with a team and wagon crossing the highway at right angles and same should have been anticipated. In that case the team and wagon were rightfully upon the highway, while in this case the county was negligent in not placing the highway in proper repair. Thus each case must be considered in the light of its own peculiar state of facts and circumstances. After all, the test is, what would an ordinarily prudent person have done under the circumstances as they then appeared to exist. Plaintiff had the right to assume, in the absence of notice to the contrary, that defendant

would keep its highway in a reasonably safe state of repair, or that it would give the public proper warning of any defect in the highway. The plaintiff testified that, on account of the topography of the ground in coming down the hill, his lights did not throw their rays down on the culvert and that he was unable to see these ruts or depressions until too late to avoid running into them.

We think that plaintiff's testimony presented questions of fact that should have been submitted to the jury and that the court erred in directing a verdict for the defendant.

REVERSED AND REMANDED.

ALBERT C. ATWATER, APPELLEE, V. CLARA M. SELLERS ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. NO. 27891.

1. **Contracts**: AGREEMENTS RELATING TO LITIGATION: PUBLIC POLICY. All agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void as against public policy.
2. ———: ———: GOOD FAITH. The good faith of the parties to a contract is not the test of its validity; the contract must be measured by its tendency and not merely by what was done to carry it out.
3. **Appeal**: VERDICT: SETTING ASIDE. A verdict of the jury sustaining an oral agreement wherein, by the evidence, it was shown that no particular definite thing was to be done, only that one of the contracting parties, who had nursed deceased during his last illness and had witnessed the deceased's last will, was to use his influence and do what he could in establishing sentiment in the community in favor of the heirs under the will, may be set aside for the reason that such a contract is void as being against public policy.
4. ———: ———: ———. Where the jury's verdict is clearly against the weight and reasonableness of the evidence, it will be set aside.

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

Charles E. Bruckman, for appellants.

Bernard McNeny, James F. Crowley, James S. Gilham and *L. A. Sprague, contra.*

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

MESSMORE, District Judge.

This is an action brought by appellee in the district court for Adams county to recover from appellants the sum of $5,000, together with interest thereon, for services alleged to have been rendered under an oral contract. A verdict was returned by the jury in favor of appellee for $6,040. Motion for a new trial was filed and overruled and judgment entered in favor of appellee in the sum of $6,040.

Appellee's petition sets forth that on or about May 10, 1927, William C. McCartney, an unmarried man, possessed of an estate of $125,000, and an uncle of appellants, was lying sick in a hospital in Hastings, Nebraska, without any hope or prospect of recovery from his illness; that previous to his coming to the hospital he had made a will devising and bequeathing his property to the Methodist Hospital in Omaha, Nebraska; that appellee, by inquiry, learned of the existence of appellants and their relationship to said McCartney and by writing to them procured their attendance upon the said McCartney; that thereupon the said McCartney made a second and last will devising and bequeathing his property to appellants; that the said McCartney died May 30, 1927; that appellants were strangers in the state of Nebraska, totally unacquainted with the laws and procedure of its courts or with the practicing attorneys therein and felt themselves helpless to assert their rights under the last will of said deceased; that appellants knew no one except appellee, and they made an arrangement with him that if he, appellee, would assist them in the employment of proper counsel, in the preparation of the necessary evidence for the maintenance of their rights in the courts, and in all respects advise and consult with them as to the assertion of their interests

under said will, they would, in the event of success in securing the property devised by said will, or the major part thereof, pay to appellee the sum of $5,000; that appellee performed his part of said agreement; that said will was duly presented to the county court of Adams county and admitted to probate; that the beneficiary under the first will thereafter appealed to the district court for Adams county and, pending the appeal, the controversy was settled in October, 1927, by giving the beneficiary under the first will $7,200, and the title and rights of appellants in and to all the rest of the estate of the said McCartney were settled in appellants, amounting to upwards of $117,000.

To the petition two answers were filed. The answer of appellant Clara M. Sellers admits the relationship of William C. McCartney to her, his residence, his death; that he was treated for his illness, and possessed of real and personal property in Adams county and elsewhere in excess of the value of $100,000; admits that during the last illness of the said McCartney and while he was confined to the hospital and on or about the 10th day of May, 1927, he made and executed his last will and testament, giving and devising all his property to these appellants, his sole and only heirs at law and next of kin, in equal shares to them and their heirs forever; admits the filing of the petition for the probate of said will in the county court of Adams county, the filing of objections to the probate thereof by the Methodist Episcopal Hospital and Deaconess Home of Omaha; that said will was sustained in said county court and the objections of contestant to the probate thereof overruled, from which ruling and judgment said contestant appealed to the district court for said county; that in the course of the trial on the contest in said district court a settlement was made with contestant, giving it the sum of $6,750; denies all allegations contained in appellee's petition not admitted.

The joint answer of Irene M. Henderson and Harold G. McCartney to the petition of appellee is substantially the same as the answer of the said Clara M. Sellers.

The evidence discloses that appellee was a trained nurse, had lived in Hastings about 18 years, first met William C. McCartney, a man 75 or 76 years of age, who formerly lived in Roseland, Nebraska, when he went to the hospital to nurse him on April 25, 1927, and did nurse him for 5 weeks and up to the date of his death May 30, 1927; that appellee first met appellant Sellers on the 6th of May, 1927, when she came to the hospital where appellee was on duty; that the said William C. McCartney made a will which was drawn by Mr. Whalen, an attorney, and which appellee took and filed with the judge of the county court of Adams county and which was duly filed for probate in said court later; that the Methodist Episcopal Hospital and Deaconess Home filed objections to the probate of said will, which objections were overruled, and contestant appealed to the district court for Adams county.

The oral contract alleged to have been made with Mrs. Sellers was, as shown by the evidence, quoting from the testimony of appellee: "Q. What, if any, agreement did you make with Mrs. Sellers with reference to the contest of the will and the McCartney estate? A. She agreed if I would stay with them and help them and do all I could in helping them establish their claim to the estate that she would pay me $5,000. Q. What were you to do? A. No particular definite thing was mentioned, only I was to use my influence and do what I could in establishing sentiment in their favor in the community."

This alleged agreement was made after the will was offered for probate in the county court and was in a conversation had with Mrs. Sellers about the middle of July, 1927. Continuing: "Q. What else, if anything, was said about what you were to do? A. That was about the substance of it. If I helped them out and they were successful in getting the property they would pay me that amount. Q. What did you do under that agreement you had with Mrs. Sellers? A. I talked with a great many around Hastings and I talked with ones at Roseland and I tried to leave a good impression about these heirs, Mrs. Sellers,

Mr. McCartney and Mrs. Henderson. * * * Q. What did you do about looking up McCartney's record as to his mental capacity after this contest was started? A. I gave my testimony in court."

Witness testified he talked to different ones, a Mr. Hall and his son Leland Hall, to Mr. Mangus, Senator Vance, and Dr. Uridil, the attending physician of William C. McCartney. The evidence developed that the Messrs. Hall were bankers in Roseland, Mr. Vance was a state senator; that he consulted with the attorneys representing appellants after the case was taken to the district court on appeal from the action of the county court in admitting the will to probate; that he talked with the attorneys about the arrangement he made with Mrs. Sellers and talked to Irene M. Henderson and Harold G. McCartney in Mr. Bruckman's office in October when they came from the east. To the question, "State what Irene Henderson and Harold McCartney said to you about the contract, if they said anything," he replied, "The only thing they said was that they were going to make it right with me if I would stand by them. I wouldn't be certain of the exact words." Witness testified that he did everything that the attorneys requested him to do in behalf of appellants.

In corroboration of this agreement appellee offered the testimony of his wife, who testified that the oral agreement was alleged to have been made in the presence of appellee's wife and daughter. Her pertinent testimony on this point is as follows: "Q. Where were you when you had this conversation with Mrs. Sellers? A. One time we were out riding with them in their car. Q. What, if anything, did Mrs. Sellers say to you at that time about a contract or deal she had with your husband? A. We were talking about plans for the future and it came up about the mortgage on our place and she said she would give us the money to pay it. And Mr. Atwater said, 'Does your brother and sister stand back of you in this?' And she said, 'Yes, they do. But in case they shouldn't, I will take it out of my own pocket. I can afford to, can't I?' That she would pay

it out of her own pocket." On cross-examination she was asked the following: "Q. What was Mr. Atwater to do? A. Assist her. Q. What did she want him to do? A. I don't remember. Q. Testify as a witness? A. Yes, sir. Q. Testify as a witness because he had witnessed the will? A. Yes, sir."

The testimony of Mr. Whalen, an attorney, was offered, but a part of it pertaining to the alleged contract was taken from the jury as a privileged communication between attorney and client.

The testimony of L. J. Mangus, pertinent to the alleged contract, was as follows: "Q. After this contest was started on the will, did you have a talk with Mrs. Sellers about any arrangement she made with Mr. Atwater? A. Yes, sir. Q. What was said by her in that conversation? A. Well, she told me she was going to pay the mortgage for Atwater's home for what he had done for them. Q. Did she say what Atwater had done or was going to do for them? A. No; she didn't."

The evidence further discloses that at the time of the contest in the district court over the will it was desirable to have appellee as a witness in that matter; that about that time a letter was written, known as exhibit 1, by appellee to Mr. Bruckman, one of the attorneys for proponents of the will, the substance of which was that he desired to have a car sent for him and arrangements made so that he could leave the case that he was then nursing at Fullerton, and to receive a summons to appear. He further stated in the letter that he received a message from Hastings to the effect that there was more in it for him to stay away from Hastings and that he did not have to come unless he wanted to.

Appellee filed a claim in the county court of Adams county against the estate of William C. McCartney in the sum of $105 on which he was allowed $71, $7 a day for 7 days, 6 days' time and board lost in making two trips from Fullerton to Hastings, also one day testifying to prove will, total $49, which was allowed him, also $14 mileage and also

$7 mileage for another trip to Fullerton and return and a telephone call of $1.50, and he also received an additional $8.10 for testifying in the district court. Said claim was filed October 31, 1927, and paid. The case in the district court was disposed of on the 24th day of October, 1927.

Appellant Sellers testified to the date of her arrival in Nebraska and meeting appellee; denied that she ever made any arrangement with Mr. Atwater of any kind, except that he did complain about his loss of time in nursing, and she stated he would be amply paid for it; denied that she had talked to Mrs. Atwater about paying the mortgage of $4,800 on the Atwater home as being part of the agreement had with Mr. Atwater in the presence of Mrs. Atwater; denied she ever saw the first will wherein her uncle had left his property to the Methodist Hospital in Omaha; testified to the payment to Mr. Atwater of the amount set forth in the claim above and also to the employment of attorneys; that Mr. Whalen drew the will in question, and at the suggestion of one Ed Livingstone she employed Mr. Crow, and that Charlie Byers had suggested the employ ment of Mr. Bruckman and that Hoagland & Carr were employed by her brother and sister, the other appellants.

William Whalen testified for appellants that he was one of the attorneys in the proceedings for the probate of the will, told about the conferences with the other attorneys, and was interrogated as to certain letters and papers and correspondence between appellants and Dr. Uridil and Mr. Atwater being burned or destroyed—he was not sure that they were destroyed; that on the same day, after the case was settled in the district court, something was said about papers, and they were taken from the room; what the papers were witness did not know. The evidence developed that there were a couple of letters written by Mrs. Sellers to Mr. Atwater from the time she had left Nebraska after the probate of the will in the county court and before the contest in the district court, in which letters, as Mr. Atwater testified, she had told him how she was returning, and wherein she said that if he would stay with them he

would never be sorry and that they would make it right with him. Mrs. Sellers denied that she knew anything about any correspondence or letters that she had written Mr. Atwater that were destroyed, that she didn't have copies of the letters with her written by her to appellee.

Appellants contend that the verdict of the jury is clearly against the weight and reasonableness of the evidence.

Concerning the testimony of appellee that no definite thing was to be done by him and that he had talked to persons to build up sentiment in favor of appellants, it developed that these talks were made to an attending physician of William C. McCartney, who was acquainted with appellant Mrs. Sellers, and with two bankers who had lived in the same community with William C. McCartney for years, and with Mr. Vance, a state senator, who was well known in the community. The only way in which this appellee could be of material assistance to appellants in the establishment of their rights and the maintenance thereof under this will, which he witnessed, would be by his testimony as to the mental competency of William C. McCartney at the time the will was made.

We quote from appellee's brief the following language: "There is no complaint that he failed to do what was asked to be done; that he failed in attendance at the office of counsel for defense. How valuable his services might have been had an actual contest of the will developed, we do not know. His relation to the matter was peculiar. He had been the nurse of the testator for five weeks. He knew his physical and mental condition, perhaps, better than any one else. He, probably, could be more helpful than any one else in some of the issues that might arise in the contest." This is tantamount to saying that he was a valuable witness for appellants in asserting their rights and interests before the court in so far as the second and last will was concerned.

The agreement alleged by appellee in his petition was to the effect that he would assist appellants in the employment of proper counsel, in the preparation of the neces-

sary evidence for the maintenance of their rights in court, and in all respects advise and consult with them as to the assertion of their interests under said will, and that appellants, in the event of success in securing the property devised by said will, or the major part thereof, were to pay to appellee the sum of $5,000. The record does not disclose that he assisted appellants in the procuring of counsel. The interest he took in the contest was the interest of a witness, for which he was paid.

The agreement, as pleaded in the petition and upon which the lower court instructed, and the agreement the record portrays are two separate and distinct agreements. The agreement established by the evidence was to the effect that no particular or definite thing was mentioned that appellee was to do, only that he was to use his influence to do what he could in establishing sentiment in favor of appellants in the community. To establish sentiment means to create a mental attitude or thought in favor of appellants in the community, to cause a decision of mind formed by deliberation and reasoning of the people of the community in behalf of these appellants, to create opinion in support of appellants. The agreement, as testified to by appellee, is an agreement that would indicate that sentiment and influence would be an essential thing in assisting appellants to assert their rights and support them in the will contest.

A contract that has for its purpose the creating of sentiment and influence in the assertion and maintenance of appellants' rights is equivalent to saying that that influence and sentiment are the controlling factors in the courts of this state to establish the rights of appellants therein. Such an agreement, by its very nature, would be contrary to public policy and could not be enforced in the courts of this state. Courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare; that sound morality and civic honesty are the cornerstones of the social edifice is a truism which needs no reenforcement by argument. The question whether a contract is against

public policy must be determined by its purpose and tendency. "It follows, to state the rule comprehensively, that all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void, though not open to the charge of actual corruption." *Brown v. First Nat. Bank of Columbus,* 137 Ind. 655. "The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration." Note, 13 Am. St. Rep. 297. In *Thomas v. Caulkett,* 57 Mich. 392, the principle set forth therein applies in this case that the good faith of the parties to the contract is not the test of its validity; the contract must be measured by its tendency and not merely by what was done to carry it out. Whatever tends to injustice or restraint of a legal right or to the obstruction of justice, or to the obstruction or perversion of the administration of the law, whenever embodied in or made the subject of a contract, the contract is against public policy and therefore void and not susceptible of enforcement. *Davies v. Davies,* 36 Law Rep. Ch. Div. (Eng.) 364; *State v. First Bank of Nickerson,* 114 Neb. 423.

A restatement of the language used in appellee's brief as to how valuable appellee might have been had the contest on the will not been settled and the peculiar position appellee was in and the knowledge he had would indicate that he was in the position of a witness who might well be in the camp of appellants and his value to appellants would be by his testimony. If this be true, the contract would be against public policy. Such a contract would have a tendency and offer a strong temptation to the procurement of perjury; the tendency of such an arrangement would be to pervert justice, to bring the courts into disrepute and cause a lack of confidence therein. Witnesses, like jurors and court officers, owe a duty to the state to aid in the due administration of government for such compensation as the law provides. The least tendency to the

contrary should not be tolerated, however innocent the claimed intent. *State v. First Bank of Nickerson, supra.*

In view of our holdings, it is not necessary to discuss the other assignments of error raised by appellants.

We must therefore conclude that the verdict of the jury is clearly against the weight and reasonableness of the evidence, and that the contract sought to be enforced is against public policy. The judgment of the lower court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

LOGAN C. MUSSER, APPELLEE, V. VILLAGE OF RUSHVILLE ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. No. 27868.

Municipal Corporations: STREET IMPROVEMENTS: ASSESSMENTS: VALIDITY. The methods prescribed by section 17-432, Comp. St. 1929, granting to cities of the second class and villages power to pave, gravel and improve streets are mandatory and jurisdictional, and unless the governing boards of such municipalities act within one of the three prescribed methods, no valid assessment can be made against property to pay the costs of such improvement.

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

Nichols & Johnson, for appellants.

A. C. Plantz, contra.

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

RAPER, District Judge.

This is an appeal by defendants from a judgment for plaintiff in an action by Logan C. Musser, plaintiff, against the Village of Rushville and the five individual trustees and the clerk of said village, defendants, enjoining the defendants from levying a special tax on certain lots of plaintiff for graveling streets in Rushville.

It appears from the pleadings and the evidence that on July 30, 1928, a petition signed by nine alleged resident owners of real estate abutting on and adjacent to Main street in the village of Rushville between Third and Fifth streets was filed with the village board, asking the board to create an improvement district on Main street between Third and Fifth streets, and to survey, grade and gravel said Main street, the cost thereof not to exceed 90 cents a front foot. On the same day and at the same meeting of the board, the village board passed an ordinance creating improvement district No. 11 (being ordinance No. 259) which district included that part of Main street from south line of Third street to south line of Fifth street, on which plaintiff's lots abutted. The ordinance provided that the roadways in said districts be graveled and improved, and further provided that plans and specifications and estimates of the cost of the work be secured and approved by the board of trustees, and following the completion of said engineering work, bids for the construction of the work should be "obtained by advertisement as by law required. Or the board of trustees may in their discretion do or cause to be done under their direction, or the direction of a competent engineer in their employ, all of the work necessary to be done without the calling for bids or letting of contracts;" and that the cost of the work be assessed against the real estate in said district according to benefits, but not to exceed 90 cents a front foot. This ordinance was published only one week in a weekly paper and no other notice was given as to creation of the district. No further steps were taken until May 26, 1930, when the board in regular session passed a resolution "that the chairman be authorized to enter into a contract with some one for furnishing and spreading of gravel on the five blocks of gravel that are covered by ordinances Nos. 259, 260, 270. The contractor to furnish bond in the amount of the contract to complete the contract." On July 9, 1930, without further action by the board, the chairman on behalf of the village entered into a written contract with a gravel company to

furnish and deliver for improvement district No. 11. The gravel furnished for district No. 11 amounted to $1,897.50. No advertisement for bids was made. The delivery of the gravel was completed on district No. 11 on July 17, 1930, and Mr. Curtis, the village clerk and the chairman, without any further action of the board, issued a warrant to the gravel company for $1,897.50 on July 19, 1930, and Mr. Curtis, who was also village treasurer, paid the warrant the same day. On this same day, without any action by the board, the clerk mailed to plaintiff postal cards, stating the amount of gravel taxes due on his lots and, if not paid by August 1, it would become a lien on his property and would be certified to the county treasurer. The amounts were computed at 82 cents a front foot on all the property, and the taxes not paid to the village treasurer by August 1 were certified to the county treasurer, except plaintiff's. This action was begun July 28, and a restraining order was granted that day.

Second street runs east and west through the village and was then graveled and is a part of a state and federal highway. The two blocks graveled on Main street run north and south. Second street is one block north of Third street, and Main street was then graveled from Second street to Third street. After the ordinance was passed and before the contract was entered into, the United States census disclosed that Rushville contained more than 1,000 population, but no proceedings had been taken to change from village to city organization. The village board held no meeting to equalize and levy the tax, and admitted that unless restrained, they would levy and certify the taxes for the improvement to the county treasurer. The district court found generally for plaintiff, that the improvement exceeded $500 in cost; that no estimate of expense by the village engineer was procured; that no advertisement for bids was made; and that the petition did not contain 60 per cent. of the resident owners of the abutting real estate in said district. Each of these special findings are supported by the evidence.

Section 17-432, Comp. St. 1929, grants power to cities of the second class and villages to improve, grade and gravel streets, but provides that none of the improvements shall be ordered unless by one of three procedures: First, by petition signed by 60 per cent. of resident owners of property directly abutting upon the street to be improved; second, whenever the governing body deems it necessary to make the improvement, it shall by ordinance create such paving or graveling district, and after the passing, approval and publication of such ordinance, shall publish notice of the creation of such district, if in a weekly paper, two consecutive weeks; and, third, the council or board shall have power by three-fourths vote of all members to enact an ordinance creating a paving or graveling district and to order such work to be done without petition upon any main thoroughfare that connects with or forms a part of the state highway system. The power of the board to make such improvements is circumscribed by the statute, and unless the board conforms to one of the three prescribed methods, they are without power to lawfully bind property to pay for such improvements. It evidently was not the purpose of the statute to grant unlimited and unrestricted power to the city councils and boards of trustees to improve streets.

It will be observed from the foregoing history of the proceedings that the village board cannot bring themselves under the first method, because they did not have 60 per cent. of property owners on the petition. Neither can they rightfully claim to have acted on the second method, because no notice of the establishment of the district was published for two weeks. As to the third method, it will be noted that improvement district No. 11 does not connect with or form part of a state highway.

"Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein." *Garver v. City of Humboldt*, 120 Neb. 132. That case further holds: "Statutes empowering municipal boards to perform certain functions

will be strictly construed, and all doubt will be resolved against the exercise of the power, rather than in favor of it."

Furthermore, there was no estimate of the proposed improvement made to or adopted by the board, and no advertisement for bids was published. These are required by section 17-119, Comp. St. 1929. The ordinance specified that should be done, but had a further provision that the board might have the work done without calling for bids or letting of contracts.

The appellants claim that under the village charter no estimate of cost is required because a village has no engineer. The ordinance required such estimate, and the villege board could employ an engineer, so it is unnecessary to decide the effect of the 1925 amendment (Laws 1925, ch. 51) to section 17-119, as applying to villages, and, besides, the village had been merged into a city of the second class.

Appellants claim that appellee is estopped to question the validity of the assessment, in that he knew the work was in progress and took no steps to prevent its completion. Estoppel in such cases may arise where there has been some irregularity in the proceedings, but where there is a failure to comply with some jurisdictional requirement estoppel will not arise. *Rooney v. City of South Sioux City*, 111 Neb. 1. Under the record as shown, no valid assessment for the cost of the graveling can be charged against plaintiff's property.

There are several other questions raised in the pleadings and briefs which are unnecessary to notice.

Th decree of the district court is

AFFIRMED.

SCHOOL DISTRICT NO. 142, HOLT COUNTY, APPELLANT, V. SCHOOL DISTRICT NO. 13, HOLT COUNTY, APPELLEE.

FILED DECEMBER 16, 1931. No. 27870.

Taxation: ASSESSMENT. A power plant consisting of powerhouse, dam, floodgates and spillway was constructed along the line

between school districts No. 142 and No. 13 in such manner that all the improvements were west of the line in No. 142, unless, perhaps, an infinitesimal portion of one corner of the powerhouse projected into No. 13. *Held*, that the doctrine of *de minimis non curat lex* applied, and that the county board of equalization abused its discretion in assessing the property in both districts and dividing the taxes equally between them.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

J. J. Harrington, for appellant.

Julius D. Cronin, contra.

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

REDICK, District Judge.

This is a controversy between school districts No. 142 and No. 13, in Holt county, Nebraska, involving the question of the proper place of assessment of personal property of the Northern Nebraska Power Company consisting of a powerhouse and machinery and a dam across the Niobrara river. The crucial question is one of fact, that is, whether or not any of the personal property above referred to is located in school district No. 13, and this depends upon the location of the dividing line between Holt and Boyd counties, which is fixed by statute as the middle of the channel of the Niobrara river. The dividing line between the two school districts runs north and south across the river.

The powerhouse is located on the north bank of the river, about half of it being built into the bank and the other half over the river. It is about 60 feet north and south by 48 feet east and west, but does not stand square with the compass, a line from the northeast to the southeast corner of the building angling somewhat to the southwest, the dam continuing in that direction in a straight line. Immediately south of the southeast corner of the powerhouse is a concrete dam about 30 feet in length, then comes a 20-foot steel gate, then a spillway of con-

crete and steel 237 feet 6 inches long, then three gates 14 feet 10 inches each in width, and beyond that to the south a dirt dam of considerable length.

The line dividing the school districts, extended north, would pass through the powerhouse at a point 6 or 8 feet west of the southeast corner and come out of the north wall about 26½ feet west of the northeast corner, thus placing about a fourth of one-third of the powerhouse and a portion of the machinery therein contained east of the dividing line between the school districts, and it is because of this fact that district No. 13 claims that a portion of the taxes levied upon the personal property of the power company should be allocated to it. It is possible that an insignificant part of the concrete dam is east of the division line, but the great weight of the testimony establishes that all the works south of the powerhouse were west of the division line and they will be so considered.

The question was presented to the county board of Holt county sitting as a board of equalization, both parties producing evidence and represented by attorneys, and the board decided that a portion of the property was located in school district No. 13 and apportioned the taxes equally between the two districts. An appeal was taken by district No. 142 to the district court for Holt county, which confirmed the decision of the board of equalization, and the case is brought here for review by said district.

The case was presented in the district court and also in this court upon the testimony taken upon the hearing before the board of equalization, which constitutes the bill of exceptions herein. If any portion of the property, the subject of the assessment, is located in school district No. 13, the judgment of the district court must be affirmed, otherwise reversed.

As above stated, the real question for determination is the location of the main channel of the Niobrara river, fixed by the legislature many years ago as the northern boundary of Holt county, or as it existed at the time of

the erection of the dam, gradual changes being possible on account of the vagaries of the waters flowing through a sandy soil. The general features of the banks and bed of the river may be here noted. The north bank was 25 to 30 feet above the surface of the river and was composed largely of shale and soapstone; the bed of the river was sand, and the south bank of the same material, quite low; the distance between the banks in many places was more than 300 feet and waters flowed in many channels, the main channel being sometimes at one point and sometimes at another as the result of floods. At a place a quarter of a mile or more west of the dam, a tongue of low land (referred to as Whiting's) extended from the north bank to a point about half a mile south, and prior to the erection of the dam the waters flowed southeasterly around this point and then turned northeasterly until they passed under a steel bridge about 200 feet or more east of the dam, being thereto conducted by a series of riprapping on the south bank, at times ignoring these obstructions and washing out the highway south of the bridge, so that a cement bridge was put in west of the steel bridge to take care of these flood waters, since which time the main flow of the water was under the center of the steel bridge.

The real point of dispute is whether, at the time of the building of the powerhouse and dam, the main channel of the river west of the powerhouse was along the north bank, for which district No. 13 contends, or whether it was south of that bank a sufficient distance to clear the south line of the powerhouse.

About an equal number of witnesses were called by each party on this point, but it would unduly extend this opinion to recite and analyze their evidence, and it must suffice to give our conclusions from a careful study of the evidence, and the reasons therefor as briefly as may be.

The evidence for appellant, school district No. 142, is clear and specific that, at the time the powerhouse and dam were put in, the main channel of the river was at least 150 feet south of the north bank; and this is sup-

ported by the undisputed facts that there was a sandbar extending that distance south from the north bank at the time the construction of the improvements was commenced; that the powerhouse and connecting cement dam were built upon practically dry land, one-half of the powerhouse being built into the bank; that a cofferdam beginning about 30 feet west of the powerhouse and 150 feet in length extending in a southerly direction was built for the purpose of protecting the cement dam from overflow during construction, and that only the southern end of the cofferdam touched deep water; that in the building of the cofferdam they had no water to contend with for the first section; that the cofferdam was not put in until they started working beyond the sandbar and then for the purpose of protection from high water; that prior to the erection of the dam the waters came from the southwest in order to pass under the steel bridge, which fact was testified to by some witnesses of appellee as well as those of appellant. Some of appellee's witnesses testified that the main channel was along the north bank, but their evidence is not satisfactory and in some instances, in the opinion of the writer, fails to distinguish between the north bank east of the dam and east of the bridge and that portion west of the dam. In short, we are clearly of the opinion that by far the greater weight of the evidence establishes that the main channel of the Niobrara river at the time of the erection of the powerhouse was at a point 100 feet or more south thereof and that no portion of the powerhouse or dam lies within the lines of district No. 13. Upon a review of all the evidence it may be stated with absolute certainty that the entire powerhouse is in Boyd county. The main channel was estimated from 50 to 60, 100 and 150 feet in width before the dam was constructed. It would therefore follow that, even though it flowed up against the north bank, one-half (30 ft.) of the powerhouse being built into the bank, only a very negligible part, if any, would be south of the center of the channel in Holt county. If the powerhouse was 72

feet long, as said by one witness, and the river channel only 50 feet wide before the dam was built, only about 88 square feet of the powerhouse would be south of the center of the main channel. For purposes of assessment the power plant, including powerhouse dams, gates and spillways, must be treated as a unit, as it is impracticable to assess the respective portions of the plant separately.

Section 77-1415, Comp. St. 1929, provides that, where a question arises as to the place of listing and assessing personal property between two places in the same county, the place for listing same shall be fixed by the county board, and when so fixed "shall be as binding as if fixed in this chapter;" and in construing a similar section (section 42, art. I, ch. 77, Comp. St. 1905) in *Diemer & Guilfoil v. Grant County,* 76 Neb. 78, it was held that the determination of the county board would not be disturbed unless an abuse of discretion is shown.

The finding of the board was: "The property of the Northern Nebraska Power Company in Holt county, Nebraska, consisting of a dam, powerhouse and machinery across the Niobrara river, is situated in school district No. 142 of Holt county, Nebraska, and No. 13 of Holt county, Nebraska, and that the valuation for school tax purposes be equally divided between said school districts No. 142 and No. 13 of Holt county, Nebraska." The final question, therefore, is whether or not the county board abused its discretion in so holding. The proportion of the property, if any, of the power company in school district No. 13, as shown by the evidence in this case, is so infinitesimal as to call for the application of the doctrine of *de minimis non curat lex.* It would be manifestly unfair and unjust under these circumstances to allocate to district No. 13 one-half of the taxes upon the property of the power company, and we are forced to the conclusion that the board was guilty of an abuse of legal discretion in so doing.

The judgment of the district court will be reversed and the cause remanded, with instructions to enter a decree

that the proper place of assessment for taxation of the property of the power company is in school district No. 142, and certify their action to the county board.

REVERSED.

ERWIN W. EBERT ET AL., APPELLANTS, V. ANNA M. EBERT ET AL., APPELLEES.

FILED DECEMBER 16, 1931. No. 27916.

Deeds: VALIDITY. Evidence examined and *held* to be insufficient to establish (1) mental incompetency of the grantor to execute the deeds in question; (2) undue influence in their procurement; and (3) a constructive or resulting trust in favor of the heirs of the grantor.

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

Good, Good & Kirkpatrick and *E. S. Schiefelbein,* for appellants.

Max V. Beghtol and *Woodruff & Gard, contra.*

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

REDICK, District Judge.

Action in equity to set aside two deeds executed by Henry P. Ebert to his second wife, Anna M. Ebert, conveying a house and lot in Lincoln and a farm of 160 acres in Dawson county. Plaintiffs Erwin W. and Arley S. Ebert and Oral M. Berlin (nee Ebert), children of grantor, claim that the deeds were executed at a time when their father was mentally incompetent and were procured by undue influence of the defendant and upon her promise that after grantor's death she would hold the real estate in trust for the appellants as heirs at law of the deceased, thereby raising a constructive or resulting trust in favor of the plaintiffs. These claims were put in issue by the answer; the case was tried in the lower court, and resulted in a decree generally against plaintiffs and for de-

fendant, but upon condition that defendant quitclaim to plaintiffs all interest or claim she might have to certain property in Saunders county, Nebraska, being all the remaining property belonging to the deceased, consisting of a two-sixths interest in a 200-acre farm, and a like interest in a house and lot in Wahoo, and a claim against the farm in the sum of $5,000. Plaintiffs appeal to this court.

For a clear understanding of the questions submitted, it is necessary that we state the situation of the parties at and before the execution of the deeds in question. Henry P. Ebert was a farmer and lived with his first wife on the 200-acre farm in Saunders county, which came to her by inheritance, and which, upon her death, descended to the three children and Henry, her surviving spouse, Henry's interest being an undivided two-sixths; he also had two claims for improvements on the property duly allowed by the probate court in the sum of $5,000; he also owned a house and lot in Wahoo; he was also the owner of personal property and farm machinery which was afterwards purchased by his son Erwin for the sum of $1,200 for which he gave his note; also an improved farm of 160 acres in Dawson county, and a five-room frame house and lot in Lincoln (the property in controversy); also personal property consisting of building and loan stock in the sum of $3,100, and note of a relative for $3,500.

Defendant Anna M. Ebert was a widow living in Kansas City, Kansas, where she owned a house and lot which had been the family homestead, and where she conducted a boarding-house and took care of her father, who lived with her; she also owned another small house and lot in Kansas City, Kansas; the value of these properties is not disclosed by the evidence but they were incumbered to the extent hereinafter stated. She had taught school for twelve years.

Some time in 1926 Henry P. Ebert met the defendant, then Mrs. Jones, on a visit to his sister, who was working for the defendant in the boarding-house, and this ac-

quaintance ripened into a friendship and correspondence between them, and in the spring of 1926 Henry went to Denver to meet the defendant, who was there on a vacation, remaining about one week. He visited defendant again at her home and proposed marriage, but defendant refused on the ground that she had to take care of her invalid father. Finally, in January, 1927, Henry invited her to come to Saunders county, where his daughter Oral and his son Erwin were to be married. She accepted the invitation, the marriages took place, and afterwards, upon the same day, Henry and defendant were married and went to Kansas City, Kansas, to live at her house. At this time Henry was 58 and defendant 53; Oral was 27, Erwin 25, and Arley 19. Arley went to school in Chicago for three months, and then went to live with his father and defendant, and continued to do so until this suit was brought, paying his board and lodging and being taken care of by the defendant while ill after an operation, and at another time, for several months. The relations of the families were always pleasant and affectionate, as evidenced by visiting back and forth and by a number of letters in evidence. Henry made his wife an allowance of $50 a month until the fall of 1927 and for an indefinite period thereafter $100 a month, and in the summer of 1928 paid off a mortgage upon Mrs. Ebert's house in the sum of $1,100. He had no occupation, but helped run the boarding-house—washing dishes, going after groceries, and making himself generally useful.

In August, 1928, Henry became ill, and in the latter part of that month suffered an apoplectic stroke which resulted in partial paralysis of his right side and affected his speech; he was confined to his bed several weeks, being taken care of by his wife. On September 10 following he transferred to his wife the building and loan stock in the sum of $3,100, a note for $3,500, and Erwin's note for $1,200, this being all the personal property he then owned, having on September 4 previously given his wife a check for $257.34, his balance in the bank at Ithaca. The validity

of this transaction is not in question in this case, but is the subject of another lawsuit pending in the federal court. After his stroke the bank account was kept in the name of defendant.

Prior to October 12, 1928, Mrs. Ebert, at the request of her husband, as she claims, after writing Erwin for them and receiving no answer, procured two deeds from the bank at Ithaca containing the description of the Dawson county farm and the house and lot in Lincoln, and had deeds prepared from her husband to herself conveying those properties, and on that date procured the attendance of a notary (Craig) to witness the signature and take the acknowledgment of the deeds, but Henry said he was not ready to sign them and they were not then signed. On October 29 following another notary, Mr. Berry, was called by Mrs. Allen, who had prepared the deeds, at the request of Mrs. Ebert, and at that time the deeds in question were signed and acknowledgment taken and were recorded late in November.

After the first ten days Henry's health continued to improve, with occasional set-backs, so that he was able to get around the house, and in the spring to be taken out riding, and during the summer to visit his children in Saunders county, until about a month before his death, which occurred November 28, 1929.

1. The evidence as to the mental condition of Henry at and about the time of the execution of the deeds is not sufficient in our opinion to establish incompetency. It consists of evidence by the three children that after his stroke he lost control not only of his motor faculties, but also of his emotional faculties; that he could not use his right arm, and when attempting to speak would burst out crying or laughing without any apparent reason other than his condition; and the testimony of Dr. Williams in answer to a hypothetical question, based upon the evidence of the witnesses, that the patient had impaired mental faculties and would not have normal powers of resistance, that one in the condition described would have "an involvement

of his intellect to a degree that is highly questionable and you would have to know the patient the moment he signed the document or made the transfer" to form an opinion of his competency at that particular time. He expressed no opinion as to Henry's competency when the deeds were signed. On the other hand, Dr. Barney, who attended the patient from the time of his seizure until his death, states that he did not observe any conditions of emotional disturbance until November of 1928, and that during all the time prior thereto he considered the defendant mentally sound and perfectly competent to transact business. Miss Showalter also fixes the crying spells as beginning the latter part of November, 1928. A number of nonexperts gave their opinions, of varying weight, to the effect that he was mentally sound. From a careful consideration of all the evidence upon this question, we have come to the conclusion above stated.

2. Upon the issues of undue influence and constructive trust, plaintiffs rely upon what is claimed to have been an unnatural disposition of Henry's property, and which is said to be the result of his mental weakness; threats of his wife, and promises made by her to distribute the property after his death according to the rules of intestacy. The evidence upon these questions is so interwoven that they may well be considered together. Arley testifies that in the summer of 1927, from an adjoining room, he overheard a conversation between Henry and his wife in which the latter suggested to Henry that his children were out of their affairs and they need not consider them, to which Henry replied, "Yes, but these children are the ones who have helped me all through my life to get what I have and I have denied them a good many privileges they could otherwise have. I don't feel we need to spend any more than the income on this and leave them the principal after we are through with it." At another time prior to the transfers, Arley testifies defendant said in his presence to Henry: "If you don't want me to have protection by giving me enough property as collateral to protect myself

you will have to turn it over to one of the kids or all of them and they will have to be responsible for your care." And again: "Well, if he feels that way about it I don't see how I can assume responsibility for his care." And Arley testified that in the spring of 1929, Henry said to defendant, "If you will just give me my property, or money, I will be glad to take care of myself," and defendant replied, "When you get all packed up and ready to go I will give you what you want." Miss Showalter testifield that she heard defendant tell Henry, in the spring of 1929, that, if he could think of any way to manage it, she was willing that he take the money he had given her and he could provide for himself in whatever way he wanted to; to which Henry replied, "No, no; I don't want to go away." There was also testimony by Mrs. Allen and the notary who acknowledged the deeds that at that time Henry said that he "didn't know why he had to do that to get protection." Mrs. Allen also testified that when she was asked to prepare the deeds defendant said, "It was to take care of him during his illness;" that she made some correction in one of the deeds after it was signed, defendant saying she "didn't want to go through all that again."

It is claimed by plaintiffs that the greater part of this testimony is undenied by the defendant. She did, however, specifically deny making any threats that if he did not sign the deed he would have to leave home and she would not take care of him, or that he would have to go back to the children or to a hospital, or making such statement to Mrs. Allen. Defendant testified that Henry said about the deeds that "he wanted to get his affairs arranged so I could take care of it;" "I do not want Erwin to take care of my affairs. We can take care of our own." She also testified that there was never any talk of reconveyance to Henry or anybody else; he never said anything about the children having any interest after my death except as I should decide; "he knew I was friendly toward the children and wanted to treat them right." Miss Showalter testified that early in the fall, after Henry was

stricken, she overheard a conversation between Arley and Henry in which Arley said: "Well, Dad, it is all right with us, you give her what you think she ought to have and don't worry about us children. We will get along all right." Mrs. Allen testified that defendant told her that "the deeds were to take care of him during his illness." In December, 1928, the sum of $2,100 out of the building and loan stock was paid on a mortgage on the boarding-house property. The $3,500 note was paid October, 1929. Rent of the Dawson county farm for 1928 was $1,000, and was used up in his care; the 1929 rent was used to build a barn, pay interest, taxes and expenses, about $1,100. Arley testified that on March 13, 1929, at his father's request and dictation the following instrument was prepared by him:

"Will of H. P. Ebert

"To whom it may concern:

"To Anna M. Ebert, my wife, I bequeath all of my tangible property and my property in Lincoln, Nebraska. I want my property in Dawson county, Nebraska, to be distributed according to the state laws of Nebraska.

"Any equity I hold in the property in Saunders county, Nebraska, I bequeath to my three children.

"This may not be a legal document but I believe it just and right and trust all parties concerned will respect my wish.

"(Signed) H. P. Ebert."

This instrument was put in a sealed envelope and placed in the bank and defendant had no knowledge of it until after Henry's death. Of course, it could not affect the deeds previously signed, if they were valid, but merely expressed Henry's state of mind when executed. Shortly after administration proceedings were started, February, 1930, and before this suit was begun, defendant deeded the property in controversy to one Ora Cox Wilson of Lincoln, Nebraska. This was simply for convenience, the grantee stating "she wanted me to keep in touch with it;" "to look after her property." "She was in Kansas and I was here and I could look after it better than she could."

With reference to the final execution of the deeds in question, the testimony was as follows: Berry, the notary, Mrs. Allen and defendant were the only persons present. Berry testified: "When I asked him if he understood what he was signing he said he did. He made some remark about not knowing why he had to do it for protection, but I didn't pay any attention." The deed was signed by mark with his left hand. "He could not use his right hand." I acted at the request of Mrs. Allen; Mr. Ebert signed of his own will and accord. Mrs. Ebert remained in the other part of the double room.

Loleta Allen testified she was in the real estate business and drew the deeds early in the fall of 1928 at the request of Mrs. Ebert; she signed Henry's name and he made the cross; signed in his bedroom, Mrs. Ebert was in the adjacent room; Henry said he did not know why he had to do it to get protection; that was all that was said, except Berry asked if he acknowledged the deeds. Mrs. Ebert testified that after the deeds were signed Henry handed them to her, saying, "These are yours; have them recorded;" that she had talked with Arley about the deeds before and after they were executed; that she told him what conveyance had been made to her. This is practically all of the pertinent testimony at the time the deed was signed. Mrs. Kepner testified that she was present on October 12 when Henry declined to sign the deeds, and that after the notary had gone she had a conversation with Henry in which he said that he didn't know just what he wanted to do, and Mrs. Ebert told him that she didn't want him to do anything that he did not want to do himself, and he said "that he wanted to fix things for her and didn't see how, but he asked me how we had our property, and how we had things fixed;" that he wanted to avoid probate court proceedings; talked about the laws of different states; that at other conversations he spoke bitterly about court trials and squandering money in litigation.

The execution of the deeds in question, or rather the transfer of the property to defendant, was discussed by

Arley and defendant prior to their execution; defendant testifying that Arley said, "It was all right." Arley's evidence as to this conversation was: "She asked me in regard to the transfer of these deeds, what I thought about it, just a sort of general opinion. I says, 'It looks to me as though it is the right thing to do if you really need it for his care.'" Also, that they discussed the effect of the transfers in the event of her death before her husband, and that defendant said: "Well, that will automatically revert back to you children then." Also that she said: "In case of his death before it is used for his care and funeral expenses, etc., I will make a proper distribution, avoid the probate court." Mrs. Ebert also testified that in a conversation with her husband "he said that property was to take care of the expenses and to take care of me after he was gone," and that he never said anything different; that he never told her to make any other disposition of the property covered by the deeds after his death, but that the property was to be hers absolutely; he also said that his claim against the Saunders county home should be canceled, and that the children should have that home and the property in Wahoo. Mrs. Gooch testified that at one time Henry said that he had "paid his children for what he thought they had been worth to him in making this farm." It appears in the evidence that Henry paid Erwin $50 a month after he was of age for work on the farm. January 2, 1930, Erwin wrote a letter to defendant asking in what condition his father left his property and inclosed $72 interest on his $1,200 note, promising to pay the remainder shortly. In response to that letter, on January 14, 1930, defendant wrote Erwin as follows:

"After your father had the trip last summer and we all got home safely and things readjusted for his comfort and etc., he seemed so much more contented and satisfied about everything and everybody, which made things a little easier for me to handle and wade through. He did not want a will but wanted you three children to have the

home place free and clear, which means the cancelation of the note or mortgage for $5,000 and the release on my part, of any claim or interest, that the law might give me, if probated.

"In November of 1928 he deeded to me the Dawson county farm and small property in Lincoln, which he wanted me to have to take care of myself, knowing there would be no one to give me the tender care he received during his long illness.

"When I asked him how he would like me to make the final adjustment should I pass out suddenly or not need all of it, he said I could fix it so his share in what was left of his property, go to you three children and the rest for me to dispose of as I felt I wanted to do.

"I'm sure he wanted to be fair with us all and pray that all will be satisfactory with you children.

"I am going to have things put in legal form just as soon now as I can get to it, so you children will get what your father wanted you to have should something overtake me. I intend to carry out his wishes in detail as nearly as it can be done.

"When you find out what is necessary to do, to help clear the 'home place,' so you can have a clear title to it, let me know and I'll be glad to do it. You will need this, should you ever want to make a transfer to any one. There is nothing that needs probating or mixing up with the courts, which always saves a good per cent.

"I'm sure your father had this in mind when he ask to have things done in this way.

"I want you to know, too, that I am and always shall be interested in you all and anxious for your well being and success. I'm sure you will know this as the years go by. Please let Oral read this, too, for it is hard for me to get so much writing done. Hoping this finds you all well and happy again, lovingly.

"Mother."

It is upon this letter that appellants chiefly base their claim of a constructive trust. It is contended that the

letter is in direct conflict with the testimony of defendant that the transfers to her were absolute, especially that paragraph reading as follows: "When I asked him how he would like me to make the final adjustment should I pass out suddenly or not need all of it, he said I could fix it so his share in what was left of his property, go to you three children and the rest for me to dispose of as I felt I wanted to do." This undoubtedly refers to the properties conveyed, but does not appear to us to be inconsistent with her testimony that the deeds were made to her unconditionally. A fair construction would seem to be that the property was given to her for her use and if anything was left she could fix it so his share of what was left would go to the three children. The most that can be made out of this paragraph is that he wished such portion of the property as was not needed by the defendant during her life to go to his children, and trusted her to make such disposition of it.

This construction is borne out by the language later on where she speaks of "having things put in legal form." What "form" she meant is not disclosed, but it is likely she intended to make a will to the children. If this was her purpose and constitutes a trust for the benefit of the children the time has not yet arrived to enforce the same.

As to the deed to Wilson, a woman as intelligent as defendant would hardly expect such a conveyance would be effective to prevent recovery of the property by the heirs if otherwise entitled. Mrs. Ebert was not asked about this matter, so the only explanation of it is that given by Ora Cox Wilson. It seems to have had the effect, however, of getting notice to defendant of these suits through service on Wilson, which otherwise might have been by publication.

We are strongly persuaded by the evidence that the defendant is a woman of excellent character; that she was very fond of her husband and, especially after his stroke, gave him all the care and attention which a dutiful and affectionate wife would do, the evidence upon this question

being undisputed; that she was most friendly and affectionate in her treatment and consideration of his children and had a natural appreciation of their claims upon the bounty and estate of their father; that after her husband's seizure she felt the necessity of taking measures with reference to his property which would enable her to minister to him and supply his needs in case his illness would be prolonged, and for which her own financial condition would be inadequate. We are not concerned with the transfer of the securities, except as that transaction may serve as an aid in determining the real nature and purpose of the conveyances in question. With reference to these there seems to have been no attempt on her part to conceal the transaction from the plaintiffs. She wrote to Erwin for the papers so she could get the description of the Dawson county farm and the Lincoln lot. She talked the matter over with Arley before the deeds were signed, and had the deeds recorded within a month thereafter. If she had procured the deeds secretly and withheld them from record until after the death of her husband, a quite different aspect of the transaction might be presented. Her frank avowal of the desire of her husband that the children should have the Saunders county property free from her husband's $5,000 claim against it is another indication of her recognition of their proper claims. If she had been a woman of the character sought to be painted by the plaintiffs, it is quite probable she would not only have insisted upon retaining the property she received, but would also have claimed her interest in the remainder of her husband's estate.

While there is evidence which, considered alone, would warrant an inference that defendant made use of the situation to persuade her husband to execute the deeds, the evidence as a whole falls far short of establishing such undue influence as to overcome the will and judgment of the grantor. That he was desirous of making some provision for his wife during his lifetime is indicated by the document subsequently executed, called a "will," which seems to ratify his previous transfer of his securities and

of the Lincoln property. The fact that, at that time, he desired the Dawson county farm to descend according to statute indicates a change of mind, but carries no implication derogatory to the validity of his former decision.

We are unable to conclude from the evidence that the transfer of the securities and real estate to defendant was of such an unnatural character as to stamp it fraudulent. The values of the respective parcels of real estate are not disclosed by the evidence. The most we have is, on the one side, $7,500 in securities, the Lincoln lot and the Dawson county farm, and, on the other side, a third interest in the Saunders county farm, a house and lot in Wahoo, a claim for $5,000 and accrued interest from 1924, and the distributive share of the widow in that property. When we consider the financial situation of the husband and wife, the husband's physical condition resulting from a stroke of paralysis, and the uncertainty of the duration of his disability, which in fact continued, with a few intervals, for more than a year, we are driven to the conclusion that, though the provision for his wife may appear somewhat liberal, the mental condition of the husband being such that he was competent to make it, and the influence of the wife to that end not being of such controlling character as to amount in law to a substitution of her will for that of her husband, we do not feel justified in setting the transaction aside.

With reference to the question of a constructive trust, we are of opinion that the most that can be claimed from the evidence is a promise by defendant that what was not needed for her support during her life should go to the children of her husband. The principles of law governing the determination of these cases are well understood; but, after all, the decision of each case depends upon its particular facts, and while we have read many of the cases cited by the plaintiffs, we do not deem it necessary to enter into a discussion of them.

It follows that the decree of the district court is correct and is

AFFIRMED.

EARL CLINE, APPELLEE, V. ALBERT HOLDREGE, APPELLANT.

FILED DECEMBER 18, 1931. No. 28023.

1. **Libel and Slander:** WORDS ACTIONABLE PER SE. Spoken words are actionable *per se* if they impute to the person of whom they are spoken the commission of a crime for which he may be punished by imprisonment in the penitentiary.
2. ———: PRIVILEGED UTTERANCES. To make privileged the utterance of words actionable *per se*, the person uttering them must believe them to be true and have reasonable grounds for such belief.

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

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

F. J. Munday and *Leon W. Samuelson, contra.*

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

PER CURIAM.

This is an action for slander in which plaintiff recovered judgment for $225, and defendant has appealed.

In the petition it was alleged that defendant, in the presence of others, falsely accused plaintiff of selling a mortgaged hog without the consent of the mortgagee. In his answer defendant admitted that there was a controversy between the parties concerning a hog sold by plaintiff, and averred that previously plaintiff had mortgaged a hog to defendant which the latter believed was the one sold by plaintiff; that defendant insisted that the hog so sold was the one described in the chattel mortgage, and that he was entitled to the proceeds of the sale. Defendant denied the other allegations of the petition.

Defendant, by pleading facts in mitigation, or, as he contends, a qualified privilege, thereby confesses the utterance of the charge. Such a plea is in the nature of confession and avoidance.

Defendant insists that the utterances, if made as

charged, are not slanderous *per se*, and, since no special damages are pleaded by plaintiff, that there could be no recovery. He argues that the words used do not impute a completed crime, but impute, at most, an intention or attempt to commit a crime.

The record, we think, demonstrates the fallacy of this contention. Plaintiff had sold a hog to a dealer; a price per pound had been agreed upon, the hog weighed and delivered, and plaintiff was waiting to receive his check in payment when the controversy arose. Defendant in his answer alleged the sale of the hog by plaintiff. The charge amounted to a present sale of mortgaged property without the consent of the mortgagee. By our statute, the sale of mortgaged chattels, without the written consent of the mortgagee, is an offense, punishment for the commission of which may be imprisonment in the penitentiary.

The rule generally recognized is that, "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." 36 C. J. 1193. In *Herzog v. Campbell*, 47 Neb. 370, it is held: "Words spoken imputing an indictable offense are actionable *per se*, and no special damage need be proved." See, also, *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64.

It is evident that if the charge had been true, plaintiff would have been liable to indictment or prosecution on an information, and might have been punished by imprisonment in the penitentiary and been subjected to infamous punishment. It was properly held by the trial court that the words were actionable *per se*. There was evidence from which the jury could properly find that the utterances were made substantially as charged and in the presence of others, and that the charge was false.

Defendant argues that he was privileged to make the charge because he believed it to be true and owed a duty to inform the purchaser of the hog, for the purpose of preventing the perpetration of a fraud on himself and such purchaser.

Mere belief that one has committed a crime is insufficient to justify one in making the charge. He must have reasonable grounds for the belief and can make the charge only to one interested in the subject-matter. It appears that the mortgage held by defendant was executed two weeks previous to the time of the slanderous utterances, and described a spotted hog weighing 200 pounds, while the hog sold by plaintiff was red and weighed 375 pounds. Defendant saw plaintiff hauling the hog to market and assumed that it was the one on which he held a mortgage. A most casual inspection by defendant would have been sufficient to satisfy him, or any reasonable person, that the hog which plaintiff sold was not the one described in the mortgage. Defendant did not have reasonable grounds for believing the charge true.

Defendant has assigned error in the giving and refusal of instructions. We have carefully examined the charge given and the request for instructions refused and find no error prejudicial to defendant. In fact, the charge was more favorable to defendant than the facts and circumstances warranted. Other assignments of error have been examined and found to be without merit.

No error prejudicial to defendant has been found. The judgment is

AFFIRMED.

JOHN M. DARLING ET AL., APPELLEES, V. FRANK S. DARLING ET AL., APPELLANTS.

FILED DECEMBER 18, 1931. No. 28024.

1. **Wills: PROBATE: PROMISE TO CONTESTANT: CONSIDERATION.** Where there is opposition to the probate of a will, made in good faith, an agreement not to contest same is a valid consideration for a promise on the part of one interested in sustaining the will.
2. **Executors and Administrators: MORTGAGE: FORECLOSURE: PARTIES.** Where the executor has made a final settlement of an estate and delivered a note and mortgage to the legatees as their property, they are proper parties to maintain a foreclosure suit.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

G. N. Anderson and *W. J. Donahue,* for appellants.

H. C. Vail and *Kemp & Brower, contra.*

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

DAY, J.

This is a suit in equity to foreclose a mortgage and distribute the proceeds of the sale. From a decree of foreclosure and a distribution of the proceeds, as sought by the plaintiffs, the defendants appeal.

The mortgage involved in this case was executed November 1, 1918, to John J. Darling, father of the principal parties hereto, and secured a note for $13,500. John J. Darling died August 23, 1921, a resident of Nance county, where his last will was probated in November, 1921, with the final decree being entered September, 1923, assigning the property of the estate in accordance with the will. The only property of the estate of interest to us is the $13,500 note and mortgage.

During the administration of the estate, all the children of John J. Darling, except Herbert Darling, signed a note for $3,600, payable to John H. Kemp, the proceeds of which were used to pay debts and a bequest to Herbert of $100 as provided by the will, and the $13,500 mortgage was assigned by them as collateral security for the loan. This loan has been almost paid and does not complicate this case, since all parties admit that his claim is superior to all others.

The plaintiffs, John M. Darling, Carrie M. Gress, Anna Pearl Gress and Hattie E. Cooper, allege in their petition that they entered into a written agreement between themselves and with Frank S. Darling, defendant, comprising all the heirs, devisees and legatees of John J. Darling, deceased, except Herbert, on the 10th day of November, 1921, to allow the will to be probated and thereafter to

divide and distribute the estate as to them by giving $500 each to Frank S. Darling and Hattie E. Cooper and dividing the remainder of the estate share and share alike to all of the heirs except Herbert, who was to get the bequest provided by the will. The defendant Frank S. Darling subsequently acquired and now owns the equity of redemption in the mortgaged property.

There was a written agreement entered into relative to the division of the property among the heirs. The preponderance of the evidence establishes the existence and terms of such an agreement. The agreement involved the interest of the five children, who are parties to this suit. Three of them, who were left small bequests by the will, testified as to the agreement. Hattie E. Cooper, a daughter, who with the son Frank S. Darling, was to share most of the estate, testified to the agreement. Her testimony was against her own personal interest. The attorney for the estate testified that he prepared the agreement; that the terms of the agreement were as alleged by plaintiffs; that it was signed by all the parties; that it was delivered to him and put away in his office; that he does not know where it is; that he has searched for it and he would say that it was lost. The defendant Frank S. Darling testified that there was an agreement, but it was not signed and the terms were not as claimed by the plaintiffs. However, his testimony is much weakened by the sworn property statement to the First National Bank of Fullerton, which was introduced in evidence. This was made February 3, 1930, and he stated therein that he had a "one-fifth interest in J. J. Darling, Est.," which is exactly his interest under the terms of the contract alleged by the plaintiffs. There is other testimony which is cumulative and corroborative which it is unnecessary to discuss in detail. It suffices to state that no other finding of fact would be possible except that the agreement was entered into as claimed by plaintiffs.

There was ample consideration for the agreement. Immediately upon the death of the father, John J. Darling,

the five children here involved met and the will was read to them. As heretofore stated, the will left comparatively small bequests to three of them and the bulk of the property to plaintiff Hattie E. Cooper and defendant Frank S. Darling. The plaintiffs, including Hattie E. Cooper, testify that there was dissatisfaction upon the part of her brother and two sisters who were left small bequests. There was some conversation about the competency of the father to make a will by reason of his mental condition at the time. Two of the children of the deceased discussed a contest of the will. The testimony is that the foregoing agreement was made as a settlement with the dissatisfied heirs. Even the defendant Frank S. Darling testifies that there was an agreement to divide the property in a manner different from the provisions of the will. There is no question presented here except whether or not the heirs at law and legatees under a will can settle their controversy, thereby avoiding litigation. Where there is opposition to the probate of a will, made in good faith, an agreement not to contest same is a valid consideration for a promise on the part of one interested in sustaining the will. *Grochowski v. Grochowski*, 77 Neb. 506; *In re Estate of Panko*, 83 Neb. 145. The defendant Frank S. Darling was interested in sustaining the will, the agreement gave him more than he would have received as an heir had the will been defeated, which was a sufficient consideration to render the contract valid.

Two other contentions of the appellants have not been overlooked. First, it is urged that the action is prematurely brought for the "plaintiffs have no right, title, interest, claim, or demand in, to, or against the mortgage or the proceeds to be derived therefrom, until after they have paid to Hattie E. Cooper and to Frank Darling each the sum of $500." Hattie E. Cooper is not complaining and appellant Frank S. Darling is not prejudiced thereby because the decree of the trial court awards him $500, as it also does Hattie E. Cooper, to be first paid from the proceeds. Secondly, as to the right of the plaintiffs to prose-

cute this action; they are the equitable owners of an undivided four-fifths and the defendant of an undivided one-fifth of this note and mortgage, subject to the payment of $500 to Hattie E. Cooper and $500 to Frank S. Darling in accordance with the agreement. In addition, the defendant Frank S. Darling is also the owner of the equity of redemption. All the parties to the agreement are parties to this suit. Who can question their right? Not the creditors of the estate because they have been paid; not the other beneficiaries under the will because their bequests have been paid; and not the defendant as owner of the equity of redemption because he bought it subject to the mortgage. There was a final settlement of the estate, the note and mortgage were delivered to the heirs, who (defendant Frank S. Darling included) assigned it as collateral for a loan. The defendant Frank S. Darling cannot complain in this respect because he was a party to the agreement and all the transactions relative thereto. The plaintiffs were proper parties to maintain the action. This view finds support in the following cases: *Walter v. Wala,* 10 Neb. 123, and *Plummer v. Park,* 62 Neb. 665.

As a résumé, we find that there was an agreement as to the division of the assets of the estate between the parties; that the contract was executed for the purpose of avoiding objections to the probate of the will, which constituted valid consideration therefor; that the suit was brought by the proper parties, and that equity and justice prevail in the judgment of the trial court, which should be and is

AFFIRMED.

IN RE ESTATE OF SARAH C. BLACK KULP.
NEBRASKA MASONIC HOME, APPELLEE, V. FRANK E. KULP ET AL., APPELLANTS.

FILED DECEMBER 18, 1931. No. 27979.

1. Wills: IMPLIED REVOCATION. Legacies of $500 each were bequeathed to four nephews of testatrix, to be paid out of the

proceeds of sale of certain lands devised to executors for that purpose, the balance of said proceeds to be divided equally between two sisters and two other nephews. The proceeds of sale of certain other land were bequeathed to the Masonic Home of Plattsmouth, Nebraska. Subsequently testatrix sold and conveyed all of said lands. *Held*, that such sale accomplished a revocation *pro tanto* of the will and that the above bequests and legacies failed.

2. ———: ———. An implied revocation of a will should not be permitted to destroy provisions thereof which are independent and capable of execution; its effect should be to destroy only such provisions as are inconsistent with the general scheme of the testator as indicated by the language of the whole will.
3. ———: EQUITABLE CONVERSION. Where lands are devised to executors to be sold and the proceeds divided between certain persons named, there results an equitable conversion of the lands into personalty, but such proceeds will not pass to the residuary legatee, where the language of the will clearly demonstrates that such was not the intention of the testator; they will be treated as property not disposed of.
4. ———: IMPLIED REVOCATION. Legacies to be paid out of the proceeds of lands to be sold by executors, having been adeemed by implied revocation of the will resulting from the sale of such lands by testatrix, cannot be paid as such out of the proceeds of such sale, as such application would in effect make a new will.

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

Pitzer, Tyler & Peterson, for appellants.

D. W. Livingston, F. H. Woodland, William C. Ramsey and *Lewis H. Smith, contra.*

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

REDICK, District Judge.

Appeal from the district court admitting to probate the will of Sarah C. Black Kulp, deceased. The only question presented is whether or not the will was revoked by implication by reason of a change in circumstances of the testatrix.

The will consists of the original testament and three codicils. At the time of its execution testatrix was the owner of 240 acres of land which, with improvements upon one of the 80's, was of the value of about $15,000, and personal property in the amount of $1,500 consisting of a farm mortgage.

By paragraphs 2 and 3 of the will bequests are made to the executors, $200 and $300 respectively, to provide care for the graves of testatrix' father and mother and the family burial lot; by paragraph 5 a bequest of $5 each to a nephew and niece. By paragraph 6 and codicils certain legacies were given to four nephews in the sum of $500 each. For the payment of all the above bequests, by paragraph 7 she gave and bequeathed to her executors in fee simple 160 acres of land, which included the improvements, with instructions to sell the same and pay the legacies from the proceeds; the remainder of such proceeds to be divided equally between her two sisters and two other nephews; as to the nephews such proceeds were to be held by the executors upon certain trusts in their favor.

By the eighth paragraph of the will it was provided as follows. "All of the personal property of my estate (but not including household furniture and personal effects) remaining after the payment of costs and expenses of administration of my estate and any charges of administration of my estate, and all the following described real estate, to wit: (then follows a description of 60 acres, to which 20 acres was thereafter added by codicil, being the remainder of her real estate not theretofore disposed of) I give, devise and bequeath to my executors hereinafter named, and to the survivor of them, in trust, however, and with these powers and conditions: To sell said real estate * * * and to pay over the proceeds arising from said sale, together with whatever amount remains in their hands from the personal property of my estate," to the trustees of the Nebraska Masonic Home located at Plattsmouth, Nebraska.

By the ninth paragraph the absence of any bequest or

provision for her husband, Frank E. Kulp, is explained because of a mutual understanding between them that neither would claim any rights of ownership or management in the property of the other. Her husband, Frank E. Kulp, and William H. Pitzer were nominated as executors. The will was dated November 20, 1917, and the last codicil September 17, 1926.

In August, 1926, testatrix began negotiations for the sale of all of her real estate, which resulted in a contract of sale for the price of $15,000, $5,000 cash and a purchase money mortgage for $10,000, and in fulfilment of such contract, February 23, 1927, testatrix executed a deed for said land. Two thousand dollars of the principal of the mortgage had been paid. Based upon the sale price, the value of the lands to be sold for the benefit of the Masonic Home was about $3,000, and that of the remaining 160 acres, with improvements valued at $5,000 to $6,000, was about $12,000.

At the death of testatrix her estate consisted almost exclusively of securities to the amount of about $18,000, being $8,000 remaining of the purchase money mortgage, other farm mortgages and a note of her husband for $502.29, aggregating $10,202.29. A portion of said securities represents an investment of the cash payment on the sale of the land. The legatees, except the Masonic Home, and the executors appeal from the decree admitting the will to probate.

The question for determination is whether or not the sale by testatrix of all of her real estate which had been devised to her executors to be sold and the various legacies paid out of the proceeds operated as a revocation of the will.

By section 30-210, Comp. St. 1929, specific modes by which a will may be revoked are provided, but with the exception that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator." What changes in conditions or circumstances will operate

as a revocation are not defined, but the question is to be determined in each case by its own peculiar facts. *Baacke v. Baacke,* 50 Neb. 18. And the doctrine of revocation is not confined to those causes which would accomplish revocation at common law. *In re Estate of Bartlett,* 108 Neb. 691.

In the determination of this question, as of questions of construction and interpretation of wills, the object is to discover and give effect to the intention of the testator. The doctrine of implied revocation is based upon a presumption that by his acts such result was intended by the testator. The claim of revocation by contestants is based upon the following propositions: (1) That the testator's primary intent was to apportion among those kindred nearest to her the greater part of the estate; (2) that it was not her intention, by reducing her real estate to personal property, to bequeath all of her personal property to the Masonic Home, which would result if the will in its entirety is admitted to probate; (3) that probate of the will would defeat the intention of the testatrix to distribute the major portion of her property among her kindred; (4) that it is not possible to determine what amount of personal property should pass to the proponent, the Masonic Home, under paragraph 8, without making a new will.

At this point we deem it proper to call attention to some general principles by which the question of revocation is to be determined. As a general proposition where, by the terms of the will, a legacy is to be paid out of the proceeds of the sale of certain property and such property is not in existence at the death of the testatrix, the same having been theretofore disposed of by her, the legacy fails. *May v. Sherrard's Legatees,* 115 Va. 617. In legal terms the legacy is adeemed and the legatee is not permitted to look to the proceeds of the sale or the general assets of the estate for its payment, unless a direction so to do is found in the will. *In re Will of Miller,* 128 Ia. 612; 40 Cyc. 1205. By the direction of the will that the real

estate be sold and the proceeds divided among the legatees, the real estate was converted into personalty. *Maxwell v. Maxwell,* 106 Neb. 689; *Stalder v. Stalder,* 105 Neb. 367. The general scheme of the testator as evidenced by all the provisions of the will is to be considered; and if the will can be executed in accordance with such general scheme, notwithstanding the change of circumstances, it will be carried out as nearly as possible in accordance with the testator's intention. *Stender v. Stender,* 181 Mich. 648. If by application of the rules of law the general scheme of the testatrix will be defeated, an intention to revoke the will will be implied from such change.

Applying these principles to the will before us, we are confronted with the question whether or not, if the will is probated, it is possible to distribute the estate in accordance with the intention and general scheme of the testatrix, the proponent claiming that it can be done and the contestants taking the contrary view.

There can be no question that the intention of the testatrix was that approximately five-sixths of her estate should be distributed among her collateral relatives, she having no children of her own, and that one-sixth should pass to the Masonic Home. How may this be accomplished? It may be said that the net assets of the estate may be divided into six parts, five-sixths to the relatives and one-sixth to the Home; but this involves the determination of the respective values of the 160 acres with improvements, and the 80 acres, and places the distribution upon quite a different basis from that provided in the will, viz., the proceeds of a sale by testatrix, instead of one by the executors, which is rendered incapable of execution by the act of testatrix. *In re Will of Miller,* 128 Ia. 612; *McNaughton v. McNaughton,* 34 N. Y. 201; 1 Jarman, Wills, p. 162. It is, of course, simple enough to pay the definite legacies of $500 each provided for in the seventh paragraph, but it is impossible to determine what would have been the surplus upon the sale of the 160 acres, or the proceeds of a sale of the 80 acres, had it been made

by the executors under the instructions contained in the will. To assume that the proceeds of such sales would be $15,000 and make the distribution upon that basis, it seems to us, is entirely inadmissible, for such proceeds might have been considerably less or in excess of that amount. It seems, therefore, impossible to determine the amounts which the Home and the legatees of the surplus after payment of the specific legacies should respectively receive in compliance with the expressed intention of the testatrix. To make distribution as suggested would be, in effect, making a new will.

If under the rules of law the legacies bequeathed by paragraphs 2, 3, 5, and 7 are adeemed and destroyed by the sale of the property out of which they were specifically to be paid, then the proceeds would become a part of the general estate and, unless contrary to the manifest intention of testatrix, pass to the Masonic Home under the eighth paragraph, which would thereby acquire the entire estate to the exclusion of the relatives of the testatrix. A mere perusal of the will convinces us that no such result could possibly have been intended by the testatrix, and we conclude that an irresistible presumption arises that she would have changed her will if such effect of the sale of the lands had been called to her attention. Thus the case presents ample proof of a change in circumstances to justify the application of the rule of implied revocation. We think, however, the revocation should not effect a complete destruction of the will, but that, in so far as its provisions are not affected by the act of the testatrix from which revocation is implied, they should be executed, thereby giving effect to the intention of testatrix as nearly as possible. Election by the husband to take under the statute does not operate to revoke the will, but merely operates to cut down the amounts to be distributed as legacies. *In re Estate of Grobe,* 101 Neb. 786.

Paragraph 8 of the will bequeaths to the Masonic Home (1) "All the personal property of my estate" and (2) the proceeds of the sale of 80 acres. This last provision (2),

as we have seen, is rendered inoperative by a sale of the land; but the first (1) remains unaffected and should be executed according to the intention of the testatrix. We think "personal property" was used in a restricted sense, upon the assumption that the real estate would be sold as provided; and, therefore, the proceeds of sale of the lands, so far as they can be traced, do not fall within this description. See *Stender v. Stender*, 181 Mich. 648.

It is therefore ordered that the judgment of the district court be modified, the will admitted to probate and executed to the extent of the legacy of personal property to the Masonic Home and appointment of executors, and the remainder of will disallowed as revoked; that the remaining assets of the estate be distributed according to the law of intestate estates; that a decree be entered accordingly and certified to the county court of Otoe county.

AFFIRMED AS MODIFIED.

ELTON GILES, APPELLEE, V. JUSTIN WELSH ET AL., APPELLANTS.

LORNE AMOS, APPELLEE, V. JUSTIN WELSH ET AL., APPELLANTS.

FILED DECEMBER 31, 1931. NOS. 28059, 28060.

1. **Appeal**: FINDINGS. A finding of the trial court in a law action, based on conflicting evidence, is entitled to the same weight and effect as the verdict of a jury.
2. **Negligence**: QUESTION OF FACT. Whether the driver of a motor vehicle is guilty of more than slight negligence in failing to see an unlighted and unguarded vehicle, standing on a highway, on a dark night and when it is misting, and the driver is confronted by the bright lights of a motor car coming from the opposite direction, is a question of fact rather than of law.

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

Frank Kelly and *Crofoot, Fraser, Connolly & Stryker*, for appellants.

Schaper & Runyan and *Allan F. Black, contra.*

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

PER CURIAM.

Both of the above entitled actions arose out of a collision between an automobile owned by plaintiff Giles and a truck owned by defendant Sargent Auto Company, operated by Justin Welsh. At the time of the accident, plaintiffs Giles and Amos were in the former's car, with the latter driving. Each plaintiff had judgment, and defendants have appealed. Both actions were tried at the same time, on the same evidence, before the court without a jury, and each presents the same questions for determination.

The evidence is sharply conflicting as to some of the facts. The findings of the trial court in a law action are entitled to the same weight and effect as the verdict of a jury. All doubtful questions of fact are, therefore, resolved in favor of plaintiffs.

From the record it appears that defendant Sargent Auto Company is the owner of an oil truck, and defendant Welsh was the driver. Just before nightfall, while the truck was being driven on a highway north from Sargent, its engine became stalled and failed to operate. The truck was stopped in the traveled path on the east, or right-hand side of the highway and remained in that position for some hours. The truck was not equipped with tail lights or reflectors on the rear end. At the time of the accident its head lamps were unlighted, and there was no light of any kind displayed on the truck; nor was any one stationed at the rear of the truck to warn travelers approaching from the south, notwithstanding Welsh had with him at the time two other young men. Some time prior to the accident Welsh had, by standing in the highway and waving his arms, attempted to stop other motor vehicles. The driver of one such car coming from the south, being thus flagged or warned, drove his car past the truck and

stopped on the right-hand side of the road, 30 or 40 feet in front of the truck. The lamps on this car were lighted and threw their rays on the highway immediately in front and to the north, where there was a hill or steep grade. About 9 o'clock that night, while it was dark and misting, plaintiffs drove north on the same highway. When they were some distance from the truck they observed the light of the car parked ahead of the truck, and as they approached the place where the truck stood, a car came from the opposite direction, the light from which interfered with the vision of plaintiffs for the instant. Both plaintiffs testified that the lamps on Giles' car were burning, and that both plaintiffs were keeping a lookout on the highway, and neither of them saw the truck until their car crashed into it.

It is contended by defendants that plaintiffs were required to keep their car under such control and drive at such a rate of speed as would enable them to stop the car within the radius of their head lights, and that, not having done so, they were guilty of such contributory negligence as will defeat a recovery.

Plaintiffs failed to see the truck before the collision. Whether they were able to stop their car within the area lighted by the lamps of their car is not involved. If plaintiffs were negligent, it was because of their failure to keep a proper lookout and in not seeing the truck in time to avoid a collision.

Our comparative negligence statute (Comp. St. 1929, sec. 20-1151) provides that contributory negligence of plaintiff will not defeat recovery where the defendant's negligence is gross and the plaintiff's negligence is slight in comparison therewith. It is evident that defendants were guilty of gross negligence in leaving an unlighted truck upon the highway on a dark night, without warning of any kind to protect approaching travelers. The trial court must have determined, under the facts, that plaintiffs' negligence, if any, was slight as compared with that of defendants. Plaintiffs are entitled to recover unless

we can say, as a matter of law, from the facts disclosed, that their negligence was more than slight as compared with that of the defendants.

While plaintiffs were lawfully traveling upon the highway, they could and did see the lights of the car that was in front of the truck. They might reasonably infer that there was no obstacle between that car and their own. Moreover, as they approached near to the location of the truck, the bright lights of a car coming from the opposite direction for an instant interfered with their vision in front. Plaintiffs were traveling at a moderate rate of speed. They were keeping a lookout. They did not see the truck until the collision.

We cannot say, as a matter of law, that plaintiffs did not act as ordinarily prudent and cautious men would have acted under like circumstances. They had a right to assume that there would be no motor vehicle without a tail light upon the highway. Their vision was momentarily interfered with by the light of a car coming from the opposite direction. In the light of what occurred, it is clear that it would have been much better if plaintiffs had slowed down or entirely stopped their car until the car coming towards them had passed, but we are unable to say, as a matter of law, that it was their duty so to do, under all the circumstances. While the question is a close one, we are of the opinion that the question presented is one of fact, and that the trial court's finding is conclusive.

We find no error in the record. The judgments are

AFFIRMED.

STATE, EX REL. THURSTON J. LONG, APPELLEE, V. ARTHUR H. BARSTLER, COUNTY CLERK, APPELLANT.

FILED DECEMBER 31, 1931. No. 28175.

1. **Mandamus.** To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.

2. ———: COUNTY CLERK: LEVY OF TAX. Ordinarily mandamus will not lie against a county clerk compelling him to levy a tax certified to him after he shall have completed the tax list duly levied by the county board of equalization and delivered it to the county treasurer. Comp. St. 1929, sec. 77-1801.

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

George H. Heinke, for appellant.

Andrew P. Moran, Edwin Moran and *D. W. Livingston, contra.*

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

GOSS, C. J.

The defendant appeals from a judgment granting a peremptory writ of mandamus against him.

At the regular election in the city of Nebraska City on November 4, 1930, a majority of the electors voted for a proposition submitted, to the effect that the proper officers of the city should make an annual levy on all taxable property in the city sufficient to raise annually the sum of $1,800 for a period of four years, to provide for the salary and expenses of a visiting, community nurse for the city. Comp. St. 1929, sec. 71-2407. Under this statute it is the duty of the city authorities to include the item in the estimate for expenses during the period for which adopted. The tax is to be levied and collected in the same manner as other taxes.

The city authorities failed to include this item, or any amount for this purpose, with the other city expenses required to be included in their estimate certified to the county clerk and to be levied on the last day of its sitting by the county board of equalization. Comp. St. 1929, sec. 77-1801, amended, Laws 1931, ch. 137, Comp. St. Supp., sec. 77-1801. This last day of sitting in 1931 was on August 5 and the tax levied by the board for Nebraska City purposes of course did not include this item. The

total levy for Nebraska City was 14 mills. Had this item been certified and levied it would have made a total levy of 14.35 mills. Thereupon, on August 8, 1931, this same relator brought a mandamus action against the city, its mayor and commissioners, to compel them to certify the item in question to the county clerk to be included in the taxes of 1931. On August 29, 1931, after a full trial, the court granted a peremptory writ, ordering the city officials to convene and certify the amount to the county clerk within 30 days. The respondents were denied supersedas, but appealed that cause to this court, where it is pending as No. 28192. However, on September 26, 1931, they obeyed the unsuperseded order, made an amended estimate as commanded, including the levy for the visiting nurse fund, certified it and delivered the certificate to the county clerk on September 28, 1931. Section 77-1801, Comp. St. 1929, provides: "Any such taxes * * * certified to the county clerk, after the county board shall have made such levy and before the county clerk shall have completed the tax list, shall be levied by the county clerk, if within the limit of the law, and extended upon the tax list the same as if levied by the county board."

After the county board of equalization adjourned on August 5, 1931, all taxes levied by that board were certified to the county clerk and he proceeded to compute the taxes and extend them on the tax list in suitable books, properly ruled, headed and prepared in the manner provided by law. Section 77-1806, Comp. St. 1929, requires him to complete and deliver the tax list to the county treasurer on or before the 1st day of November annually. The county clerk completed and delivered the tax list to the county treasurer on September 19, 1931. So that list did not include the levy for the purposes of a visiting nurse for Nebraska City because, as we have recited, the certificate for that purpose was not actually delivered to him until September 28, 1931.

Upon receiving the certificate, as to this additional levy, on September 28, 1931, the county clerk refused to place

the levy upon the tax books of the county. Nothing was done for nearly four weeks until on October 24, 1931, when this mandamus action was begun to compel him to enter the levy upon the tax books. He demurred to the alternative writ and affidavit upon which it was based. Upon the overruling of the demurrer, he answered, setting up most of the historical facts above stated, reciting the expenses and difficulty of revising or rewriting the lists, and pleading lack of legal authority to add the tax. Upon issues joined there was a trial to the court on October 30, 1931, and on the same day a peremptory writ was granted commanding the county clerk forthwith to enter the special levy. The final order dismissed the county treasurer and the county attorney, who were also respondents. Motion for new trial was overruled and the court denied a request to allow supersedeas. The cause was promptly appealed here and on November 5, 1931, we allowed a supersedeas. The bond was approved and filed Novembr 7, 1931. Most of the facts were stipulated.

The evidence shows that the rewriting or interlining of the tax lists, if done in that way, so as to show this additional levy, would require thousands of entries upon upwards of 200 pages, would take two or more weeks of time with the defendant's usual office force and one additional person to be hired for that purpose, with its necessary cost and interference with the usual work of the clerk's office; that the treasurer has had 11,000 tax receipts printed with the usual and necessary matter on the front and back, but not devised with a view to this additional tax; that on October 30, 1931, at the time of the trial, 170 tax receipts had already been issued by the county treasurer, receipting "in full for the following taxes for the year 1931," the printed receipt showing on the back thereof a total levy of 14 mills for Nebraska City and the front thereof showing in its proper column the amount of the tax paid by the city taxpayer. It is fair to assume that since the date of the trial several hundred would have paid their city taxes in the usual course and to avoid in-

terest. The evidence is free from proof that the defendant connived or conspired with the city authorities or anyone else to defeat or prevent the additional levy desired by relator and by those in whose interest relator acted.

"To warrant the issue of mandamus against an officer to compel him to act, a duty to do so must be imposed upon him by law; the entire scope of the writ in this respect is to compel the officer to perform his duty and cannot be invoked to enlarge or confer a power upon him to act. The duty sought to be enforced must be a duty which still exists at the time when the application for the writ is made; and it has frequently been asserted that the duty to act must be clear." 18 R. C. L. 117, sec. 31. See 38 C. J. 582; *State v. Colby,* 107 Neb. 372; *Gutschow v. Ramser,* 87 Neb. 591; *State v. Weston,* 67 Neb. 175; *State v. Whipple,* 60 Neb. 650; *State v. Bartley,* 50 Neb. 874; *State v. Bowman,* 45 Neb. 752; *State v. Merrell,* 43 Neb. 575; *State v. Nelson,* 21 Neb. 572; *State v. City of Omaha,* 14 Neb. 265.

The county clerk's duties and powers with respect to tax lists are enjoined and granted by the statute. It was his duty, under section 77-1806, to complete and deliver to the treasurer on or before November 1, 1931, the list for taxes levied by the county board of equalization. He did this on September 19, 1931. The evidence shows that sometimes, in previous years, that had been done as early as September 1. After the adjournment of the county board of equalization any taxes otherwise levied must be levied by the clerk. If such taxes as those here involved are certified to him before he "shall have completed the tax list" (section 77-1801) authorized by the board, and before the list shall have been "delivered to the county treasurer" (section 77-1806), it is then his duty to levy such other tax and see that it is "extended upon the tax list" (section 77-1801). We are unable to find that he has any power to make a levy for any additionally certified taxes after he has completed and turned over to the treasurer the main tax list. He derives his authority and

power from the legislature. If it has given him none in such an important function as that of the imposition of taxes, it seems certain that he has no power to enlarge the authority given him by the legislature and to exercise authority of his own devising. His duty to act as relator desired, not only was not clear, but it seems to us that it is clear he had no authority to levy any tax after the tax list made upon the levy of the county board was completed and turned over to the treasurer. Thus he was within the rules of law above recited.

We do not desire to be understood as deciding that, if the county clerk had conspired with the city officials, or others, to prevent his levy of the city tax by a wilful disregard of the rights of the electors of the city and of his statutory duty and by unreasonably hastening the completion and delivery of the tax lists to the treasurer, we would hold that mandamus would not lie. That is not the situation here. When such a case shall be presented we reserve the right to consider and determine whether such conduct would prevent the statute from barring a further levy of taxes.

If further reason were needed for concluding that the appellant was justified in his refusal to levy the tax, it may be said that, from the record and evidence, it appears that disorder and confusion would arise out of such a levy. This confusion would result not so much from the clerical changes in the tax records as from the rights and liabilities as to the levies of the taxes in the cases of those who have already paid and obtained receipts in full for the 1931 taxes.

"Where the issue of the writ would disturb official action, or create disorder or confusion, it may be denied; and this is so even where the petitioner has a clear legal right for which mandamus would be an appropriate remedy." 38 C. J. 550. See, also, Merrill on Mandamus, secs. 71, 73; Ferris on Extraordinary Legal Remedies, sec. 202.

"Courts, in the exercise of wise judicial discretion, may, in view of the consequences attendant upon the issuance

of a writ of mandamus, refuse the writ though the petitioner has a clear legal right for which mandamus is an appropriate remedy." *People v. Board of Supervisors,* 185 Ill. 288, 293. This rule was followed later in denying mandamus where its allowance would have required a recomputation of a considerable portion of the county taxes and a readjustment of taxes already paid by some taxpayers. It is to be noted that this readjustment of taxes in the Illinois case would require refunds from the treasurer to the taxpayers, not a collection of additional taxes, as in the case at bar. *People v. Olsen,* 215 Ill. 620. The supreme court of Oklahoma reversed a judgment granting a writ of mandamus because of the delay in getting the tax rolls extended so as to collect an additional tax, even though it was stated that the petitioners had a legal right to the writ. *Board of Excise v. Board of Directors,* 31 Okla. 553. The relator contributed to the particular condition in the instant case by waiting from September 28 to October 24 to bring this action.

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

REVERSED.

LIBERTY HIGH SCHOOL DISTRICT, APPELLEE, V. E. A. CURRIE: O. R. LOVELACE ET AL., APPELLANTS.

FILED DECEMBER 31, 1931. No. 27919.

1. **Depositories:** DEPOSIT OF SCHOOL FUNDS: DEPOSITORY BOND. It is lawful for a bank to give a depository bond to a school district to secure a deposit of its funds. Sureties on such a bond are bound thereby, notwithstanding there is no statute expressly authorizing the deposit of such funds in a bank.
2. ———: DEPOSITORY BONDS: EXPIRATION. Section 77-2509, Comp. St. 1929, is not applicable to the deposit of school district funds.
3. ———: ———: LIABILITY OF SURETIES: DEMAND. The law does not require the doing of a vain or useless act.

4. ———: ———: ———: ———. Demand for payment by a principal is not a condition precedent to action against the sureties on a depository bond, where the sureties are contesting the validity of the bond.

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

Raymond & Fitzgerald, for appellants.

Mothersead & York, contra.

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

GOOD, J.

This is an action on a depository bond. Plaintiff was the obligee and defendants the sureties on the bond. Plaintiff had judgment, and defendants have appealed.

There is no conflict in the evidence. The following facts appear from the record: On the 5th day of July, 1929, the American Bank of Mitchell, Nebraska, executed and delivered to plaintiff a depository bond in the sum of $10,000 to secure repayment of funds of the Liberty High School District that might be deposited in the bank. Funds were deposited in the bank by the district, and on the 4th of January following, the bank being insolvent, its doors were closed, and shortly thereafter a receiver was appointed. The sureties on the bond were officers and stockholders of the American Bank. These sureties sought to have the treasurer of the district prosecute a claim against the bank as preferred and payable out of the depositors' final settlement fund. The treasurer refused, but, instead, this action was instituted.

Questions of law only are involved. It is argued by defendants that the bond is invalid because the public policy of the state prohibits the deposit of school district funds in a bank. We have not been referred to any statute which expressly authorizes the deposit of funds of a school district in a depository bank; nor have we been able to find any express authority therefor.

In *State v. Keim,* 8 Neb. 63, it was held that "an unauthorized or unratified loan or deposit of public money constitutes no cause of action in the name of the state." In that case action was brought by the state for the deposit of public funds with a banking copartnership. Shortly thereafter the legislature, doubtless influenced by that decision, enacted a statute, now appearing as section 77-2601, Comp. St. 1929, and which reads as follows: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, copartnership or other firm or association of persons, it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto: Provided, nothing herein contained shall be construed to in any manner affect the liability of any surety or signors of any official bond hereafter given or made in this state."

While the quoted statute does not expressly authorize the deposit of school district funds, it does provide specifically that it shall be lawful for the officers making such deposit to maintain an action for the recovery of moneys deposited, and that all contracts for the security or payment of such moneys shall be held good and lawful contracts, binding on all parties thereto. In *Bliss v. Mason,* 121 Neb. 484, this court held that said section "authorizes a state bank to contract for indemnity of sureties on a depository bond given by such bank to secure deposit of public funds." Certainly, if the bank were authorized by this statute to indemnify sureties on a depository bond, the bank and the sureties would likewise be held liable upon such a bond.

Defendants have cited a number of sections of the statute relating to the duties of school district officers and to

acts for which they may be liable for embezzlement. We find that none of these statutes cited prohibit the giving of such a bond or relieves the parties from liability thereon when they have executed such a bond.

Defendants argue that the bond is not in force because it had expired on the 1st day of January, 1930, and cite section 77-2509, Comp. St. 1929, as supporting their contention. This section, however, applies only to state and county funds and is inapplicable to deposits of school district funds. This court is committed to the rule that section 77-2601, *supra*, makes valid the contract of a depository bank to indemnify the deposit of such public funds as are specified in said section. We therefore conclude that the bond is a valid obligation.

Defendants argue that the action was prematurely brought because no previous demand had been made on the bank for the payment of the deposit. It is evident that a demand would have been unavailing. The bank could only act through its officers. These officers have been superseded in their duties by the department of trade and commerce. The officers could not have complied, had a demand been made upon them or upon the bank. A demand would have been a vain and useless act. The law does not require the performance of such an act. Furthermore, a demand is unnecessary where defendants deny liability on the contract.

We find no error in the record. The judgment is

AFFIRMED.

SCHOOL DISTRICT OF MITCHELL, APPELLEE, V. E. A. CURRIE: WILLIAM LEDINGHAM ET AL., APPELLANTS.

FILED DECEMBER 31, 1931. No. 27920.

Depositories: DEPOSITS: DEPOSITORY BOND: LIABILITY OF SURETIES. Sureties on a depository bond, securing deposits in a bank which later becomes insolvent, are not released by forbearance of the obligee named in the bond to prosecute an appeal from the decision of the receiver classifying the claim for deposit as general instead of preferred.

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

Raymond & Fitzgerald, for appellants.

Mothersead & York, contra.

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

GOOD, J.

This is an action on a depository bond; plaintiff is the obligee and defendants sureties thereon. Plaintiff had judgment. Defendants have appealed.

This is a companion case to *Liberty High School District v. Currie, ante* p. 173, decided at the present sitting of the court. The nature of the action and the defendants are the same, but a different school district is plaintiff.

The pertinent facts are similar to those in the above case with this exception: In the instant case, the district presented to the receiver a claim for the deposit, which he classified as a general instead of a preferred claim. The district refused to appeal from the receiver's action; whereupon a taxpayer of the district filed a petition in intervention and sought, unavailingly, in the district court to prosecute the claim on behalf of the school district. That proceeding was appealed to this court, and it was held that the taxpayer was authorized to prosecute the claim in the name of the district. *State v. American Bank of Mitchell,* 121 Neb. 862.

One other question of law is argued in this case, in addition to those presented and decided in *Liberty High School District v. Currie, supra.* Defendants argue that it was the duty of the plaintiff to protect the defendants in this action by prosecuting its claim against the receiver for a preference, and, had it done so, it might have recovered the full amount of its deposit, without resorting to an action on the bond. True, the plaintiff might have prosecuted an appeal from the receiver's decision, but was

not obliged so to do. Mere forbearance to prosecute an appeal will not release the defendants.

In *Eickhoff v. Eikenbary*, 52 Neb. 332, it was held: "Mere forbearance by a creditor to sue a principal will not release the latter's sureties; and this is true although by lapse of time remedies may be lost against the principal." Plaintiff had a right to pursue either or both remedies. It might have more than one judgment, but could have but one satisfaction of its claim. *State v. American Bank of Mitchell, supra.* If defendants had desired to protect themselves by prosecuting a claim for a preference, they might have done so by paying the amount of the deposit and thereby been subrogated to the rights of plaintiff. This they failed to do.

The other propositions of law presented on this appeal are fully disposed of in *Liberty High School District v. Currie, supra.*

We find no error in the record. Judgment

AFFIRMED.

TED WELLS V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1931. No. 28037.

1. **Intoxicating Liquors: CONVICTION OF POSSESSION: INSUFFICIENCY OF EVIDENCE.** In a criminal prosecution under two counts, charging possession and transportation of intoxicating liquor, evidence showing no possession other than was strictly incidental to transportation, *held* insufficient to sustain conviction on charge of possession.
2. **Criminal Law: PRIMA FACIE CASE.** A *prima facie* case is not necessarily conclusive before the jury in a criminal case, since the state may make a *prima facie* case which enables it to go to the jury and yet defendant may be acquitted by the jury for want of evidence of proof beyond a reasonable doubt.
3. ———: **INFORMATION: GENERAL VERDICT.** Where there is one good count sustained by the proof, a general verdict of guilty will be referred to and sustained by it, although there are other counts in the complaint which are defective or unsupported.

ERROR to the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Reversed in part and affirmed in part.*

Loren H. Laughlin, for plaintiff in error.

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

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

BEGLEY, District Judge.

Plaintiff in error was prosecuted in the district court for Gage county on a complaint charging him in the first count with unlawful possession of intoxicating liquor and in the second count with unlawful transportation of intoxicating liquor in an automobile. The plaintiff in error was convicted by a jury on both counts and was sentenced to pay a fine of $100 on the first count and to serve 60 days in the county jail on the second count, and the court also ordered the automobile used by plaintiff in error for the transportation of liquors to be confiscated. The plaintiff in error brings error proceedings in this court.

The first proposition of error relied upon by the plaintiff in error is that he was convicted of both possession and transportation charges, where no possession, independent of transportation, is shown by the evidence. The evidence discloses that the deputy sheriff and his assistant secreted themselves and their automobile along the public highway in Gage county, Nebraska, and shortly thereafter the plaintiff in error drove his car past them, turned the corner of the highway and stopped. The officers drove up and commanded him to surrender. He gave flight and was pursued by the officers, who fired at the car. During his flight, plaintiff in error was observed by the officers to throw four gallon tin cans out of his car. These were recovered and produced at the trial and were shown to contain intoxicating liquor. Plaintiff in error in his flight drove into a farm yard and attempted to conceal himself but was captured by the officers.

In *Haarmann v. State,* 111 Neb. 790, it was held that a defendant may be convicted of both unlawful possession and unlawful transportation of intoxicating liquor, where the evidence shows that the defendant remained in possession of liquor after his transportation of it had ceased. We do not think the evidence is sufficient to warrant the assumption that the transportation had ceased in the present case, but that at time of arrest he was in flight in an attempt to transport the same. The fact that the car stopped momentarily does not conclusively prove that the transportation was complete. The possession was only incidental to the transportation. The motion of plaintiff in error, made at the close of the state's case, to dismiss the first count of the complaint should have been sustained.

The next assignment of error is that the court prejudicially erred in instructing the jury in instruction No. 8, as follows:

"The jury are instructed that by the term *'prima facie* evidence' of a fact is meant such as establishes the fact, and, unless rebutted or explained by the evidence, it becomes conclusive and is to be considered as if fully proved.

"You are further instructed that this does not relieve the state of proving beyond a reasonable doubt every element of the offense charged in the complaint. You are, however, instructed that at all times the burden of proof is upon the state to prove beyond a reasonable doubt every essential element of the offenses charged in the complaint."

The first paragraph of this instruction is inaccurate and technically erroneous. *Prima facie* evidence is not conclusive evidence in a criminal prosecution. *"Prima facie* evidence is sufficient to support a verdict in favor of the party by whom it is introduced where no controverting evidence is introduced by the adverse party." 23 C. J. 9. See *Eckman Chemical Co. v. Chicago & N. W. R. Co.,* 107 Neb. 268, and *Smith v. Gardner,* 36 Neb. 741. A *prima facie* case is not necessarily conclusive before the jury in a criminal case, since the state may make a *prima facie* case which enables it to go before the jury, and yet defendant

may be acquitted by the jury for want of evidence of proof beyond a reasonable doubt. *Griffith v. Arnold & Rasmussen,* 204 Ia. 1216.

This instruction is referable only to the question of fact as to the defendant's guilt of the illegal possession of liquor as charged in the first count of the information. The judgment and conviction of the defendant on the first count is reversed and the same is dismissed for the reason that the only possession of the defendant was incidental to transportation. This instruction was not applicable to any question of fact to be determined relative to illegal transportation in the second count, as to which the judgment is affirmed. Therefore, the giving of this erroneous instruction was not prejudicial in this case and does not require a reversal of the judgment.

The next proposition on which plaintiff in error relies for reversal is that the verdict was a general one of guilty as charged in the complaint, instead of a specific finding of guilty on each count. This verdict clearly indicates, beyond a reasonable doubt, that it was the intention of the jury to find plaintiff in error guilty on each count of the information and is sufficient to justify a sentence on each count. Where there is one good count sustained by the proof, a general verdict of guilty will be referred to and sustained by it, although there are other counts in the complaint which are defective or unsupported. 16 C. J. 1106.

The judgment of conviction of plaintiff in error on the first count of the information is reversed and same dismissed; and the judgment of conviction on the second count is sustained.

REVERSED IN PART AND AFFIRMED IN PART.

BRAUN, RAY BROTHERS & FINLEY COMPANY, APPELLANT, V. A. F. ROBERTS CONSTRUCTION COMPANY ET AL., APPELLEES.

FILED DECEMBER 31, 1931. No. 27898.

Appeal: REMITTITUR. Where the only error in a judicial record consists of an excessive recovery, the error may be corrected on appeal by a remittitur, if the amount of the excess is definitely shown.

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

J. E. Ray and *Denney & Denney*, for appellant.

John C. Hartigan and *M. A. Bender, contra.*

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

NISLEY, District Judge.

This is an action to recover $846.54, the agreed price of three carloads of lumber sold and delivered by plaintiff to defendant and accepted and used.

In a cross-petition defendant pleaded that he purchased from plaintiff 15 cars of lumber consigned to different places; that the lumber first shipped was not of the grade purchased, part of it being unfit for use, and plaintiff being so notified; that the parties afterward agreed defendant should accept and use the 15 cars, cull what lumber was unfit for use, purchase and substitute other lumber for the culls, and cut defective parts from usable pieces and utilize the latter; that plaintiff agreed to pay for the substituted lumber and for the extra work incidental to the use of defective materials in the original shipments; that defendant paid all lumber bills presented by plaintiff except a balance of about $800. Under the agreement pleaded in the cross-petition defendant's claim for substituted lumber and extra expenses on account of defects was $2,184.81. The facts on which the cross-petition of defendant was based were put in issue by an answer of plaintiff. Upon a trial of the issues the jury rendered a verdict against

plaintiff on its petition and in favor of defendant for $1,000 on the cross-petition. From a judgment against plaintiff for that sum it appealed.

An assignment of error challenges the verdict in favor of defendant as excessive. The cross-petition and the undisputed evidence show conclusively that defendant incurred liability for the purchase price of the three carloads of lumber for which plaintiff in his petition demanded judgment for $846.54. There was therefore no legal justification for a verdict against plaintiff on his petition. The limit of defendant's legal recovery against plaintiff on the cross-petition was $1,000 and the trial court so instructed the jury in specific terms. There is sufficient competent evidence to support the verdict in favor of defendant for that sum. The record clearly shows, therefore, that the verdict and judgment are excessive to the extent of $846.54. To correct the error defendant will be permitted to file with the clerk of this court within 20 days a remittitur for $846.54 as of the date of the judgment of the district court. Upon the filing thereof, the judment will stand affirmed to the extent of $153.46. Otherwise, it will stand reversed and the cause remanded for a new trial. Other assignments of error seem to be without merit.

AFFIRMED ON CONDITION.

EMMA HOLTMAN, ADMINISTRATRIX, ET AL., APPELLANTS, V. ALBERT LALLMAN ET AL., APPELLEES.

FILED DECEMBER 31, 1931. [illegible].

1. **Deeds**: VALIDITY. Where an aged parent, whose mental competency is much weakened, who has for many years lived with and trusted the entire management of all his business affairs to a son, conveys all his land to the son, which comprised much the greater part of his property, such transaction should be scrutinized with care, and the presumption is against the validity of the deed, and the burden is upon the son to show that the grantor had sufficient mentality to understand the transaction and that it was not the result of undue influence or imposition.

2. ———: ———. Evidence examined and found to be sufficient to establish the validity of the transfer of the land.
3. ———: RENTS: PAYMENT: PROOF. In this case the parent retained a life estate in such land, and the son used the land under a claim that he rented the same from his father, and the son pleads that he paid the father for such rent by supporting the father. The evidence examined and found insufficient to prove such payment.
4. Gifts: VALIDITY. The defendant Albert Lallman claims that his father, August Lallman, made a gift to him of a large sum of money which comprised practically all of his property, to the exclusion of other children with whom the father was cordial, at a time when the father was 89 years of age, was physically weak, and whose mental capacity to transact business was at least very doubtful, and the father for many years had lived with and had entrusted the son with the full conduct of all his business affairs, apparently indifferent to such transactions, such gift, under the situation disclosed in the evidence, if made, cannot be upheld.
5. Landlord and Tenant: LEASE OF FARM LANDS. Generally in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28, of the succeeding year, and the rental becomes due at the expiration of the term.
6. ———: ———: TERMINATION OF LEASE: LIABILITY FOR RENT. Where a life tenant dies before the expiration of a yearly lease of farm lands, the owner of the fee, who was the tenant, is not liable for that year's rental, in the absence of proof as to the rental value up to the time of the life tenant's death.

APPEAL from the district court for Washington county: FRANCIS M. DINEEN, JUDGE. *Reversed, with directions.*

Abbott, Dunlap & Corbett and *O'Hanlon & O'Hanlon*, for appellants.

A. C. Debel and *Maher & Carrigan, contra.*

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

RAPER, District Judge.

This is a suit to set aside a deed to 240 acres of land in Washington county, made by August Lallman, deceased, to his son Albert and to recover rents and a sum of money

from Albert, on the grounds of mental incompetency of grantor and undue influence exerted by Albert. The trial resulted in a general finding and decree for defendants.

August Lallman died on June 17, 1928, leaving the following heirs: Emma Holtman, a daughter; William Lallman, a son; Mary Lallman, a daughter; Albert Lallman, a son; and Florence and Mabel Langhorst, daughters of Lizzie Langhorst, a deceased daughter. This action was brought by Emma Holtman as an individual and as administratrix of the estate of August Lallman, deceased, and Florence and Mabel Langhorst, as plaintiffs, against William, Mary and Albert Lallman defendants.

The petition alleges that August Lallman died intestate, and the deceased, from and after 1923, by reason of old age, and physical weakness and mental incompetency, was unable to understand or transact business, and that by reason of said incompetency, and undue influence, Albert obtained a deed from his father on April 16, 1924, to 240 acres of land, being all the land he owned; that the deed reserved a life estate in the grantor, and that Albert owed his father rent for the land for the years 1924 to 1928, inclusive, and that on January 19, 1928, Albert wrongfully converted to his own use money of his father in excess of $7,000. William and Mary did not answer. Albert's answer denies the alleged mental incompetency of his father, and denies any undue influence, alleges the deed was a gift, as was the money, which was obtained in January, 1928, and pleads statutes of limitation as to deed and all rent prior to 1926, and alleges that he paid his father for all the rent.

The deceased and his wife lived on the land in controversy for many years, and accumulated considerable property. The deceased daughter and Emma Holtman had married and left the home many years ago. William, Mary and Albert remained at home continuously with the parents. Albert married in 1920 and brought his wife to the home. William and Mary never married. The family relation appears to have been friendly until after the death

of the father. He died June 17, 1928, at the age of 89 years; the wife died in 1927. The petition alleges that William and Mary were mentally incompetent, but the only testimony to substantiate that was a statement by the witness Schoettger that, about 15 years ago, August told him that Albert was the only one there (at the home) capable of taking care of the business. However, William was called as a witness for the defense, and it is in evidence that he had a substantial account in a bank and that he sold some land to Albert. Mary did not testify. Albert began writing checks on his father's bank account in 1916, or 1917, and from that time wrote all the checks and had full management and control of the farm and his father's business affairs, and Albert received all proceeds from the farm since 1917. Under this situation the presumption is against the validity of the deed and the alleged gift of money and rent, and it devolved upon Albert to show that the father had sufficient mental capacity to make such conveyance and that his acts were free and voluntary and free from undue influence. *Gibson v. Hammang*, 63 Neb. 349.

This being a trial *de novo*, the rulings of the trial court in refusing to admit much evidence that should be before us is unfortunate. The parties were unduly limited in the admission of proper testimony, and in cross-examinations, particularly in the cross-examination of Albert, and counsel on each side were not diligent in offering much that might aid. In such cases a full disclosure of the properties, advancements, conduct of the parties and family situation should be permitted.

The testimony as to mental incompetency of the father is quite contradictory, but it is in proof that as early as 1902 the father had begun to fail very appreciably in his memory, so that he at times would not recognize his daughter and his grandchildren, and had attacks of illness, and that particularly after the fall of 1923 he conversed very little, except he would talk more freely of things that had happened in Germany where he was born, and on one or

two occasions he wandered away and became lost, and in 1921 at one time could not remember that Albert was married, and in the spring of 1921 he complained to a son-in-law that his money was all gone, and inquired if the son-in-law knew anything about some bonds and stamps, that he, August, had lost them, and when oats were four inches high, asked the son-in-law when he was going to cut them, and that he was physically getting weaker; that in 1923 the deceased could not remember a debt that was owed to him by Edward Langhorst, the husband of the deceased daughter, and witnesses testified that August was incompetent during 1923, and ever since till death. These are a few of the incidents referred to in the testimony to indicate that his memory and mind were at least very weak. On the other hand, defendants' witnesses testify that the father's mind at all times, except during a period of illness in the fall of 1925, was clear, and he was competent.

On the 16th of April, 1924, Albert went to Arlington, and brought to the home Mr. Schoettger, the president of the bank, where August had for many years transacted business. Albert testifies he got Mr. Schoettger at his father's request. At the home Mr. Schoettger testifies that August told him he had divided all his property with the girls and did not think it was any more than right that he should make deeds to the land he had to the boys, and that he wanted to retain a life estate, or the use and occupancy of the premises for himself and wife during their lives, and the deed to the 240 acres was so drawn and there read, signed and acknowledged by August and his wife and given to Mr. Schoettger, who afterwards gave it to Albert, and it was recorded the next day. It further appears that August told Schoettger that he wanted to deed the 240 acres to Albert and a 120-acre tract to William. The court refused to permit witness Schoettger to answer about the second deed. August at that time owned no real estate other than the 240 acres. Albert and William and the mother were present, but made no effort to correct the father about his not owning 120 acres, a very curious over-

sight. The land at that time was worth $250 an acre. As to what the father said about having divided up all his property with the girls, there is no evidence that Mary ever received any. Mr. Langhorst testified that the father told him in 1923, after Mrs. Langhorst's death in August of that year, speaking of a $2,000 loan, which witness offered to pay at that time, "let it go, and let that go for the girls," and said the girls are going to get some more money; and Mr. Langhorst further testified that, after his wife's death and before he talked to the father about the $2,000 loan, Albert came to him and said: "Father sent him over to tell me that since Lizzie (the deceased daughter) died Florence and Mabel were to have the money that Lizzie was to receive, now since Lizzie was dead." Albert did not deny this. Four witnesses besides Albert testified that August had stated at different times 10 or 15 years before his death that Albert was to have the farm. These statements are weakened materially, for it is shown that Mr. Lallman had a will in existence at the time the deed was made, which devised the farm to Albert, but provided that Albert should pay the girls the difference. This was a statement that Mary made to Mr. Langhorst. The court would not permit Albert to be questioned about the will. After the death of the father, Mr. Langhorst and Emma and Edward Holtman went to the home of Albert and inquired about the father's property. Albert became enraged and swore at them and threatened Holtman with a chair and told them it was none of their damned business, and when asked about the will said it was destroyed, and it was none of their damned business who destroyed it. Albert did not deny this. Albert's deposition was taken in March, 1930. This case was tried in January, 1931. In that deposition Albert testified that in March, 1928, he burned his father's will by his father's order. There is no evidence aside from the above statement as to the contents of the will. The inference may be drawn that it was to Albert's interest to have the will destroyed. Albert never told any of the plaintiffs or their families that he had a deed to the

farm and they testified they did not know of the deed until after the father's death. While there are many suspicious circumstances connected with the making of the deed, Mr. Schoettger testified directly to the father's competency; the mother and brother, William, were there; and we find that under all the circumstances shown the deed should stand. It will be unnecessary to determine the question of the statute of limitations.

After the deed was made Albert made improvements on the place, paid the taxes and insurance, and paid the living expenses of all the family, and claims that the support was pay for the rent, and that no rent was demanded and the acquiescence of the father confirms his right to the rent. Under some circumstances this might be conclusive, but under the situation here it has but little force. Celia, Albert's wife, testified that in the fall of 1921 August told her in Albert's presence that Albert would not have to pay any more rent. Albert does not confirm this. In the March deposition he stated that before the deed was signed his father had not said anything about the use of the land. In 1921 the father stated to the Holtmans that Albert was to pay him rent and he could live on that, as he was then planning to move to the Holtman place. Albert claimed to have rented the place for 1921, and produced a check payable to his father as proof of payment for that year, but the father's bank account did not show such deposit, and Albert admitted he received all the proceeds from the farm since 1917. At the trial Albert testified that his father took an interest in the farm affairs and discussed them until about the time of his death, but in the deposition he testified that his father did not talk over farm affairs or business for five or six years before his death. As before stated, it may be doubted whether the father from 1923 was able to carry on business transactions generally; his great age and weakening powers were having a material effect. He no doubt was a man of acquisitive habits, and it is improbable that he would willingly and knowingly divest himself of all his personal property, and the impli-

cation naturally arises that some influence intervened outside of his own will, even if he was competent, to have him yield all of his property to Albert. As to the expense of keeping the family, Albert testified that he did not pay his father any money, outside of the expense of the family. William lived with them and worked as a farm hand, presumably a healthy man, and Albert paid him $50 a year. Mary worked in the fields and helped with the housework and received no pay except her clothes and board. In addition to the income from the farm, Albert received large sums checked out of his father's bank account. Deposits in August's bank account from 1920 to 1927, inclusive, were about $3,300, and in addition to that Albert received $750 in Liberty bonds and a $500 check from his father in 1919, making about $5,000, exclusive of the sum of $7,849 hereafter referred to. No authority for these are proved except Albert's statement that all the checks he gave were by his father's direction. He offered no proof of the amount of taxes paid. Albert has not sustained the burden of proof as to his payment of the rent, nor his right to withhold it. The plaintiffs do not ask for rental before 1924. He will be charged with $1,920 yearly rent for the years 1924 to 1927, inclusive (the rental value was proved to be $8 an acre), with interest on each year's rent from March 1 of the succeeding year. The father died in June, 1928, and Albert is not chargeable with the rent for 1928, and having failed to prove the amount paid for taxes he is not entitled to a set-off for that.

The other remaining item claimed by plaintiffs is the sum of $7,849, of which amount it is alleged $5,142.12 was drawn by Albert from the bank account of the father in January, 1928. Deceased's bank account shows a deposit on October 21, 1927, of $7,849. Checks for about $1,810 were drawn against it between October 21 and December 13, 1927, leaving a balance of $6,142.12. On January 19, 1928, a check in Albert's favor signed "Aug Lallman by A. L." was charged to the account. Albert testified that his father gave him this sum and reserved the $1,000 bal-

ance in the bank to pay for funeral and church subscription. There is nothing to show from what source the $7,849 deposit came.

Plaintiffs do not ask for the sums checked out in December. Mr. Schoettger wrote out the check for Albert at the bank and Albert signed it and took the proceeds. Mr. Schoettger said that about a month after that he went to see Mr. August Lallman about the check and asked Mr. Lallman if it was all right and Mr. Lallman replied: "Sure it was or I would not have told you to let him (Albert) take care of my account I had there." Mr. Schoettger says that William, Albert's wife, and, he thinks, Albert were there, but none of them testify to this conversation. Albert testified that no one was present when his father told him to take the $5,142, and they had only the one conversation about it, and that was on the day the check was given. Celia, Albert's wife, testified that in December, 1927, she heard the father tell Albert that he should have all the money in the bank but $1,000. Albert never told plaintiffs or their families anything about the moneys he received, or any of his dealings with his father. Albert's testimony at the trial was flatly contradictory to the testimony given in his deposition in many important facts and but little credence can be given to his testimony. Mr. Schoettger may not be entirely disinterested, and even if, at a short visit he made, the deceased appeared then to understand, he would not be in position to know about any influence that may have been previously imposed on this 89-year-old man, and it will be remembered that Albert took care to be present. The situation in regard to this $5,142 is in some respects similar to *Chamberlain v. Frank*, 103 Neb. 442, where it is said that a conveyance made by one well stricken in years, living under such circumstances as to place him under the control and domination of a son, will be closely scrutinized, and when from the evidence, or lack of evidence, the court is satisfied either that the grantor was incompetent to transact business of that nature, or that his mind was so overborne by influences which in its

weakened state it was unable to resist, and that he made the conveyance disregarding the natural affection to his other children, and which he would not have made if uninfluenced, or that a combination of both weak mentality and undue influence existed, it will set aside the conveyance.

In this case there is no direct evidence of undue influence exerted upon the deceased, but under all the evidence we have reached the conclusion that August Lallman was in such condition of mind at the time of the alleged gift of the $5,142.12 as not to have been a free agent. There may be doubt as to whether the father did give it. We find that plaintiffs are entitled to recover that sum from Albert, with interest at 7 per cent. per annum from January 19, 1928. The plaintiffs ask no recovery for the $1,000 balance, as it was used for funeral and other expenses.

The plaintiff Emma Holtman, as administratrix of the estate, is entitled to judgment against Albert Lallman for the rent, to wit: $1,920 with interest at 7 per cent. from March 1, 1925; $1,920 with interest at 7 per cent. from March 1, 1926; $1,920 with interest at 7 per cent. from March 1, 1927; $1,920 with interest at 7 per cent. from March 1, 1928; also the sum of $5,142.12 with interest at 7 per cent. from January 19, 1928. The decree of the district court is reversed and the cause is remanded, with direction to enter judgment as above stated, and to confirm the deed to the 240 acres.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1932

ELMER P. FOLKEN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 7, 1932. No. 27976.

1. **Pleading:** AMENDMENT. "Prejudicial error cannot be predicated on an order allowing a pleading to be amended, when the amendment does not change the issues, nor affect the *quantum* of proof as to any material fact." *Cate v. Hutchinson*, 58 Neb. 232.
2. ———: ———. Section 20-852, Comp. St. 1929, permits an amendment of a petition to conform to the proof where such amendment merely increases the amount of the plaintiff's claim for damages in an action to recover for injuries to his truck arising out of a collision with defendant's engine.
3. **Evidence of Value.** In an action for damages on account of injury to personal property, the owner thereof is qualified by reason of that relationship to give his estimate of its value.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

C. A. McGaw, Thomas W. Bockes, Thomas F. Hamer and *George W. Wertz*, for appellant.

John C. Sprecher, contra.

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

GOSS, C. J.

Plaintiff recovered a judgment for $1,526.40, for damages to his truck, caused by its collision with defendant's engine.

Plaintiff had alleged and prayed for $879.25. At the conclusion of plaintiff's testimony on rebuttal, he asked leave to amend the petition to conform to the evidence as to the amount of damages. Defendant objected on the grounds that the request came after the proof was in and without opportunity to meet it, and that the defendant was taken by surprise. The objection was overruled. Plaintiff amended his petition so as to allege and pray for $1,750. The ruling is assigned as one of the errors. Defendant had submitted no evidence as to the amount of damages. After the amendment was allowed he did not ask to submit any evidence nor ask for a continuance. He contented himself with an exception to the ruling. That is the last word appearing in the bill of exceptions. Evidence had been received which, if properly admitted, justified a verdict for the amount prayed for in the amended petition. The amendment did not change the issues nor the character of the proof. Section 20-852, Comp. St. 1929, permits an amendment of a petition to conform to the proof where such amendment merely increases the amount of plaintiff's claim for damages in an action to recover for injuries to his truck arising out of a collision with defendant's engine. "Prejudicial error cannot be predicated on an order allowing a pleading to be amended, when the amendment does not change the issues, nor affect the *quantum* of proof as to any material fact." *Cate v. Hutchinson,* 58 Neb. 232. There was no error or abuse of discretion in allowing the petition to be amended.

The collision occurred about 9 o'clock on the night of September 19, 1927. Plaintiff had been engaged for several years in the business of trucking live stock to the Omaha market and bringing groceries back. He had secured a load of hogs and calves northwest of Schuyler. His route led him south across the defendant's railway at Schuyler by way of Colfax street, which is 66 feet wide. The middle 30 feet was graveled. The right of way is 100 feet wide. The railway runs almost east and west. About 20 to 25 feet north of the crossing was a light about 20 feet from

the ground on a pole on the west side of the street. About 50 feet south of the crossing on either side of the street was an electrolier with three lights on each iron post about 10 feet high. North of the tracks and west of the crossing is a coal-shed about 100 feet long and 18 feet high, about a foot from the right of way. South of the tracks is another coal-shed in about the same relative position and of about like dimensions. About 50 or 60 feet west of the crossing and between the north track and the west-bound main track stands the section-house or tool-shed, 12 by 16 feet, the height not shown. Two rows of telegraph poles are located about in a line with the south side of the section-house. Five tracks cross Colfax street. First, on the north, is the switch track, the center of which is 6 feet from the right of way line; it is 44 feet from this center to the center of the west-bound main track, 13 feet more to the center of the east-bound main track, 17 feet farther to the center of the next sidetrack, and 14 feet beyond that to the center of the fifth and last track on the south. It is 6 feet more to the south line of the right of way. The street lights were lit. The defendant maintained a wigwag and gong, located on the crossing about 20 feet north of the west-bound track. It does not operate except for trains on the above described east-bound and west-bound tracks. No watchman is provided for this crossing. Plaintiff had frequently used the crossing for years and knew these facts. It had been misting but had cleared. The night was dark.

Plaintiff was driving, accompanied by Arthur Spence, who had been employed by him for several years as a truck driver, who was also familiar with the crossing. The truck was equipped with headlights and brakes all in good condition. They approached the crossing going 12 to 15 miles an hour. Plaintiff saw that the signal was not operating, entered the crossing, looked east and west and saw no trains, fed his engine some more gas and proceeded across. As they were crossing the north main track, driving about 12 miles an hour, they heard two short whistles close together and saw an engine coming from the west on the

fourth track. Plaintiff applied both his emergency brake and his foot brake, but struck the engine a few feet back of the front near the steam chest. The truck was carried alongside the engine until the engine stopped. The truck had slipped back along the engine so when both came to a stop the truck was on the east sidewalk and the back of the engine was about 15 feet ahead of the truck. The engine was 60 or 70 feet long. There was evidence that the engine was coming on the crossing when it whistled, that it had no headlight, that the street lights from the electrolier on the south of the right of way would not shed light on the tracks very far west of the crossing because of the shadows cast by the coal-sheds adjoining the right of way on the south. The engine had brought a train from the west, had been uncoupled about a block away, and had been brought forward to take water at a point 500 feet east of Colfax street crossing. While the train crew and other witnesses for defendant testify that the headlight, as well as smaller lights on the engine, were burning, yet, on the assignment that there was not sufficient evidence for the jury to find that the headlight was not lighted, we must take the evidence as submitted to the jury. There was sharp conflict on this point.

Under section 74-572, Comp. St. 1929, a headlight of the power and visibility described in the section is required to be used at the time and in the service in which the engine was moving in the instant case. Failure of such equipment is evidence of negligence to be considered by the jury. Whether the plaintiff looked for the engine where by looking he could see or listened where by listening he could hear went rather to the question of his contributory negligence. The question of negligence of the defendant and of contributory negligence of plaintiff was submitted to the jury in an instruction on comparative negligence appropriately phrased. There is no ground for reversing the judgment for insufficiency of the evidence.

Error is assigned because the court, by its first instruction, submitted as one of the charges of negligence the

"permitting various obstructions on its right of way which partly shut off plaintiff's view to the west." Defendant claims this is not alleged in the petition. The petition is not artfully drawn, but no move was made to require it to be made more definite. The other charges of negligence given by the court to the jury were abstracted by the court from the fifth paragraph of the petition; but in the fourth paragraph thereof plaintiff alleged that "there are buildings erected near stated switches and close to said highway on the west of that crossing, which obstruct the view somewhat of drivers upon stated street." There was shown in evidence as obstructions "west of that crossing" only the section-house and the two lines of telegraph poles heretofore mentioned. This allegation of the petition evidently was intended as one of the items of negligence. There was about as much testimony concerning it as was received on some others of the four charges of negligence in the petition. The crux of the case of plaintiff was the question of the headlight. Defendant requested no instructions. Perhaps it would not have been error to have failed to instruct the jury as to these alleged obstructions, for erection and maintenance of convenient structures is not ordinarily negligence as to one who is familiar with the situation. *Rickert v. Union P. R. Co.*, 100 Neb. 304. Yet there was some evidence on the subject, and so we think there was no prejudicial error in the giving of the instruction.

Defendant complains of the ninth instruction, in which the court abstracts section 74-562, Comp. St. 1929, requiring either a bell to be rung or steam whistle to be blown on each locomotive "at least eighty rods from the place where the railroad shall cross any road or street, and be kept ringing or whistling until it shall have crossed such road or street." The jury were instructed they might consider these requirements in determining questions of negligence and contributory negligence. The evidence on behalf of plaintiff justified this instruction.

Plaintiff's truck was an International. He testified he had one of the mechanics from the International Harvester

Company at Omaha come up, go over it and give him an estimate on the cost of repairing it to put it in as good condition as before. On defendant's objection he was not allowed to state the estimate. He then was permitted, without objection, to state that it was worth $2,000 to $2,500 before the collision. Thereupon he was asked its value after the collision. Defendant objected on the ground of no foundation and hearsay. The objection was overruled and he stated the value as $250. Plaintiff's counsel asked him how he knew that. Defendant's counsel objected to his answering the question on the ground it was incompetent, and the objection was sustained. Defendant claims it was error to allow plaintiff to testify to the value of his truck after the collision. In an action for damages on account of injury to personal property, the owner thereof is qualified by reason of that relationship to give his estimate of its value. 22 C. J. 581; *Hespen v. Union P. R. Co.*, 82 Neb. 495; *Hawkins v. Collins*, 89 Neb. 140; *Neal v. Missouri P. R. Co.*, 98 Neb. 460; *Gibbons v. Chicago, B. & Q. R. Co.*, 98 Neb. 696; *Miller v. Drainage District*, 112 Neb. 206. The testimony of the plaintiff had shown that the collision and dragging of the truck broke up its engine and "pretty well damaged" the front end of the truck and "the frame all over (was) bent around out of shape." This made the difference in value rule, which was given to the jury and is not assigned as error, applicable. There is no other evidence as to the injuries to the truck. The testimony of the plaintiff, owner of the truck, as to its value before and after the injury was competent to be submitted to the jury to be weighed for whatever the testimony seemed worth.

The judgment of the district court is

AFFIRMED

CENTRAL IRRIGATION DISTRICT, APPELLANT, V. GERING IRRIGATION DISTRICT ET AL., APPELLEES.

FILED JANUARY 7, 1932. No. 27952.

Easements: DRAINAGE. Landowners, by open, notorious, peaceable, uninterrupted, adverse construction, maintenance and use of a drainage ditch discharging water into an irrigation canal for more than the statutory period of ten years, may acquire from the irrigation district an easement for that purpose.

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

Raymond & Fitzgerald, for appellant.

Morrow & Morrow, contra.

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

ROSE, J.

This is a suit in equity commenced by the Central Irrigation District, plaintiff, for a perpetual injunction preventing the Gering Irrigation District, Frank Schenbeck and Olive H. Schenbeck, defendants, from draining water from a marsh by means of a ditch into plaintiff's irrigation canal, called the "Central canal."

The Schenbecks own a quarter section of land in Scotts Bluff county in Gering Irrigation District between the "Gering canal" and the Central canal. The drainage ditch of which complaint is made varies in width from one to two feet, is about a foot deep, extends northward 950 feet from a marsh on the land of the Schenbecks and empties into the Central canal. The area of the marsh does not exceed 15 acres. The ditch therefrom carries seepage and surface water. The Central canal conveys irrigation waters eastward. At the mouth of the ditch the southern bank of the Central canal is two and a half or three feet high. Further east in a cut the banks reach a height of 13 feet or more. In the cut the bottom of the canal is practically level for a considerable distance. No complaint is made of the water from the drainage ditch during the irrigating

season, but the alleged irreparable damages upon which plaintiff relies for an injunction are said to be caused by ditch water and silt which collect in the cut with weeds and remain there after water for irrigating purposes has been shut off at the intake of the Central canal at the close of the irrigating season. As pleaded by plaintiff, the result is that water and silt from the drainage ditch and weeds which naturally fall or blow into the Central canal in winter freeze in a solid mass in the cut, remain there until the following May, interfere with irrigation and necessitate the cleaning of the Central canal at great expense.

In addition to a plea that water from the drainage ditch does not damage plaintiff in any respect but lessens the expense of cleaning the Central canal, defendants interpose the defense that the Schenbecks, by open, notorious, peaceable, uninterrupted, adverse use of their drainage ditch for more than the statutory period of ten years, acquired an easement permitting them to drain into the Central canal surface waters and seepage from the marsh on their land.

Upon a trial of the cause the district court found the issues in favor of defendants and dismissed the suit. Plaintiff appealed.

Should an injunction be granted? Former owners of the quarter section on which the marsh is situated dug the drainage ditch more than 20 years ago without consulting plaintiff and openly and peaceably maintained and used it without interruption or complaint until they sold the land to the Schenbecks in 1913. The latter thereafter likewise continuously used and maintained the ditch without interruption or complaint until officers of plaintiff asked Frank Schenbeck, defendant, to request the Gering Irrigation District, defendant, to make a cement opening at its expense in the bank of the Central canal at the mouth of the ditch. The request was made and granted in 1925. Later plaintiff closed the ditch at the mouth from time to time, but in each instance the obstruction was promptly removed. These temporary interferences occurred after continuous use of the ditch for more than ten years. Evidence of the

facts outlined is not contradicted. There is nothing to show that the initial drainage of the marsh or the subsequent maintenance and use of the ditch for more than ten years was permissive. A pertinent rule of law applicable to easements was stated in an earlier case as follows:

"Where a landowner has openly, notoriously and continuously used a private way across the land of another for more than the statutory period of ten years, it will be presumed that he did so under a claim of right, and the burden of proving the contrary rests on the owner of the servient estate." *Moll v. Hagerbaumer,* 98 Neb. 555.

This principle is discussed in *Majerus v. Barton,* 92 Neb. 685, where other cases involving the same subject are cited. The following is settled law in Nebraska:

"An easement in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years." *Omaha & R. V. R. Co. v. Rickards,* 38 Neb. 847. See, also, *Jensen v. Showalter,* 79 Neb. 544; *Agnew v. City of Pawnee City,* 79 Neb. 603; *Dunbar v. O'Brien,* 117 Neb. 245.

If the easement interposed as a defense could lawfully have been acquired by prescription, the evidence shows conclusively that the Schenbecks acquired that right. Notwithstanding the evidence summarized and the rules of law quoted, plaintiff contends, nevertheless, that the Central Irrigation District is a common carrier, made so by statute; that its property is held by it in trust for public purposes; that it was without power to grant the easement pleaded as a defense, and that therefore a private or individual right to use the Central canal for drainage could not be acquired by adverse user. In support of these propositions plaintiff cites sections 46-111 and 46-627, Comp. St. 1929, and also *Edholm v. Missouri P. R. Corporation,* 114 Neb. 845. The position thus taken does not seem to be tenable. The power of an irrigation district is not limited to irrigation alone, but extends to drainage, even beyond district boundaries. Comp St. 1929, sec. 46-132. A preponderance of the evidence shows that there is seepage from the Central

canal into the marsh on the land of the Schenbecks—land in a different irrigation district; that water would eventually flow over the bank into the Central canal if the ditch were closed, thus overflowing the flat bottom of the cut longer than water from the ditch. The better view is that plaintiff had power to grant the easement in the first instance.

Edholm v. Missouri P. R. Corporation, 114 Neb. 845, is distinguishable from the case at bar. It is there properly held that title to part of a railroad right of way cannot be divested by adverse possession. Under constitutional and statutory provisions the right to use railroads for the transportation of persons and property is extended alike to the entire public. The right to use water from the canal of an irrigation district is limited to persons owning land therein, the area subject to irrigation by plaintiff being approximately 2,100 acres. Plaintiff has no greater protection from the general law of adverse possession or user than municipalities had before the act of 1899 removed the limitation of time for commencing actions to recover title to or possession of streets and other public grounds. Comp. St. 1929, sec. 20-202. The provisions of that act do not extend to irrigation districts, which are not municipal corporations. *Bliss v. Pathfinder Irrigation District,* p. 203, *post.* Before it was passed, title to or easements in streets were frequently acquired by adverse possession. *Meyer v. City of Lincoln,* 33 Neb. 566; *Lewis v. Baker,* 39 Neb. 636; *Agnew v. City of Pawnee City,* 79 Neb. 603.

The conclusion is that the Schenbecks acquired by prescription an easement to drain water from their marsh into the Central canal. On that ground alone the suit was properly dismissed.

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLEE, V. PATHFINDER IRRIGATION DISTRICT, APPELLANT.

FILED JANUARY 7, 1932. No. 28019.

1. **Pleading**: DENIAL. "A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue." *Knight v. Denman*, 64 Neb. 814.
2. ———: ———. An answer denying that a bank "is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska" is insufficient to put in issue the corporate capacity of the bank.
3. **Waters**: IRRIGATION DISTRICTS. An irrigation district, organized under the laws of Nebraska, is a public corporation, but is not a municipality, within the meaning of that term as used in section 77-2601, Comp. St. 1929.
4. **Banks and Banking**: DEPOSITS: PLEDGE OF ASSETS. A Nebraska state bank is without authority to pledge any of its assets to secure a deposit of funds, except in those instances where it is expressly authorized so to do.

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

Morrow & Morrow, for appellant.

Mothersead & York, contra.

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

GOOD, J.

This is an action to cancel a real estate mortgage and to quiet in plaintiff title to the mortgaged premises. The trial court entered a decree for plaintiff. Defendant has appealed.

The state bank, of which plaintiff is now receiver, executed and delivered to defendant a mortgage for $5,000 on real estate, an asset of the bank, to secure repayment of deposits of funds that defendant thereafter might make in the bank. Later the bank became insolvent and a receiver was appointed, at which time defendant had $4,714.23 deposited in the bank. The receiver seeks to have the mortgage canceled on the ground that the bank

had no authority to pledge any of its assets to secure such a deposit, and that the contract securing it was against public policy.

In its answer defendant set out in detail the transaction, and claimed that the mortgage was a valid lien to secure its deposit. The answer also contained the following: "Defendant denies that the Irrigators Bank of Scottsbluff, Nebraska, is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska." A general demurrer to the answer was sustained. Defendant elected to stand upon its answer and refused to further plead.

Defendant argues that the quoted denial puts in issue the corporate capacity of the bank. The denial is of the exact language of an allegation in the petition. The argument is unsound. There is pleaded only a legal conclusion. The denial is in the nature of a negative pregnant. It might be that the bank had failed in some immaterial respect to fully comply with the law in its organization as a corporation, but which failure would be insufficient to deprive it of the right to transact business as a banking corporation. No fact is pleaded which shows in what respect, if any, the bank failed to comply with the statutory requirements in its organization. In fact, defendant dealt with the bank and accepted from it a mortgage executed by it as a corporation. In *Knight v. Denman*, 64 Neb. 814, it is held: "A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue."

The principal question for determination is the power of a state bank to pledge any of its assets to secure the deposit of funds by an irrigation district. The statutes of this state authorize state banks to pledge assets to secure the deposit of certain public funds where the bank has been designated as a depository. Section 77-2506 and section 77-2601, Comp. St. 1929, as construed by this court in *Bliss v. Mason*, 121 Neb. 484, authorize a state bank, designated as a county depository, to pledge sufficient of its assets

to protect the deposit of county funds in the depository bank. It is contended by defendant that the opinion in that case is authority for the securing of a deposit of any public funds by pledge of assets. It is true the language contained in that opinion uses the term "public funds." It is a universal rule that the language in a judicial opinion has reference to and must be construed to apply only to the facts presented by the case under consideration. Whether a state bank could pledge any of its assets to secure a deposit of public funds other than county was not intended to be, and was not, in fact, determined in that case.

Defendant contends that section 77-2601, Comp. St. 1929, authorizes a state bank to pledge sufficient of its assets to secure the deposit of funds made by an irrigation district. That section provides, in part, as follows: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, * * * it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto." It is contended that an irrigation district is a municipality, within the meaning of the quoted section.

Corporations are generally classed as public and private. While a municipality is a public corporation, it does not follow that every public corporation is a municipality. In 1 Dillon, Municipal Corporations (5th ed.) 58, sec. 31, the term "municipal corporation" is defined as follows: "A *municipal corporation,* in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the

general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." A like definition is found in 43 C. J. 65, and in the same volume, at page 72, we find the following with respect to public corporations: "Public corporations are all those created specially for public purposes as instruments or agencies to increase the efficiency of government, supply public wants, and promote the public welfare. Public corporations are classified as municipal, quasi-municipal, and public-quasi corporations. Public corporations include not only municipal corporations, but also all other incorporated agencies of government of whatever size and form or degree of organization. While all municipal corporations are public corporations, all public corporations are not municipal corporations."

In 43 C. J. 73, it is said: "There is a want of harmony in the decisions relating to what local subdivisions are embraced by the phrase 'municipal corporations.' There are many public bodies which are not corporations in the full sense but resemble them in that they have some of the attributes of a corporation, and which are therefore called quasi corporations. Some of these are almost perfect in their organization and scarcely distinguishable from municipal corporations. Others represent the lowest order of corporate life, with few powers and imperfect organization. Between these two extremes are a large number of districts erected as agencies of government, of divers names and objects, with varying degrees of organization; sometimes styled political, sometimes public, sometimes civil; including counties, towns, townships, school districts, drainage districts, highway districts, improvement districts, hospital districts, irrigation districts, * * * and all other sections of territory delimited and organized for the performance of certain governmental functions; * * * such bodies are not 'municipal corporations' or 'municipalities' in the proper sense."

In *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411, it is held: "Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state." This holding was approved and followed in *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613. There have been many sessions of the legislature since these decisions were handed down. Had the legislature desired, it could have amended section 77-2601, *supra,* to include irrigation districts.

In *State v. Gering Irrigation District,* 109 Neb. 642, it is held that an irrigation district is a public corporation. This holding was followed and approved in *State v. Gering Irrigation District,* 114 Neb. 329. And in *Central Irrigation District v. Gering Irrigation District, ante,* p. 199, it is, in effect, held that an irrigation district is not a municipality. In *Thaanum v. Bynum Irrigation District,* 72 Mont. 221, it is held that an irrigation district is not a municipality. A like holding is made in *Davy v. McNeill,* 31 N. M. 7.

We are constrained to hold that an irrigation district, while a public corporation, is not a municipality or a municipal corporation.

The public policy of this state, with reference to securing of deposits made in state banks, is evidenced by many acts of the legislature. It has authorized banks, designated as depositories, to pledge assets of the bank to secure state and county funds when deposited in designated depository banks. Comp. St. 1929, secs. 77-2503, 77-2508. It has further authorized the securing of deposits by cities, school districts and other municipalities, but has not specifically authorized the pledging of assets for that purpose.

By the enactment of section 8-1,102, Comp. St. 1929, the legislature has further provided: "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 were due and thus under receivership." There can be little doubt that the legislature intended this statutory provision to prevent state banks from securing deposits, by the pledging of assets, except in the specified cases. Had it not so intended, there would have been no occasion to expressly authorize the pledging of assets in certain instances.

But we find a still further enactment by the legislature in section 8-140, Comp. St. 1929, which makes it a felony for any officer or employee of a state bank to directly or indirectly give any consideration of value or render any service for or at the request of a depositor as an inducement, in addition to the legal interest, for making or retaining a deposit in the bank, or for any depositor to accept any such inducement. A pledge of its assets by a bank to secure or retain a deposit is inducement to the depositor to make such deposit, and, in such a transaction, both the bank official, acting for the bank, and the depositor would be subject to criminal prosecution.

From a consideration of all the legislative acts referred to and others, it is clear that the legislature intended to deny, and has denied, to state banks the right to pledge their assets to secure deposits, except in those instances where expressly authorized so to do. The following decisions from other courts support this view: *Farmers & Merchants State Bank v. Consolidated School District No. 3*, 174 Minn. 286; *Divide County v. Baird*, 55 N. Dak. 45; *Commercial Bank & Trust Co. v. Citizens Trust & Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (n.s.) 950; *Porter v. Canyon County Farmers Mutual Fire Ins. Co.*, 45 Idaho, 522.

It is also, by inference, suggested that there is no distinction between a loan and a deposit, and, since banks are authorized to pledge assets for the securing of loans, the same rule should apply to the securing of deposits. A pertinent and convincing answer to this argument is found in *Farmers & Merchants State Bank v. Consolidated School District No. 3, supra.* Commenting upon the dissimilarity

between bank deposits and borrowings, it is said in the opinion (p. 291): "Bank deposits and bank borrowings are alike in but the one respect that one result of each is the relation of debtor and creditor. In every other respect the two operations are not only different but in complete antithesis. Deposits are attracted by the strength of a bank, whereas its borrowings are compelled by weakness or other adverse circumstance. (The borrowing of money has been said to be 'so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.' *Western Nat. Bank v. Armstrong,* 152 U. S. 346, 351.) Large deposits signify health, and large borrowings banking disease. Springing from opposite causes, the two by their existence signify opposite conditions—deposits the normal, and borrowings the abnormal. Moreover the antithesis holds to the end, for the withdrawal of a deposit is a loss, whereas the payment of a loan is a gain. Deposits continued and increased evidence success, whereas borrowings continued and increased portend failure. Save in the relation of debtor and creditor common to both, the two are different in their every incident—not only different but opposed in origin, in purpose, and in effect. How it comes then that the obvious truth that a bank may pledge collateral for borrowed money can be used to sustain the same power in the case of deposits we cannot understand. The former is clearly necessary, usual and incidental, whereas the latter is neither necessary, usual or incidental, but is positively dangerous. * * * It is not an express power and clearly not included among those implied."

Defendant has cited and relied upon the decisions of other jurisdictions upholding the proposition that a bank may pledge assets to secure deposits. We have examined with considerable care each one of the cases cited. In most instances the opinions are based upon charter or statutory provisions which confer, as construed by the court, the right of a bank to pledge its assets to secure deposits. In

nearly every case cited by the defendant on the proposition, the question has arisen with reference to the securing of public funds of some nature by the pledging of assets, and where the policy of the state has been to protect such funds. But, under our statutory provisions and the policy declared by the legislature of this state, we are compelled to hold that a state bank is without power to pledge any of its assets to secure the deposit of funds except in the instances where expressly authorized so to do.

The district court rightly held that the mortgage should be canceled and the title to the real estate quieted in the plaintiff. The judgment is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BANK OF CRAB ORCHARD: L. E. LAFLIN, APPELLANT: RUSH G. MYERS, APPELLEE.

FILED JANUARY 7, 1932. No. 27897.

1. **Execution:** INSOLVENT DEBTOR. Where the debtor is insolvent, the issuance of execution and a return *nulla bona* are not necessary, since their purpose is to establish the insolvency of the debtor, and where that is shown by other satisfactory evidence, and the issuance of the execution would be of no practical utility, it may be dispensed with.
2. **Exemption Laws:** CONSTRUCTION. The exemption law of Nebraska, section 20-1553, Comp. St. 1929, providing that the head of a family who has no homestead shall have exempt from forced sale the sum of $500 in personal property, is to be liberally construed by the courts, and in case of doubt should be resolved in favor of the head of the family claiming the exemption.
3. **Exemptions.** Exempt property of a debtor, who is the head of a family, may not be taken from him by appropriating funds, held by a receiver of a bank, which belong to the debtor, in satisfaction of a judgment, any more than such funds could be taken directly on execution, or garnishment.

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

Loren H. Laughlin, for appellant.

F. C. Radke and *Magdelene Craft Radke, contra.*

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

PAINE, J.

This is an appeal from a judgment of the district court for Johnson county, Nebraska, denying an application of L. E. Laflin, claimant and assignee of a judgment for $3,426.36 against Rush G. Myers, appellee, purchased from the receiver of the Bank of Crab Orchard. The said Rush G. Myers, as administrator of the estate of Isaac S. Platt, had a deposit in said failed bank, which had been reduced by dividend to the sum of $2,944.52, and the said Rush G. Myers had paid the heirs in said estate and become the owner of said deposit in his own right. Upon this deposit a dividend of $324.68 had been declared, and was due him because he was entitled thereto as assignee. L. E. Laflin, claimant and appellant, made application to have the court order the receiver to pay this and also future depositor's dividends to him to apply upon his judgment entered on a mandate from this court in *Bank of Crab Orchard v. Myers,* 120 Neb. 84. Myers claimed the entire dividend, being less than $500, as exempt to him in lieu of homestead as the head of a family, and his claim was sustained by the district court.

Many of the facts upon which this case is founded were set out in the decision of Good, J., and the dissenting opinion of Rose, J., in the case of *Bank of Crab Orchard v. Myers, supra,* and such facts will not be reviewed in this opinion. The appellee had filed an affidavit, claiming a homestead right in his old farm, which was being foreclosed. On September 22, 1930, the district court determined that Myers had no homestead right in said farm and appointed a receiver therefor. Upon the same date, L. E. Laflin filed an application to apply this dividend of 13 per cent., then declared upon the claim owned by said Myers as assignee, to the payment of the judgment which he had purchased from the receiver against said Myers, originally

founded upon promissory notes given by Myers to the bank. To this application Myers filed affidavits, in which he set out that he was the head of a family, and that his entire property consisted of said dividend of $324.68, two suits of clothes, and three shares of worthless stock, and that he had no other property. This claim for exemption was contested, and it was charged that he was a part owner of the Model Grocery, at 3104 Holdrege street, Lincoln, Nebraska. Several affidavits were filed, and depositions were taken in relation thereto. The son testified that the trade name, Myers & Son, in which name the store was run, referred to his mother and himself, and not to his father; that his mother had advanced $1,000 towards the purchase of the store, and he had advanced $900, and that his father worked simply as a clerk in said store, and had no other interest in it. A personal property tax schedule was signed, "R. G. Myers by wife," and the wife testified that she signed the same in that manner simply under the direction of the deputy assessor.

Rush G. Myers testified that he was 61 years old, lived in Lincoln, that he had no longer any interest in the farm in Johnson county, taken from him under foreclosure, nor other real estate of any kind, no money in any bank or otherwise, and claims said dividend in lieu of his homestead exemptions of $500.

1. The appellant sets up several assignments of error, among them the following: That the court erred in finding appellee entitled to claim exemption up to $500 in the dividend declared by the receiver of said bank; that the court erred in holding that the claim for exemption was properly made and presented by the appellee, and insists that a full and complete disclosure and inventory was not made by the appellee; and that the court erred in not holding that appellant was entitled, as assignee of the bank's judgment, to impound and hold the dividend declared in favor of the appellee, and that this right was superior to any claim of homestead exemption. Appellee had resisted the application upon the ground that no execution had first been

issued. The district court decided that the procedure followed in the case was proper; that the appellant, L. E. Laflin, was not obliged to first issue an execution.

The weight of authority is to the effect that, when it appears that the debtor is insolvent, the issuance of execution and a return of *nulla bona* are not necessary, since their purpose is to establish insolvency of the debtor and want of remedy at law, and where the debtor is shown to be insolvent by other satisfactory evidence, and the issuance of execution would be of no practical utility, it may be dispensed with. *Selz v. Hocknell,* 63 Neb. 503; *Sayre v. Thompson,* 18 Neb. 33; 15 C. J. 1396-1397; *Veith v. Ress,* 60 Neb. 52; *Sturtevant Co. v. Bohn Sash & Door Co.,* 59 Neb. 82.

2, 3. The real contest in this case is based upon two sections of our statutes. Appellee defends upon section 20-1553, Comp. St. 1929, which reads in part: "All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property, except wages," etc. And appellant rests his case upon section 20-818, Comp. St. 1929, reading as follows: "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other."

Does the statute last set out supersede the statute of exemption in lieu of homestead?

May the appellant, Laflin, have an order of court directing the receiver to pay him this dividend of $324.68, due Rush G. Myers, to apply upon his judgment secured by the receiver upon promissory notes of the said Rush G. Myers, given to the same bank?

Appellant insists that the decision in this case should be governed by the case of *Serhant v. Haker,* 73 Ohio St. 250,

which holds that the right of set-off is not subject to be defeated by the provisions of other sections relating to exemptions. Yet, an examination shows that the Ohio statute on exemptions, section 5441, Rev. St. 1905, is merely permissive, and reads that the husband and wife living together "*may*" in lieu thereof hold exempt from levy and sale real or personal property not exceeding $500 in value, while our Nebraska statute reads on that point that all heads of families "*shall have exempt.*"

We have carefully considered the opinions cited by the appellant, especially this case of *Serhant v. Haker, supra,* and also *Caldwell v. Ryan,* 210 Mo. 17, 16 L. R. A. n.s. 494, 124 Am. St. Rep. 717. We will admit that North Carolina also stands with Missouri and Ohio in *Lynn v. Cotton Mills,* 130 N. Car. 621, but we are convinced that the courts of these three states are entirely out of line with the great weight of authority.

Statutory exemption laws are founded upon public policy. Each state has a right, as well as a duty, to protect an unfortunate head of a family from having all his property taken from him and he be forced to become a charge upon the taxpayers. In perhaps just one state, Louisiana, it was held, in 1850, that exemption laws should be strictly construed, *Hanna v. Bry,* 5 La. Ann. 651, 52 Am. Dec. 606, in which case a horse, used to visit his patients, was taken from a practicing physician. On the other hand, nearly every other court has said that exemption laws should receive liberal construction in favor of the poor man. Without extending this opinion too far, we cite: "Exempt property of a debtor may not be subjected indirectly by appropriating it in satisfaction of a set-off, any more than it might be done upon a judgment obtained on the set-off in an independent action." *Beattyville Co. v. Sizemore,* 261 S. W. 620 (203 Ky. 7). See 25 C. J. 128. A creditor holding a judgment against the debtor, cannot set it off as against a judgment obtained by the debtor, where the debtor's entire property including the judgment does not exceed the amount of his exemption. *Carpenter v. Cool,*

115 Ind. 134. Nebraska has held that a judgment may be claimed as exempt property. *Mace v. Heath,* 34 Neb. 54.

In *Deering & Co. v. Ruffner,* 32 Neb. 845, an insolvent Cass county man was indebted to Deering & Company for $292.35. The company urged him to enter their employ during the rush season, at a salary of $100 a month and expenses, and agreed to pay him one-half the salary in cash and credit the balance on his debt to them. At the end of two months he was given a receipt for $200, and was told with an oath he could get no more. The district court found that he was the head of a family, and was entitled to receive the amount agreed to be paid him. This case may not be exactly in point, as it was decided under a provision of statute exempting 60 days' pay to the head of a family. If we admit that this case is not in point, then perhaps no Nebraska case is exactly parallel, as counsel insist.

The appellant contends that his application comes strictly within his statutory rights, yet "where a plaintiff brings an action for wages due from the defendant, and such wages are exempt to the plaintiff, the defendant cannot counterclaim a debt due from the plaintiff to him, although the counterclaim comes within the letter of the statute." *Bradley v. Earle,* 22 N. Dak. 139, Ann. Cas. 1914A, 1181.

Admitting that this exact question may never have been passed upon by this court, it occurs to us that the exemption law, allowing $500 to heads of families in Nebraska, means exactly what it says, and that courts are required to carry out the exemption law in a liberal spirit, and that the head of every family has the right to have at least $500 personal property that creditors cannot take from him. This court now holds that, when there is a doubt as to whether or not property should be exempt, such doubt should be resolved in favor of the head of the family claiming exemption. The plain purpose of our exemption laws is to save to a debtor, who is the head of a family, personal property up to the value of $500. *Phelan v. Lacey,* 51 Okla. 393,

L. R. A. 1916B, 786. See, also, *Hoyt v. Pullman*, 51 Okla. 717, L. R. A. 1916B, 1288.

The district court was right in holding that the claim of appellee, that $324.68 be safeguarded to him under the exemption laws as the head of a family owning no real estate, is paramount to the claim of the appellant to be given said sum to apply on his judgment against the appellee.

AFFIRMED.

LIZZIE LARSON, APPELLANT, V. L. I. KEITH, APPELLEE.

FILED JANUARY 7, 1932. No. 28001.

1. **Compromise and Settlement.** Where a tenant is holding possession of premises from a landlord under a written lease, and a difference arises between them as to the payment of rent, and the parties enter into a subsequent written contract whereby they agree that if defaulted rent is not paid within a certain time the lease shall be terminated and the tenant will yield possession, and appraisers will be appointed to appraise the value of tenant's interest in a crop of growing grain thereon, and such appraisers are appointed and make such appraisement, after which the claim of the landlord is deducted from the value of the grain, and the landlord delivers to the tenant a check for the amount of the difference, and the tenant, before cashing the check, expressed himself as being dissatisfied with the transaction, yet afterward cashed the check and received full credit therefor; *held*, that the tenant waived any right to question the transaction further, and cannot lawfully withhold possession of the premises from the landlord.
2. ———. Where there is a *bona fide* dispute between parties, and a certain sum is tendered to the creditor, conditioned upon his acceptance thereof in full satisfaction of his claim, the creditor must either refuse the same, or, if he accepts it, he accepts the condition also, notwithstanding any protest. *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396.

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

Butler & James, for appellant.

K. F. Williams and *F. J. Schroeder, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is an action in forcible detention. The plaintiff is the owner of a farm in Frontier county and the defendant is in possession thereof under a lease. At the conclusion of the trial in the lower court, both parties made motions for a directed verdict and for judgment, whereupon the trial court took the case from the jury and rendered judgment in favor of the defendant and dismissed plaintiff's cause of action. From this finding the plaintiff has brought the case to this court for review.

It appears from the record that the plaintiff at the time of the commencement of the action was the owner of a half section of land in Frontier county, Nebraska; that the defendant during the crop year of 1929 had occupied the premises as tenant of the plaintiff. Hereafter, for convenience, the parties will be designated as landlord and tenant. That on the 30th day of September, 1929, the landlord entered into another lease with the tenant for the crop year of 1930; that the tenant was in arrears of rent for the crop year of 1929; that on or about the 18th day of February, 1930, the parties met at the office of the clerk of the district court in Stockville for the purpose of making some sort of settlement of their differences. Upon that date they entered into a written contract wherein it was recited that the tenant was indebted to the landlord for money advanced in the amount of $163.42, and pasture rent of $55, being a total of $218.42, and upon this amount of indebtedness the tenant was entitled to a credit of $39 for fence posts which he claimed he had paid for for the landlord. Whereupon the parties agreed in substance that, in event the tenant did not pay to the landlord the above mentioned items, the tenant would forfeit the lease and deliver up peaceable possession of the premises to the landlord, upon condition that each party should appoint one appraiser and the two choose a third to appraise the number of acres of wheat already planted on the premises

and to be harvested during the year 1930, and fix what they considered a reasonable value for such wheat, which amount should be paid by the landlord to the tenant, less the items of indebtedness due from the tenant to the landlord, and upon payment thereof the lease should be terminated, and the tenant expressly agreed to deliver up possession of the above described premises to the landlord. It further appears that the tenant failed to make the payment due the landlord, and that each party, under their agreement, selected an appraiser, and the two selected a third, and the appraisers went upon the premises and appraised the wheat and found that there were 65 acres planted to wheat and that the reasonable value thereof at the time was $5 an acre. After the appraisement was made, to wit, on the 19th of March, 1930, the parties met again, at which time the indebtedness due from the tenant to the landlord was again discussed and computed to be the sum of $218.42, and the price of the growing wheat at the valuation fixed by the appraisers was computed at $325. A computation was made and it was found the balance due under this arrangement to the tenant, after deducting his indebtedness, was $107.75, whereupon the tenant executed a bill of sale to all his interest in the wheat and the landlord executed and delivered a check to the tenant in this amount, which check was indorsed by the tenant, and credit received thereon the 26th day of March, 1930.

The testimony of the tenant is that, after the check had been delivered to him, he discovered that he had only received pay for two-thirds of the wheat, and that he should have received pay for all, and that he was dissatisfied with the transaction. By his own testimony he states that he made no effort to deliver back the check after he had expressed himself as being dissatisfied, but retained the same and cashed it and has never returned any of the funds to the landlord since that time. There seems to be very little dispute in the testimony of the parties. The appraisers made no effort to fix the value of the tenant's interest in the wheat, but merely found it to be of the value of $5 an acre.

The main objection urged by the appellant is that the findings and judgment of the trial court are contrary to law and not supported by the evidence, and that the trial court erred in overruling appellant's motion for a new trial. The evidence is undisputed that these parties sustained the relation of landlord and tenant, and were having differences concerning the arrears of rent for the year 1929. In order to settle any differences they might have, they entered into a written contract whereby it was agreed by both parties that the tenant should pay the balance of the rent due by the next day after the contract was entered into or appraisers would be appointed to appraise the interest of the tenant in the growing crops on the land. It is evident that the tenant did not pay this rent, because he selected his own appraiser to appraise the property and the landlord selected one, the two selected a third, and these appraisers made the appraisement and returned their findings as to the value of the wheat. The landlord and the tenant, in the settlement of the disputed question, computed the difference between them and found that there was due the tenant $107.75, whereupon it was paid by the landlord and accepted by the tenant and is still retained by him. It also appears that the tenant never paid for the fence posts that he put on the premises for the landlord.

It seems to us that the law governing transactions of this character is so well settled it hardly admits of an argument.

"Where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, * * * the dispute will be a sufficient consideration to uphold the settlement." *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396.

"Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demands, the sum due being in dispute, the creditor must either refuse the tender or accept it. * * * If he accepts it, he accepts the condition also, notwithstand-

ing any protest." *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co., supra.*

One accepting a check knowing it is offered in full settlement of an account is estopped to claim that deductions in the account were improperly made. *Thomas v. Columbia Phonograph Co.*, 144 Wis. 470; *Nassoiy v. Tomlinson*, 148 N. Y. 326.

The tenant raised no objection to the settlement at the time of the delivery of the check, and even had he done so, and the check was tendered to him, as it was, in full satisfaction of the sum in dispute, the duty was then cast upon the tenant to refuse the same, and if he did not do so he will be held in law as having accepted settlement, notwithstanding any protest he might make.

"A compromise * * * whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed." *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600.

"Where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

The landlord herein paid to the tenant the amount of the appraisers' award, which was accepted by him, and after acceptance thereof the tenant refused to comply with his agreement to deliver up possession of the premises, claiming that he only received the value of two-thirds of the wheat, when he should have received the value of all of it. Even if this were true, his position would be untenable. If a mistake were made in the amount due him for the wheat by the appraisers or any other party concerned, still he could not be heard to claim a right to the possession of the premises simply because there was more due him

than he received under the settlement. His contract was that he would deliver the possession of the premises if he failed to pay the 1929 rent on the 19th of February. This he failed to do. The computation of the value of his wheat by the appraisers involves a question wholly separated from the right to withhold possession of the premises. If he were correct in his contention, he could have brought an action at law to recover from the landlord the amount yet due him under this settlement, but the fact that he claims an amount due him under the settlement would not justify his withholding possession of the premises of the landlord, and the law seems too well settled that the amount has been fully paid and satisfied by the giving of the check which he cashed and received credit for in full satisfaction of his claim, and he having accepted payment thereof after he claimed that an error had been made in the settlement.

Under the facts, which are almost entirely undisputed, we hold that the trial court erred in rendering judgment for appellee instead of appellant.

For reasons heretofore stated, the judgment is reversed and the cause is remanded.

REVERSED.

LIZZIE LARSON, APPELLEE, V. L. I. KEITH, APPELLANT.

FILED JANUARY 7, 1932. No. 28099.

Compromise and Settlement. One accepting a check, knowing it is offered in full settlement on an account or claim, is estopped to claim that deductions in the account were improperly made.

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

K. F. Williams and *F. J. Schroeder,* for appellant.

Butler & James, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is an action in replevin. L. I. Keith was defendant below, and for the purpose of this opinion will be termed defendant, and Lizzie Larson will be termed plaintiff.

The facts appear to be as follows: The plaintiff in her petition alleged a special ownership in the property replevied, by virtue of being the assignee of a certain chattel mortgage executed by the defendant to the International Harvester Company for the purpose of securing his note to them. The mortgage described various articles of farm machinery, together with "an undivided two-thirds interest in 65 acres of fall wheat now growing upon the premises." The defendant answered setting forth that the plaintiff had already taken possession of the defendant's interest in the 65 acres of wheat and sold the same, and there was enough money received from the sale thereof to satisfy the mortgage indebtedness, and consequently the note was fully paid. The plaintiff in her reply alleges that the wheat thus sold was to meet other obligations existing between the defendant and plaintiff, and that the same was converted into money and sold before the plaintiff became the owner of the note and mortgage, and that the plaintiff paid the defendant in full for his interest in the wheat prior to the time the plaintiff became the owner of the note and mortgage.

A jury was waived, and the issues of fact as well as law were submitted to the trial court. The trial court found in favor of the plaintiff and against the defendant. The defendant filed a motion for new trial, which was overruled, whereupon he presents this record to this court for review.

This is a companion case to *Larson v. Keith, ante*, p. 216, between the same parties, in which, although the action is of a different nature, the defense pleaded in this case is practically the same defense as was urged in that one, which was an action in forcible detention.

By stipulation of parties it was agreed that the chattel mortgage in question was executed and delivered by the

defendant to the International Harvester Company, and that the plaintiff, at the time of commencement of this action, was the owner of the said chattel mortgage and notes secured thereby, having taken the same by assignment. The evidence is practically the same as in the forcible detention proceeding, and the defense urged in this action, as we have stated, is substantially the same as he made in that proceeding; that the defendant was at that time the tenant of the plaintiff, and that they made a settlement in writing whereby the lease was terminated and certain appraisers were to be appointed in accordance with their agreement to appraise the value of the growing crop of wheat on the premises; that such appraisement was made; that the amount of indebtedness which the defendant owed the plaintiff was subtracted from the value of defendant's interest in the wheat, and the amount owing to the defendant, after deducting said indebtedness, was $107.75. The defendant gave plaintiff a bill of sale to all his interest in the wheat, and the plaintiff gave defendant her check, dated March 19, 1930, in the amount of $107.75, which was accepted by the defendant, upon which he afterward received full credit.

We see no reason to discuss the evidence generally, for the reason that in all essential features the case turns on the same question as *Larson v. Keith, ante,* p. 216. Suffice it to say that from the record here it appears that the defendant was indebted to the plaintiff prior to the time the plaintiff became the owner of the chattel mortgage in question; that the defendant, having already mortgaged to the International Harvester Company his interest in the wheat upon the premises, again sold and delivered the same property to the plaintiff by bill of sale. This all occurred before the plaintiff became the owner of the note and mortgage. The record discloses that the delivery of the bill of sale for the wheat by the defendant to the plaintiff was not intended to satisfy any obligation which was secured by the chattel mortgage, but was to satisfy obligations which the defendant owed the plaintiff as her tenant,

and after such obligations were satisfied he received from the plaintiff a check for $107.75, which he cashed and for which he received credit in full settlement of his interest in the wheat. It was after this settlement, to wit, on the 5th day of September, 1930, that the plaintiff became the assignee of the note and mortgage, purchasing the same from the International Harvester Company, and paying them therefor the amount of $379.88, which was received by the mortgagee. Therefore, it appears conclusively from the record that the settlement between these parties for the wheat in question was had and completed some months prior to the time the plaintiff became the owner of the note and mortgage. The defendant testifies that the transaction in which he conveyed his interest in the wheat to the plaintiff, on March 19, 1930, had nothing to do with the note and mortgage upon which this action is based.

It is unnecessary to reassert the principles of law applicable to the case, for the reason that the same have already been stated in the forcible detention action. The settlement made between the parties, in which the wheat was conveyed to the plaintiff, is a transaction fully closed and satisfied and cannot in any way be heard as a defense to this action. The judgment of the trial court is

AFFIRMED.

QUEEN INCUBATOR COMPANY, APPELLANT, V. NATIONAL SURETY COMPANY, APPELLEE.

FILED JANUARY 7, 1932. No. 27876.

1. **Indemnity Bond: CONSTRUCTION.** Where an indemnity bond contains several conditions, each in a separately numbered paragraph, and where condition No. 3 provides for the termination of the bond under stated conditions, and concludes with this sentence: "The right to give notice of a claim hereunder shall cease at the end of six months after the termination, expiration, or cancelation of this bond as to any employee," and where such time limit for giving notice is inconsistent with the provisions of another condition of the bond, such time limit is referable only to the classification stated in condition No. 3.

2. ———: ———. A contract of indemnity, issued by a surety company, will be most strongly construed against the company and in favor of the insured or obligee.

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

Fred C. Foster and *William M. Holt,* for appellant.

Baylor & Tou Velle and *George A. Healey, contra.*

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

NISLEY, District Judge.

This is an action on a fidelity bond, to recover loss sustained on account of the defalcation of one of plaintiff's employees. The trial court sustained defendant's motion for a judgment on the pleadings and dismissed plaintiff's petition and cause of action. Plaintiff has appealed.

The controlling question for determination is: May an action be maintained upon the bond, where notice of the defalcation and resulting loss was not given to the bonding company until more than six months after the term of the bond had expired? Defendant contends that the giving of such a notice is a condition precedent to the right to maintain any action. Its contention is based on one of the conditions of the bond hereinafter quoted. Plaintiff, on the other hand, contends that the provision relied upon by defendant applies to only that class of cases referred to in condition No. 3 of the bond and that, unless its application is so limited, it is inconsistent with another condition of the bond which will be hereinafter set out.

The bond, after providing indemnity for loss occasioned by the misconduct of certain specified employees, contains 12 separate and distinct conditions, each in a separate paragraph, each separately numbered. Conditions No. 3 and the pertinent part of No. 4 are as follows:

"3. In the event of the death of any employee during the term of this bond; or of the suspension, dismissal, or retirement of any employee from the service of the em-

ployer during said term; or upon any employee entering into partnership relations with the employer, this bond shall thereupon terminate automatically as to such employee without any action on the part of the surety. The right to give notice of a claim hereunder shall cease at the end of six months after the termination, expiration, or cancelation of this bond as to any employee.

"4. Upon the discovery by the employer of any evidence of any dishonest act on the part of any employee, the employer shall, at the earliest practicable moment, and at all events not later than five days after such discovery, give written notice thereof addressed to the surety at its home office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the surety at its home office within three months after such discovery and shall be verified and paid by the surety within sixty (60) days after receipt thereof."

The pleadings show that notice of defalcation and resulting loss was not given until more than six months had elapsed after the term of the bond had expired. In that behalf plaintiff alleged that it did not discover the defalcation until March 8, 1928, and that on the 9th of March, 1928, it gave notice to the defendant of the defalcation. Plaintiff further pleaded: "That plaintiff was without fault in its failure to discover said defalcations or any of them before March 8, 1928."

Condition No. 4 provides for notice not later than five days after the discovery of evidence of any dishonest act on the part of any employee; provides for proof of loss under oath within three months, and that the claim shall be paid by the surety company within 60 days thereafter. Nowhere in the provision is reference made to the six month's time within which to give notice of claim. If the time limit for giving notice of claim, provided in condition No. 3, was meant to apply to any claim under the bond, it certainly would be inconsistent with the provisions of condition No. 4. A careful reading of condition No. 3 leads us to believe that such time limit has reference to

claims under the classification set forth in condition No. 3. In the last sentence of condition No. 3, "The right to give notice of a claim hereunder shall cease," etc., the word "hereunder," as contended by defendant, means "under the bond;" as contended by plaintiff, it means "under the provisions of condition No. 3." We think the latter is to be preferred.

A somewhat similar question was before the court of Missouri in *Goffe v. National Surety Co.*, 321 Mo. 140, wherein it was held: "A provision in the fidelity bond that claims under it must be presented within three months after the expiration of its coverage, and another provision that the assured must give notice immediately upon becoming aware of an act of an employee affecting the liability of the surety company, and within sixty days after the discovery of the loss file itemized statements, are inconsistent where such discovery is not made within three months after the bond has expired."

Likewise, we are compelled to hold that, if the time limitation in condition No. 3 was intended by the defendant to apply to any claim under the bond, then it is inconsistent with condition No. 4, but we are of the view that, fairly construed, the limitation applies only to the class of cases mentioned and specified in condition No. 3. The pleadings do not show that plaintiff's claim arises out of or under any of the contingencies specified in condition No. 3. The time limit therein specified is inapplicable.

A bond of the character of the one sued on is in the nature of an insurance policy, and the rule of almost universal recognition, that the provision of a policy of insurance will be construed most strongly against the insurer and in favor of the insured, is applicable to a bond of this character.

Rulings on the admission and exclusion of evidence are complained of, but it is clear from the record that the entire rulings of the court were based solely upon the construction of the quoted provisions of the bond. The conclusion reached renders it unnecessary to further discuss these rulings.

Because of the erroneous rulings of the court, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED.

CHARLES P. HALL, APPELLANT, V. LYMAN S. HALL ET AL., APPELLEES.

FILED JANUARY 7, 1932. No. 27943.

1. **Insane Persons:** APPLICATION FOR GUARDIANSHIP: SPECIAL PROCEEDING. An application to the county court by the children of a supposed incompetent for the appointment of a guardian for his estate is a special proceeding, not a civil action nor adversary in character.
2. ———: ———: DECREE: SUIT TO VACATE: FRAUD: PARTICIPATION OF PETITIONERS. In an action in equity to set aside a decree in such proceeding finding plaintiff incompetent and appointing a guardian, for fraud or upon other grounds of equitable cognizance, it is not necessary to prove participation by petitioners in the fraud or wrong, since they have no rights entitled to protection under the decree.
3. ———. ———: ———: VACATION OF DECREE. Where a supposed incompetent, being misled by the advice of his attorneys, makes no defense to proceedings in which he is charged with incompetency, and consents to the appointment of one of his attorneys as guardian, who secured substantial pecuniary benefits thereby, a court of equity will set aside such proceedings as for constructive fraud growing out of the confidential relation of attorney and client, even though, as in this case, the attorney acted in perfect good faith.

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

Crossman, Munger & Barton, for appellant.

Charles E. Matson, John J. Ledwith, C. E. Sanden and *Bernard S. Gradwohl, contra.*

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

REDICK, District Judge.

This is an action in equity brought in the county court of Lancaster county, Nebraska, January 30, 1930, for the purpose of setting aside and canceling a judgment theretofore entered in said court on April 17, 1928, declaring the plaintiff an incompetent and appointing defendant John J. Ledwith guardian for the management of plaintiff's estate. No appeal was taken from such judgment, and this is an independent action to set it aside on the grounds of alleged fraud practiced by plaintiff's attorneys, defendants Ledwith and Charles E. Matson of the Lancaster Bar.

Prior to the guardianship proceedings, plaintiff was a farmer living on his homestead near Elmwood, in Cass county, Nebraska, for a period of over 50 years. His family consisted of his wife and nine children, all of whom are of age and none of them living at home at the time of these proceedings. His wife died in 1926. Plaintiff was and is the owner of personal property consisting principally of farm mortgages of the value of $100,000 and unincumbered real estate of the value of about $150,000.

January 4, 1928, plaintiff married Estelle G. Fowler, a widow 68 years of age. This lady was the mother of John Fowler, an officer of the Federal Trust Company of Lincoln, with whom plaintiff had done business exclusively for more than ten years in making investments in farm mortgages. Upon his marriage plaintiff went to live with his wife at her home in Lincoln, Lancaster county, taking with him his clothes and personal effects and securities, and continued to live there down to the present time.

On February 23, 1928, plaintiff's nine children filed a petition in the county court of Lancaster county, alleging that on account of plaintiff's advanced age, at that time 79 years, he was incompetent to transact business and care for his property, and prayed for the appointment of a guardian. Personal notice of these proceedings, together with a copy of the petition, was served upon the plaintiff, and upon the recommendation of Fowler, his step-son, plaintiff employed the defendant John J. Ledwith to rep-

resent him in said proceedings and defend against the application for the appointment of a guardian, and later on, at the suggestion of plaintiff, Mr. Charles E. Matson was employed as an attorney to assist Mr. Ledwith. A number of consultations were had between plaintiff and his attorneys, an informal inventory of his property was taken, and Mr. Hall's deposition was taken at the instance of the petitioning children in the presence of two doctors who, it appears, were present to observe the conduct and demeanor of the plaintiff while testifying. The deposition is not in evidence and we are therefore not informed of its contents.

The application came on for hearing before the county court on April 16 at 2 o'clock p. m. All of the petitioners with their attorneys, C. E. Sanden and Bernard S. Gradwohl, and the plaintiff and his attorneys, Ledwith and Matson, were present. Plaintiff was called as a witness by the petitioners and examined by their attorneys and by the court, but not cross-examined. About three hours were consumed in the examination, and at 5 o'clock the court adjourned until the morning of the 17th at 10 a. m. No further evidence was offered, and the county judge announced that he would find the defendant incompetent and appoint a guardian for his estate, but not for his person, and asked the plaintiff if there was any one he would like to nominate as his guardian. Plaintiff replied that he would like to have one of his attorneys, John J. Ledwith, appointed. Thereupon Mr. Ledwith was called and examined as to his qualifications and willingness to accept the appointment. Counsel for petitioners objected to the appointment of Mr. Ledwith on the ground that he had been the attorney of Mr. Hall, but the county judge, being fully convinced of the good character and ability of Mr. Ledwith, announced that he would appoint him guardian upon giving a bond in the sum of $100,000. Later in the day a decree was entered to that effect. Bond was duly filed and Ledwith took possession of the assets and continues to act as guardian, making regular reports to the court.

After the first day's hearing Ledwith and Matson had a consultation with the plaintiff, in the evening, at Ledwith's office, in which they informed plaintiff that the court would probably appoint a guardian, but that plaintiff had the right to nominate the person to be appointed, to which plaintiff replied that he wanted Mr. Ledwith, and did not want any one appointed by his children, and thereupon a written consent to the appointment of Mr. Ledwith was prepared and signed by Mr. Hall and filed in the county court the following morning.

For a year or more the guardian managed the estate without any objections from plaintiff, leasing the different portions of the real estate to some of the children, upon terms which, so far as the evidence shows, were usual and customary, and without objection by plaintiff until when plaintiff desired a certain 80 acres in Cass county to be leased to one Roden, which the guardian refused to do, having already leased it to one of plaintiff's sons for that year. This is the first and only dispute between the guardian and his ward regarding the management of the estate. An allowance of $500 a month, later reduced to $400, was made for the support of plaintiff by the county court, and paid to him.

January 30, 1930, the petition herein was filed in the county court against the nine children of plaintiff and the guardian, to set aside the guardianship proceedings upon two grounds: (1) That the plaintiff at the time was a resident of Cass county and that the county court of Lancaster county had no jurisdiction; (2) that the decree finding plaintiff incompetent and appointing a guardian over his estate was procured by fraud of plaintiff's attorneys. The petition alleges that plaintiff employed Ledwith as his attorney, and later Mr. Charles E. Matson, to resist the charge of incompetency; that he believed himself competent; that prior to the date set for hearing plaintiff's deposition was taken but no evidence was offered at the trial; that plaintiff's attorneys advised him that the proceedings could be terminated and his property handled

by guardian but not that such appointment required finding of incompetency; that, while guardian, Ledwith advised him to make a will wherein the Federal Trust Company, of which Ledwith was the attorney, was named as executor; that he executed the written consent to the appointment of Ledwith not knowing that a finding of incompetency was necessary; that he was not advised of any question of jurisdiction; that his attorneys stipulated with opposing counsel that plaintiff was a resident of Lancaster county; that Ledwith, as an inducement to sign the consent to his appointment as guardian, represented that he would handle the property as plaintiff wished, that the guardianship was a mere matter of form; that the form of the decree was determined by the attorneys without being submitted to him, and he had no knowledge of its terms until shortly before this suit was commenced; that his attorneys did not advise him of his right of appeal; that he was a resident of Cass county and the Lancaster county court had no jurisdiction; that, by reason of the above matters, his attorneys were guilty of fraud; that he is in fact mentally competent; and prays that the judgment may be set aside and canceled, and for general relief.

The children answered, admitting the court proceedings, taking of the deposition, filing of a stipulation as to residence, and denying all other allegations. They then allege that the plaintiff is incompetent, and a resident of Lancaster county. Ledwith answered, admitting he was duly appointed guardian, and that he represented Hall as an attorney in the county court, and denied all other allegations.

There was a general finding for defendants and dismissal by the county court, and an appeal taken to the district court, where the issues were separated, the questions of jurisdiction and fraud only being tried, and the question of competency reserved. The trial in the district court resulted in a general finding for defendants and dismissal of the suit, and plaintiff appeals.

1. Jurisdiction. It does not appear to us that there

was ever any serious question as to the jurisdiction of the county court of Lancaster county. As above stated, immediately upon his marriage plaintiff went to live at his wife's residence in Lincoln, January 4, 1928, and has resided there ever since, making only occasional visits to his old homestead, and plaintiff testified to those facts although he claimed to be a resident of Cass county and never intended to change that residence. Moreover he registered and voted as a resident of Lancaster county. The question of jurisdiction may therefore be dismissed without further consideration.

2. Fraud. Let it be observed that we are not called upon to determine the competency of plaintiff to care for his property and transact business; the county court having jurisdiction and no appeal having been taken from its judgment, for present purposes it must be presumed that it acted upon sufficient evidence, though it must be remembered that no evidence was offered on behalf of the supposed incompetent. The only charge of fraud connected in any way with the children or their attorneys has reference to the stipulation as to residence of the plaintiff and the form of the decree. As to the former, we have seen that there was no real question of jurisdiction, and that the stipulation was in accordance with the fact; as to the latter, plaintiff's only complaint seems to be that he was not furnished with a copy of the decree nor consulted as to its form. It may be stated with full confidence that there is an entire absence of any evidence warranting an inference that the petitioners or their attorneys connived in any degree with defendant's attorney Ledwith; neither is there any suggestion impugning the good faith of the county judge or his conscientious performance of his duties.

The case, therefore, rests solely upon charges of fraud against plaintiff's attorney Ledwith, which are stated to be his failure to introduce any evidence in opposition to the appointment of a guardian, his failure to advise plaintiff that the appointment could only be based upon a finding

of incompetency, his procuring the written consent of plaintiff to his appointment as guardian, his signing a stipulation as to plaintiff's residence, his advising plaintiff to make a will in which the trust company, of which Ledwith was the attorney, was named as executor, his representation that the guardianship was a mere matter of form and that he would handle the property as plaintiff wished, that Ledwith and Matson overcharged plaintiff for their services in the guardianship proceedings, and that he failed to advise plaintiff that he had a right to appeal.

Assuming, as plaintiff claims, that he was at all times competent in every way, we are forced to the conclusion from a careful consideration of the evidence on the point that he knew that he was charged with incompetency and that the appointment of a guardian had its dependence upon that fact. He read the copy of the petition served upon him with the notice, he employed defendant Ledwith to contest the application, and was present in court when the judge announced that he would find him incompetent and appoint a guardian of his choosing, if qualified. We also think it is established that Ledwith and Matson, on the evening before the appointment of a guardian, advised the plaintiff that the court would find him incompetent and make the appointment; also that plaintiff understood what he was doing when he signed the written nomination of Ledwith as guardian. It does not necessarily follow that because the plaintiff, on account of his age, appearance and testimony before the county court, was found incompetent to transact business and properly take care of his property and that a guardian should be appointed, he was unable to understand and appreciate the effect of his actions above referred to. We must confess that careful consideration and study of plaintiff's testimony given in this case furnishes little if any ground for an inference of incompetency; on the contrary, his answers to questions, though sometimes contradictory, are direct and to the point, as much so as those of any ordinary witness in the trial of a case. It further appears from the evidence that he was not averse

to having some one appointed to take care of his property, but he talked of a supervisor or power of attorney, and the gravamen of his complaint at this time is the finding of the county court that he was incompetent, which he seems to consider equal to a finding that he was crazy or insane.

He produces no evidence of mismanagement of his estate by the guardian and makes only two complaints in that regard, one that the guardian leased 80 acres in Cass county to plaintiff's son instead of an old friend of the plaintiff, and that the guardian had paid some $600 in taxes which he claims should have been paid by some of his sons, lessees upon his farms. These matters have to do only with the management of the estate and do not touch the question of fraud. In answer to a question whether he knew of a single fraud that Mr. Ledwith had perpetrated upon him, he answered: "I have never claimed that he committed a fraud. No, sir. That haint my contention now." And in answer to the question, "Now, what objection do you have against Mr. Ledwith?" he answered, "Nothing. I have nothing against the man, only he haint a business man and he don't carry on property the way it should to be of any benefit to me at all. He don't understand stock and he didn't know nothing about stock after I had invoiced the stock. And he don't know who had any apparently, and he didn't know what was cattle or hogs or horses, whether they was or not. He didn't know a hog from a horse, I don't think." He gave much more testimony to the same effect, but offered no instances of mismanagement. The irresistible conclusion from his testimony is that he does not like the finding of the county court that he was incompetent to transact business and care for his property, and wants to have it wiped out and have the management of his property returned to himself; that his attorneys did not properly defend the application and had misled him into consenting to the appointment of a guardian.

The only method by which the present desires of plaintiff may be accomplished is by a suit in equity such as this to set aside the decree of the county court as having been

obtained by fraud, actual or constructive, and as it happens here, the only persons, if any, guilty of fraud are his attorneys in the guardianship proceedings.

Plaintiff's attorneys in their brief frankly state their position in the following language: "We desire to be perfectly fair to Mr. Ledwith, and do not question but that he was, in his own mind, fully justified and felt conscientious in doing what he did. But if what he did was not justified under the strict and rigorous standards to be strictly applied to fiduciaries then it matters not if he mistakenly considered that his standards were as high as those the law requires. In many other trusts and fiduciary relationships, as well as those of guardian and ward and attorney and client, it is absolutely forbidden by law for the fiduciary to take action where his interest is adverse to that of his client, ward or beneficiary of the trust." We greatly appreciate the conscientious attitude of counsel which dictated the above statement; therefore, in further consideration of this case, we take it as conceded that no charge of intentional fraud or misconduct is made against Mr. Ledwith, and that the claim of plaintiff rests upon the proper legal deductions to be made from the facts disclosed by the evidence.

Although there may be some contradictory testimony in the record, the facts upon which our judgment must rest are practically without dispute and present to our view the following picture:

Plaintiff was an old gentleman of 79 years; he had been a farmer for over 60 years, and by hard work, the assistance of his wife and children, frugality, and by the wise investment of his surplus funds, had acquired an estate of the value of about $250,000. In 1926 his wife died, and about two years later, January 4, 1928, he married a widow lady about 68 years of age and removed from the old homestead in Cass county to Lincoln, Lancaster county, and has lived there ever since in a house belonging to his wife. February 23, 1928, a petition was filed by his nine children to have him declared incompetent, and for the appointment

of a guardian, a copy of which petition was served upon the plaintiff with the customary notice. Shortly thereafter, upon the recommendation of his step-son, he employed the defendant, John J. Ledwith, as his attorney, to contest said proceedings, and afterwards Mr. Charles E. Matson was joined as associate counsel. His attorneys took no steps to procure evidence as to the mental competency of plaintiff, but took an inventory of his estate and made provision for the safe-keeping of his securities. Prior to the hearing in the county court, plaintiff's deposition was taken at the instigation of the children, in the presence of two doctors and plaintiff's attorneys. Many consultations were had by plaintiff and his attorneys, and the latter came to the conclusion that their client was incompetent and that a guardian should be appointed. April 16, 1928, the matter came up for hearing in the county court. Plaintiff was called as a witness by the petitioners, was not cross-examined by his attorneys, and no witnesses were called by them. The session, lasting two or three hours, was adjourned until 10 o'clock the next morning. That evening a consultation was had by plaintiff and his attorneys. The attorneys testified that plaintiff declared that he would not go back to court and testify any further. It seems that the attorneys did not inform plaintiff of their opinion as to his competency, but they did advise him that the court would probably find him incompetent and appoint a guardian, and that plaintiff would have a right to name the guardian, and plaintiff said he wanted Mr. Ledwith. Thereupon a written request for the appointment of Ledwith as guardian was prepared and signed for plaintiff by his attorneys and contained the following: "That in order to avoid the disagreeableness of litigation and expense that will necessarily be incurred, requests the court to appoint as guardian of his estate and property, both real and personal, John J. Ledwith of Lincoln, Nebraska." It was then, at that time, suggested by Ledwith and Matson that the fees for their services in the guardianship matter should be determined, and named the amount of $7,500, to which the plaintiff agreed. The follow-

ing morning, the parties and attorneys being in court, the county judge, without further evidence, announced that he would find plaintiff incompetent and appoint Ledwith guardian, having asked plaintiff his preference in that regard. On the same day decree was entered, and very shortly Ledwith qualified as guardian, giving a bond in the sum of $100,000.

April 23, 1928, Ledwith advised Hall to make a will, which he did, disposing of his property in the same manner that the statute would have distributed it in case of intestacy, and appointed the Federal Trust Company of Lincoln, executor. Plaintiff's step-son, Fowler, was an officer of the trust company and Ledwith was its attorney.

Management of the estate by the guardian proceeded without protest for over a year, when some minor disputes arose, as elsewhere stated. This action was brought about a year and ten months after the decree of the county court, and the question for our determination is whether the facts above related are sufficient to require setting aside the judgment of the county court on the ground of fraud or under any other recognized head of equity jurisprudence. The suit is not brought under the statute, section 20-2001, Comp. St. 1929, "for fraud practiced by the successful party in obtaining the judgment or order," but appeal is made to the general powers of a court of equity. The statute is not exclusive but declaratory of the equitable powers of the court at the time of its enactment. *In re Estate of Kelly*, 103 Neb. 513; *Kulhanek v. Kulhanek*, 106 Neb. 595.

A number of cases are cited by appellee to the point that fault or fraud upon the part of plaintiff's attorneys is not ground to vacate a judgment after the term at which it was rendered, in the absence of participation by the successful party, among them *Kulhanek v. Kulhanek*, 106 Neb. 595, *Brandeen v. Beale*, 117 Neb. 291, and *Funk v. Kansas Mfg. Co.*, 53 Neb. 450, and therefore the general proposition may be considered as established law in this jurisdiction. From this premise it is argued that, inasmuch as no claim is made of participation by the children in the

supposed fraud, the action cannot be maintained. All but two of the cases cited were of an adversary character and are based upon the reasoning that one in whose favor a judgment had been rendered may not be deprived of its benefits by the fraud or neglect of opposing attorneys to which he has not contributed. One of the exceptions referred to is the case of *McCormick v. McCormick,* 109 Ia. 700. That was a petition, under a statute providing that a judgment might be vacated after the term for fraud of the successful party in obtaining same, or for inevitable casualty or misfortune preventing the party from defending, to set aside a decree finding the plaintiff incompetent and appointing a guardian on the ground of fraud practiced by the successful party in procuring said judgment. The charge of fraud was against the petitioner and another for conspiring to obtain the decree, plaintiff claiming to have been misled by her counsel and others into not making a defense, and relief was denied for failure of proof of any fraud; that the mere failure of the attorney to interpose a valid defense to the application was not sufficient to warrant the vacation of the judgment; the attorney received no financial benefit from the decree, no charge of fraud was made against the attorney, and no question arising out of the fiduciary relation existing between attorney and client was involved. In discussing the other ground urged for setting aside the judgment—unavoidable casualty or misfortune preventing plaintiff from defending—it was said: "Again, fraud and negligence of an attorney in not interposing a valid defense is not ground for vacating a judgment and granting a new trial"—citing *Jones v. Leech,* 46 Ia. 186; *Jackson v. Gould,* 96 Ia. 488. But these cases were both ordinary actions to which the principle was clearly applicable. The second exception, *Brandeen v. Beale,* 117 Neb. 291, will be referred to later.

It seems to us, however, that there is a distinction between the case we are considering and those of an adversary character where the enforcement of the rule is requisite to protect the rights of the litigants. A petition

for the appointment of guardian for an incompetent is not a civil action but a special proceeding. 28 C. J. 1082; *Lawrence v. Thomas,* 84 Ia. 362. It is not an adversary proceeding. *Huffman v. Beamer,* 198 Ia. 1113. "The situation in a guardianship proceeding is, of course, anomalous, for in one sense there are not two antagonistic sides to it. The person who by petition arouses the jurisdiction and duty of the county court may have nothing inimical in sentiment or interest to the alleged incompetent. He may be actuated purely by a desire * * * to protect the public at large. Nevertheless, he, by his own volition, assumes an attitude of practical antagonism to the freedom of the other, however benevolent his motives;" this for the purpose of service of notice of appeal on the "adverse party." *In re Guardianship of Welch,* 108 Wis. 387. The term "adverse" involves element of hostility under claim of title. 2 C. J. 35. The petitioners, as heirs of the defendant have no property rights to be protected, but the proceeding is one for the benefit and protection of defendant and the preservation of the estate. The reason of the rule fails when its application is sought to a proceeding of this character. The petitioners obtained a decree of incompetency and the appointment of a guardian, and while they have accomplished their desire in the matter, they cannot be accurately described as the successful party because they had no interest to protect and received no benefit for themselves; the real successful party is the incompetent whose property is thus preserved from his own inconsiderate acts and the inroads of designing persons. True, in *Brandeen v. Beale,* 117 Neb. 291, it was held that an application to set aside a judgment "for fraud practiced by the successful party in obtaining the judgment" applies to a proceeding of this character, and that the petitioner might be treated as the "successful party," but in that case fraud was charged against the petitioner and the action failed by the application of the special statute of limitations. In a proceeding based upon the statute, the party obtaining the order complained of may be treated as the successful party, but where the pro-

ceeding is based upon an independent ground of equitable jurisdiction other elements may control the definition. We are therefore of opinion that the rule contended for should not be applied strictly to the present situation, especially in a proceeding not based exclusively on the statute.

The contention of plaintiff is that, by reason of the confidential relations between himself and his attorneys, and his reliance upon their advice, in ignorance of the fact that in order to have a guardian appointed a finding was necessary that plaintiff was incompetent, he was prevented from contesting that question before the county court and induced to consent to the appointment of his attorney as guardian, as the result of which the attorney secured a very large fee, a position as guardian which would pay him about $1,000 a year, and probable employment later on as attorney for the trust company in the management of his estate after the death of plaintiff.

We, therefore, have a case where the attorney conscientiously concluded that any defense against the petition would be of no avail and therefore presented none, but who secured or accepted for himself, as a consequence or result of the decree, considerable financial benefit. Are these facts of such a character that a court of equity should take cognizance of them and interpose its remedial arm to prevent injustice? In *Berman v. Coakley,* 243 Mass. 348, it was said: "The relation of attorney and client * * * is highly fiduciary in its nature. The attorney is not permitted by the law to take any advantage of his client. * * * The defendant is alleged to have received large sums of money from the plaintiff. * * * That circumstance, together with the existence of the trust relation * * * arising out of that relation * * * is enough to warrant the interposition of equity to adjust the relation between the parties. * * * The existence of the trust relation goes far toward justifying relief in equity for abuse of the confidence thus reposed in respect to financial transactions." That was an action against the attorney for an accounting, but the statement is a correct exposition of the relations between attorney

and client. See, also, *Hamilton v. Allen,* 86 Neb. 401; *Schneider v. Lobingier,* 82 Neb. 174.

And the presumption is not met or defeated by the fact that the attorney acted in the utmost good faith and according to his best judgment. *Raimondi v. Bianchi,* 100 N. J. Eq. 448, citing *Dunn v. Dunn,* 42 N. J. Eq. 431. That was a suit to set aside a transaction between attorney and client and to charge the attorney with profits made therein, and the court said (p. 436): "And it does not follow that in any such case the act or advice of the counsel may be dishonest or fradulent—not in the least, for the law does not proceed on such basis at all, since, if the act be either fraudulent or dishonest, the remedy therefor is abundant and proceeds on totally different grounds; but, in such cases as the present one is claimed to be, the courts administer relief because of undue influence, that influence which blinds, misleads and prevents all further inquiry. * * * In other words, public policy sets its face against such things." And again (p. 438): "As I have said above, it is not on the ground of actual fraud that courts interfere, but simply because of the fiduciary relation that is shown to have existed, and it not being made to appear that the transaction * * * was perfectly fair and just. Weeks, in his work on Attorneys at Law, says: 'The rule is on the ground of public policy, not of fraud, and prevails although the attorney may be innocent of any intention to deceive, and act in good faith.'"

We are of the opinion that the fee of $7,500 charged by plaintiff's attorneys and paid by plaintiff is greatly excessive, and the suggestion of appellee Ledwith that whether or not such charge was reasonable cannot be an issue in this case but will be met at the proper time and place is inadmissible in our opinion, in view of the time and circumstances surrounding its settlement. If plaintiff was incompetent as the attorneys thought, clearly he would not be bound by the agreement; if competent, it being a transaction between attorney and client, it is a proper subject of inquiry by a court of equity whether or not it was fair

and reasonable. Moreover, we are unable to say what effect, if any, the agreement for so large a fee may have had upon the judgment of the attorney as to the propriety or necessity of making a defense in the county court.

Notwithstanding the above criticism of counsel regarding the amount of their fee or the other dealings of the plaintiff with defendant Ledwith, we do not wish to be understood as holding that the attorneys were guilty of any intentional fraud; in fact, they are gentlemen of very high reputation, both as to legal ability and character. What we do hold is, that plaintiff had a legal right to have a defense made on the question of his competency, and conceding that the attorneys acted in the best of faith in failing to make such defense, having reached the conclusion that it would be useless, nevertheless plaintiff was misled by their advice, and is without remedy unless it is afforded by a court of equity. An action against the attorneys for a reexamination of the reasonableness of their charge is not adequate, as plaintiff would still be, under the decree, an incompetent. The situation presents a case of constructive fraud growing out of the confidential relation of attorney and client. The only person having a legal interest is the plaintiff (*Timonds v. Hunter*, 169 Ia. 608) whose right to possession and control of his property has been taken away without his having an untramelled opportunity to be heard. The children, as above noted, have no rights to be protected by the decree attacked, and have no standing in court to object to the relief prayed for by plaintiff; no one can be wronged by granting of plenary remedy to him. *Timonds v. Hunter, supra.*

The situation of plaintiff is well pictured by Evans, J., in *Huffman v. Beamer*, 198 Ia. 1113: "The premature quarrels of expectant heirs are thrust upon the natural repose due to old age, and often result in despoiling the common benefactor and in destroying his status, and in depriving him of the liberty to do as he will with his own, and in compelling him to eat his own substance out of a stranger's hand."

We conclude that the judgment of the district court is erroneous and the same is reversed, with directions to try and determine the question of competency of plaintiff, and, if found incompetent, render judgment dismissing the action; if found competent, to enter judgment for plaintiff vacating the judgment of the county court dated April 17, 1928, and remanding the case to the county court, with instructions to make final settlement of the guardian's account, discharge the guardian and order the return of the property in his possession to plaintiff.

REVERSED.

JESSE KOCHENTHAL ET AL., EXECUTORS, APPELLANTS, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED JANUARY 8, 1932. No. 28034.

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

Morsman & Maxwell, for appellants.

Edward J. Shoemaker, contra.

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

PER CURIAM.

This is an action to recover damages resulting from an unlawful trespass on real estate. From a judgment in favor of the defendant in the trial court, the plaintiffs appeal.

The plaintiffs claim that the defendant trespassed on the real estate by fastening to the front wall of the second floor a guy wire supporting the trolley wires used by the defendant in the operation of an electric railway system; that the strain from this wire and the jarring from the use thereof by the defendant in the operation of its cars damaged the wall of the building; that the damages were $325 which was the expense of repairing the wall. The

defendant admits that it attached its wire to plaintiffs' building, but denies that any damage resulted therefrom, and alleges that the repairs necessary to the wall were not at the place of attachment or caused by said attachment.

One assignment of error is that the court permitted the defendant's witness, Edgecomb, to testify to statements which he claimed he made to one of the plaintiffs to the effect that he was of the opinion that the damage to the plaintiffs' wall was not caused by the attachment of the wire by defendant but was rather caused by the deterioration of the brick wall. The expert testimony of the witness Edgecomb at the trial states his opinion in the same language and to the same effect as he testifies he stated it to the plaintiffs at a previous time. There are good reasons why the testimony complained of should have been excluded, but since it was an expression of an opinion by an expert, identical with his opinion given at the trial, its reception was not prejudicial to the plaintiffs.

It is also contended by the plaintiffs that the cross-examination of witnesses was unduly restricted. The cross-examination of the witnesses of the defendant was relative to the number of supports for the trolley wires on Douglas street for a distance of a block from the building and the trolley wire involved in this case. This court is of the opinion that the proposed cross-examination was too remote to be material to the issues in this case and that in this respect the limitation of the trial court was not an abuse of its discretion.

The petition alleged the trespass on the part of the defendant on plaintiffs' property, while the answer admits the trespass. The defendant having admitted the trespass, the court should have instructed the jury to return a verdict for nominal damages and failure to so instruct was error. The petition alleged that plaintiffs' property had been damaged by the trespass to the extent of the cost of repair and the prayer was for exactly the said amount. The defendant denied any damage to the building caused by its trespass. This question of substantial damages was sub-

mitted to the jury under proper instructions and the verdict responsive thereto was in favor of defendant. There is no error which requires the resubmission of this case to a jury.

However, since under the pleadings the trial court should have instructed the jury to return a verdict at least for nominal damages, the judgment is reversed and the cause remanded, with directions to the trial court to enter a judgment in favor of the plaintiffs for a sum not exceeding $1.

REVERSED.

CORNELL SUPPLY COMPANY, APPELLANT, V. CHARLES A. GILLILAND, APPELLEE.

FILED JANUARY 8, 1932. No. 28035.

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

Fred C. Foster and *William M. Holt,* for appellant.

Mockett & Finkelstein, contra.

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

PER CURIAM.

In this case the plaintiff and appellant sued the defendant, a former traveling man, for a balance of $169.68 due on two chattel mortgage notes, which he had given in payment of automobiles required by him to travel for them. The defendant denied the amount claimed upon said notes was the correct amount, and for a counterclaim set out that he was entitled to $200 commission on sales made for plaintiff. The case was tried to a jury, and the jury found that there was $130.45 due to the plaintiff on the notes, and that there was $200 due to the defendant on his counterclaim, and therefore rendered a judgment for the difference of $69.55 for the defendant.

The errors set out for reversal were that the verdict was not sustained by sufficient evidence and the court erred

in certain rulings in the admission of evidence and in the giving of instruction No. 6. This instruction reads as follows:

"The contract under which the defendant began working in 1928 provided for a bonus upon all merchandise sold over and above $55,000 of 4 per cent. on $10,000 and 2 per cent. on the balance. There is no controversy that the net sales made by the defendant amounted to $69,184.46. The controversy in this case, however, is whether the amount of sales before defendant was entitled to a bonus under the new arrangement made in March, 1928, whereby the defendant took other territory, was changed from $55,000 to $70,000, and you are instructed that the burden is upon the plaintiff to establish that the quota was changed by a preponderance of the evidence, as that term is hereinbefore defined."

The plaintiff, in its answer to the counterclaim of defendant, alleged: "The plaintiff and defendant modified said written contract by agreeing verbally to a change in the territory and the quota of merchandise to be sold by the defendant before he became entitled to a bonus."

The burden of proving this allegation was placed upon the plaintiff very properly by instruction No. 6, and this court sees no error in that instruction. There was a sharp contest on questions of fact, which were decided by the jury, and there is sufficient evidence to sustain the verdict. No question of law is submitted which has not heretofore been determined by this court. The judgment of the lower court is

AFFIRMED.

IN RE ESTATE OF LIZZIE FRELING.
CHARLES C. HAYNES, ADMINISTRATOR, APPELLANT, V. ROY W. MATSON, EXECUTOR, APPELLEE.

FILED JANUARY 8, 1932. No. 28135.

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

B. N. Robertson, for appellant.

Crofoot, Fraser, Connolly & Stryker and *William A. Ehlers, contra.*

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

PER CURIAM.

This is an appeal from a judgment approving the final supplemental report of an executor and the order discharging him and exonerating his bond. This case has heretofore been before this court (*In re Estate of Freling,* 119 Neb. 605) to which reference is made herein. The former appeal was from the approval of the final report of the executor by the county court. The report was that the estate was without funds to pay claims. It appears that the only asset of the estate now involved is an interest in the estate of decedent's deceased husband, no part of which, reported the executor, came into his possession. The district court found that there was property of the estate of the husband of the reasonable value of $1,012.28. The trial court found that no prudent attempt had been made by this executor to collect this asset from the other estate, and that the executor was chargeable with the value thereof, $1,012.28, less any lawful deductions on account of claims and expenses of administration in that estate. This order is not ambiguous and its import is apparent. The court found that the executor had been negligent in securing collection of assets, found the value of such assets and charged him therewith as executor. This executor could only be chargeable with the amount coming from the other estate, so the court added the provision that the charge should be the value of the property, less proper charges against it in that estate. In fine, the money would come to this estate, less all proper charges against it in the other estate. This was the only judgment which could be entered because the administration of the husband's estate was still pending at the time. This judgment was affirmed by this court and the mandate issued. Pursuant to the terms

of the mandate, the executor filed this supplemental report, charging himself with the $1,012.28, as provided, and setting out as deductions the claims filed in the other estate, together with the costs of administration therein. The county court had entered a decree finding that there were no funds in the hands of the administrator of the husband's estate and that claims and cost of administration were largely in excess of $1,012.28. It found upon a hearing upon this report that the claims and costs of administration exceeded the sum of $1,012.28 in the husband's estate. The county court thereupon approved the supplemental final report, which was also approved by the district court upon appeal. This is in accord with the mandate issued upon the former appeal. This charge was made against the executor on account of his neglect of duty. It is sophistry to say that, because these claims against the other estate were not paid, they cannot, under our former decision, be deducted. Obviously, if this inexperienced executor had been diligent and secured the collection of this money by the administrator of the husband's estate, these valid claims against that estate would have consumed it, so that not one dollar of it would have reached this executor. Therefore, it is meet, just and proper that the charge against him for negligence should be limited, as provided by the trial court in the former appeal and affirmed by this court, to the amount that diligence on his part would have collected for this estate. The judgment of the trial court and the county court approving this supplemental final report, discharging the executor, and exonerating his bond, is altogether a righteous judgment.

AFFIRMED.

EMMA TEMPEL, APPELLANT, V. JONAS F. PROFFITT ET AL., APPELLEES.

FILED JANUARY 8, 1932. No. 27995.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE. The mere fact that one rightfully using a stairway, which it is the duty of the

owner to keep in reasonable repair, is aware of a defective condition of the steps and is injured by reason thereof does not as a matter of law amount to such contributory negligence as to defeat a recovery, if it reasonably appears that he might safely use such steps with the exercise of due care.

2. ———: TRIAL: INSTRUCTIONS: COMPARATIVE NEGLIGENCE. Where the jury may rightfully infer from the evidence that the defendant was negligent and that the plaintiff was guilty of any negligence directly contributing to the injury complained of, it is the duty of the court to instruct the jury on the comparative negligence of the parties. Comp. St. 1929, sec. 20-1151.

3. ———: CONTRIBUTORY NEGLIGENCE: PLEADING AND PROOF. The burden is on the defendant to plead and prove contributory negligence of the plaintiff.

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

James D. Conway, for appellant.

Stiner & Boslaugh, Edmund P. Nuss and *G. W. Bolin, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

GOSS, C. J.

This is an action for damages for personal injuries. Negligence is charged and contributory negligence of plaintiff was an issue. Verdict and judgment were for defendants. The jury were not instructed on the subject of comparative negligence. Comp. St. 1929, sec. 20-1151; *Morrison v. Scotts Bluff County,* 104 Neb. 254. They should have been instructed on that subject, unless the evidence of negligence of defendants was legally insufficient or unless the contributory negligence of plaintiff required a verdict for defendants. *Day v. Metropolitan Utilities District,* 115 Neb. 711; *Traphagen v. Lincoln Traction Co.,* 110 Neb. 855; *Baker v. Omaha & C. B. Street R. Co.,* 110 Neb. 246, 249; *Casey v. Ford Motor Co.,* 108 Neb. 352; *Francis v. Lincoln Traction Co.,* 106 Neb. 243; *Robison v. Troy Laundry,* 105 Neb. 267.

There was evidence to show that plaintiff, an employee

of a tenant of defendant owners, on an errand for her employer, when injured, was using a stairway which was the only means of going to and from the second floor, where she was employed; it was the duty of the owners to keep the stairway in reasonable repair; some of the steps had been in a defective condition for some time and plaintiff was aware of that fact, but defendants were not; plaintiff was injured by reason of a defective condition of one of the steps. The evidence does not show affirmatively that the plaintiff was not exercising due care when she was injured, unless the mere fact that she was injured in the circumstances stated requires that conclusion.

Section 568, 16 R. C. L., 1049, says: "Even though it is the duty of a landlord to keep the portions of his premises under his control in reasonably safe condition, the right of the tenant to recover for injuries caused by defects thereon may be barred by reason of his contributory negligence. * * * It is generally held, however, that the mere fact that a tenant is aware of the defective condition of a portion of the premises which it is the duty of the landlord to repair does not as a matter of law make it contributory negligence to continue the use of the same, if it reasonably appears that he might safely do so with the exercise of care. Thus, the fall of a tenant in a tenement house, caused by a hole in a stair carpet, does not as matter of law show contributory negligence, although he knew of the holes in the carpet and the stairway was well lighted at the time." The duties and liabilities of a landlord to his tenants in such matters extend to an employee of a tenant. 16 R. C. L. 1067, sec. 588.

We cannot say that reasonable minds could come to no other conclusion than that plaintiff was shown by the evidence to be guilty of more than slight negligence and that judgment must have been rendered by the court in favor of defendant, as in *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Tyson v. Missouri P. R. Corporation*, 113 Neb. 504. Nor do we think *Grandorf v. Detroit Citizens Street*

R. Co., 113 Mich. 496, strongly urged by defendant, is controlling here. There the court charged the jury that plaintiff was guilty of contributory negligence and could not recover. But there the stones were in a public street; plaintiff saw and knew all the risks; she had a choice of ways and knowingly chose a dangerous way. Here the plaintiff had no choice of ways because there was only one stairway; the risks were not so plain; it appeared safe to use the stairs by exercising care. Whether she was guilty of contributory negligence and, if so, whether it was more than slight, was a matter for the jury to weigh in the light of all the circumstances. See the negligence cases systematically annotated under "c. Hall and Stairway Carpeting" and "d. Protruding nails, screws, etc." in the following American Law Reports, annotated: 25 A. L. R. 1307, 1310; 58 A. L. R. 1418, 1419; 75 A. L. R. 166.

So, we hold that the failure of the court to instruct the jury on the subject of comparative negligence was prejudicial to the plaintiff.

By the fifth paragraph of his first instruction to the jury, the court placed upon the plaintiff the burden of proving by a preponderance of the evidence that the action was not caused by nor the result of her own negligence. While it is true that the jury may derive its conclusion of facts from all the evidence, whether submitted by plaintiff or defendant, yet the burden is on defendant to prove the contributory negligence of plaintiff. For that is its defense to plaintiff's plea and proof of negligence.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

GUS LINN, APPELLEE, V. ARTHUR R. MARSHALL, APPELLANT.

FILED JANUARY 8, 1932. No. 28057.

1. **Sales: ACTION FOR PRICE: VERDICT: SUFFICIENCY OF EVIDENCE.** Evidence outlined in opinion *held* sufficient to sustain a jury's finding that plaintiff and defendant, for the price of

$175, entered into a contract for the sale and purchase of a potato picker which plaintiff delivered to defendant.

2. Appeal: CONFLICT OF EVIDENCE. On an issue of fact, where the testimony is conflicting, the finding of the jury, if supported by sufficient evidence, will not be disturbed on appeal.

APPEAL from the district court for Kimball county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

S. E. Torgeson, for appellant.

Roland V. Rodman and *John H. Kuns, contra.*

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

ROSE, J.

This is an action to recover $175, the purchase price of a potato picker which plaintiff alleged he sold and delivered to defendant. In an answer to the petition defendant denied that he made the purchase. The action was defended on the theory that the minds of the parties never met on a contract of sale or on terms of purchase, defendant pleading in effect that negotiations on his part went no further than an offer to order the latest improved type of potato picker sold by plaintiff after a successful demonstration with an implement of the same make in the soil in which defendant raised potatoes, a test never made. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for the full amount of his claim with interest—$192.95. Defendant appealed.

The controlling question for review is the sufficiency of the evidence to sustain the verdict in favor of plaintiff. The record shows that the evidence would sustain a finding in favor of defendant, who testified frankly to facts showing his understanding that the negotiations did not result in a contract of sale, but the jury believed testimony of a different import. It is clear both parties understood that plaintiff did not warrant the potato picker to work and that defendant was anxious to get one that would pick potatoes in his fields. The record contains evidence tend-

ing to prove the following facts, in substance: At plaintiff's store defendant inquired about a potato picker and asked to be notified when and where he could see demonstrations. He was informed the cash price was $175 and that the potato picker would be demonstrated on some of the farms in the vicinity. Later defendant witnessed two actual experiments in different potato fields in the neighborhood of his farm. In one of the places the potato picker did not work and he discussed with the operator the reasons why it would not perform in the soil of that particular field. It would work in some soils. Defendant said he thought it would work in his potato fields and ordered one of the potato pickers. He was told there was none in stock at plaintiff's store, but that an effort would be made to procure one for him. Afterward two of the latest potato pickers of the same type as the one demonstrated were brought from Scottsbluff and one of them was delivered to defendant at his farm in Kimball county. Defendant used it in picking two acres of potatoes, but it failed to work in another potato field, though he had put on an attachment and had made repairs. He did not return the potato picker, but abandoned it on his farm without notifying plaintiff where he had left it. The facts outlined, when believed by the jury, were sufficient to sustain a finding that defendant purchased the potato picker delivered to him by plaintiff. With the controlling issue of fact thus determined, prejudicial error in the proceedings and judgment below has not been found in the record.

AFFIRMED.

EMMA L. HIGGINS, APPELLEE, V. OLD LINE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 8, 1932. No. 28016.

1. **Insurance: FORFEITURE: WAIVER.** Evidence examined, and *held* that, by its conduct, the insurance company waived the right to strict enforcement of the forfeiture provisions of an extension premium note.

2. ———: ———: ———. A provision that a policy shall be forfeited if a premium note is not paid upon maturity is for the benefit of the company, and may be waived by the insurer.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

King & Haggart, for appellant.

McElfresh & Walker, contra.

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

DAY, J.

This is an action to recover upon a life insurance policy. The insurance company appeals from a judgment in favor of the beneficiary.

The company insured the life of the son of the beneficiary and received the premiums for the first and second year and the first semiannual of the third year. The policy provides that it shall lapse, unless the premium is paid when due or within a 31-day grace period. The semiannual premium in this case was due February 2. It was not paid when due, but during the 31-day grace period the insured sent the company $10. The letter of the company acknowledging receipt of this remittance shows the application made thereof:

"Lincoln, Nebraska, March 3, 1930.

"Carl P. Higgins,
"Schuyler, Nebr.
"Dear Mr. Higgins:

"We are in receipt of your remittance in the sum of $10 to be applied as part payment on the semiannual premium on your policy No. 28718. The same has been given proper credit.

"We wish to advise, Mr. Higgins, inasmuch as our records must show a premium paid in full in some manner we are inclosing herewith a note for the balance of the premium payable March 18, 1930, and when the same with your signature is received we will issue premium receipt.

"Thanking you for your remittance and with kind wishes, we remain,

"Very truly yours,
"The Old Line Insurance Company,
"By E. McCormick,
"Ass't Cashier."

The note referred to was nonnegotiable and provided for forfeiture of the policy if not paid when due, in which case the note was canceled and ceased to be an obligation of the insured. The insured did not sign and return this note immediately, but on March 15 the company wrote to him again about the matter. It retained the $10 and made no other statement regarding the payment or the purpose of the note. Upon March 24, or 8 days after the maturity of the note, the insured changed the due date from March 18 to April 18 and returned it to the company. It was accepted and retained by the company.

On April 18 the insured remitted $10, which was applied on the indebtedness. No new extension agreement was executed, but a letter states that the time for payment of the balance was extended 30 days. At this time a line was drawn through the due date (4-18-30) of the note and extension agreement and 5-18-30 written in pencil thereon. The policy had no loan or cash surrender value, but upon the payment of the balance of $8.72 it would have had such a value of $44. On May 21 the company notified the insured that the policy had lapsed for having failed to pay the note. The insured died June 23.

If the semiannual premium due February 2, under the terms of the policy, had not been paid within 31 days thereafter, the policy, according to its terms, would have been lapsed. *Novak v. LaFayette Life Ins. Co.*, 106 Neb. 417. However, the insurance company did not see fit to forfeit this policy. The insured sent in a partial payment. It was accepted and retained by the company. Later, after the expiration of the 31 days of grace provided by the contract and the statutes of Nebraska, it sent him for execution a nonnegotiable note with a forfeiture provision in case said

note was not paid when due, so that its records might "show a premium paid in full in some manner." This note was not executed and returned to the company until March 24, or 21 days after the expiration of the grace period. This first remittance, according to the letter quoted above, was "Applied as part payment on the semiannual premium on your policy No. 28718. The same has been given proper credit." This language, together with the action of the company in retaining the premium, is incapable of any meaning except that the remittance was received as a part payment on the premium. In fact, the suggestion that the extension was only for their records was a waiver of the strict forfeiture provision, which was an inducement to sign said note. This was followed by a second remittance of $10, leaving a balance of $8.72 on the semiannual premium. No new extension agreement was executed. According to the strict terms of the extension note signed, the policy might have been lapsed, but the company again accepted a partial payment and did not demand a forfeiture. This letter acknowledges this second remittance:

"April 24, 1930.

"Carl P. Higgins,
"Schuyler, Nebr.
"Dear Mr. Higgins:

"We wish to thank you for your remittance of $10 representing part payment of note and interest on your policy No. 28718. The same has been given proper credit and for your convenience we are today extending the balance for a period of thirty days.

"Very truly yours,
"The Old Line Insurance Company,
"By ————————,
"Ass't Cashier."

At this time the due date was changed on the policy from April 18 to May 18. When the balance of $8.72 was not paid on May 18, the company attempted to forfeit the policy under the provisions of the extension agreement. "Forfeitures are looked upon by the courts with ill favor,

and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682. "A stipulation for the forfeiture of an insurance policy is waived by conduct of the insurer inconsistent with his right or intention to claim such forfeiture." *Jensen v. Palatine Ins. Co.*, 81 Neb. 523. See *Knoebel v. North American Accident Ins. Co.*, 135 Wis. 424. In this case the company waived by its conduct, which was inconsistent with its right to enforce such forfeiture, by accepting and retaining partial payments of the premium. It was a waiver of payments according to the contract. A provision that a policy shall be forfeited if a premium note is not paid on maturity is for the benefit of the company, and may be waived by the insurer. *Phenix Ins. Co. v. Rollins*, 44 Neb. 745. By waiving the provisions as to the time of payment and the retention of the portion of the premium, the company extended the insurance for the *pro rata* period represented by the amount of the payment. This extended the insurance in force until June 8.

The company urges that the insured was not entitled to any grace period after the due date of the semiannual premium, which was February 2. They discuss the language of the contract and contend that, under its terms, that was the due date. Section 44-602, Comp. St. 1929, provides: "No policy * * * shall be issued * * * in this state unless it contains in substance the following provisions: * * * 2. A provision that the insured is entitled to a grace of one month within which the payment of any premium after the first year may be made." Section 44-608, Comp. St. 1929, says: "A policy issued in violation of this article shall be held valid, but shall be construed as provided herein, and when any provision in such a policy is in conflict with any provision hereof, the rights, duties and obligations of the company, policy holder and the beneficiary shall be governed by the provisions of this article." The construction recommended by the company

would be in violation of the statute. The premium, having been accepted in partial payments and the forfeiture provisions waived, was paid until June 8. At that time there was due $8.72, which the statute gave the insured a grace period of a month to pay. The policy was therefore in force on June 23, the date the insured died.

The court does not pass upon the question as to the allowance of a grace period after the due date of an extension note. The judgment of the trial court is

AFFIRMED.

CORA A. ROTHERY, APPELLANT, V. THOMAS H. DOHRSE ET AL., APPELLEES.

FILED JANUARY 8, 1932. No. 28020.

1. Fixtures: TRADE FIXTURES. The term "trade fixture" will include a large boiler, originally purchased and now owned by a tenant, and installed as a necessary part of his equipment to furnish steam for cleaning and pressing in the French Dry Cleaning Works, of Omaha.
2. ———: ———. The fact that said boiler is used to some extent to heat the rooms will not make it a part of the real estate, where its principal use is the furnishing of large amounts of steam for operating the cleaning plant.
3. ———: ———: REMOVAL. The tenant will be allowed to remove said boiler at the termination of his five-year lease, even though a small portion of a brick wall in the rear of the boiler room must be opened and replaced, at the expense of the tenant, to permit the boiler to be taken out.

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

Finlayson, Burke & McKie, for appellant.

Rosewater, Mecham, Burton, Hasselquist & Chew, contra.

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

PAINE, J.

On September 9, 1925, Thomas H. Dohrse purchased all of the stock of the French Dry Cleaning Works, located in

Omaha, Nebraska, and was given a lease for five years, with option to purchase the building in which said business was conducted. The bill of sale included a boiler, which soon proved defective, and a credit of $300 was made therefor. A new boiler was purchased by the tenant, and used until the termination of the lease, at which time he attempted to remove the boiler he had purchased from the premises. Upon trial to the court, a restraining order, which had been issued upon application of the owners of the fee, was dissolved, and the tenant was given the right to remove the boiler as a trade fixture.

The appellant is the owner of the fee, and erected a new building upon the premises, at a cost of some $12,000, and the lease gave the appellees the option to purchase the building for the sum of $15,000. While the building was being erected, the question of the installation of a large boiler for use in heating the building and in furnishing steam necessary to operate the cleaning plant arose between the parties. As the lease provided for a rental of 1 per cent. a month upon the cost, if a new boiler was installed, under the option to purchase the tenant would pay 1 per cent. a month of its new cost, or a total of 60 per cent. plus 100 per cent. of its cost if he elected to purchase the property at the end of his lease under his option, thereby making him pay 160 per cent. of the cost of the boiler that would have been used for five years; and thereupon the tenant elected to buy the boiler and install the same, and was allowed a credit of $300 for the value of the old boiler. The boiler was set up before the walls were built around it, and a section of such boiler room wall will have to be taken down and replaced, at the expense of the tenant, to remove the boiler. The present value of said boiler is $500.

The sole question to be decided in this case is: Did the boiler in question, together with the pipes attached thereto, become a part of the real estate, and therefore the property of the plaintiff, or did it retain its character as personalty?

We are cited to several Nebraska cases, *Lanphere v. Lowe*, 3 Neb. 131, which held that trade fixtures which can be removed without material injury to the premises might be removed, and a case involving a steam-heating plant, being *President and Directors of Ins. Co. of North America v. Buckstaff*, 3 Neb. (Unof.) 632, which last case is very closely in point. These cases and many others are discussed and considered in the case of *Frost v. Schinkel*, 121 Neb. 784, in which case it was held: "Trade fixtures may be defined as articles annexed to the realty by a tenant for the purpose of carrying on a trade or business, not exclusively agricultural, and are ordinarily removable by him while he is in possession of the freehold, and that such trade fixtures must be taken to pieces or even wrecked to remove them from the premises does not affect the tenant's right of removal, but such removal must never cause substantial damage to the freehold." This holding will control in this case.

In the case at bar, the tenant did not succeed in removing the fixtures before the termination of the lease; but, by an agreement between the litigants and their attorneys in writing, it was stipulated that whatever rights the tenant had for the purpose of removing said boiler would be granted to him after the expiration of the lease, and such fact alone would not bar the recovery of the tenant in the case.

It appears from the record in this case, and the evidence taken, that it was the clearly-expressed intention of the tenant, at the time he purchased and installed the new boiler, that the same would be and remain a trade fixture and one of his business appliances in the cleaning establishment; and this court finds that the tenant had a right to remove the same, and the decision of the district court in dissolving the temporary injunction, and declaring that the boiler was a trade fixture and might be removed by the tenant, is right and is

AFFIRMED.

NORTHWESTERN STATE BANK OF HAY SPRINGS, APPELLEE, V. DE WITT C. HANKS ET AL., APPELLANTS.

FILED JANUARY 8, 1932. No. 28013.

1. Mortgages: DEED AS SECURITY: TITLE. Where an instrument, in form a warranty deed, is executed and delivered to the grantee for the purpose of securing an indebtedness owing from the grantor to the grantee, the legal title under such instrument passes to the grantee.
2. ———: ———: ———. Where an instrument, in form a warranty deed, is executed and delivered by the grantor to the grantee for the purpose of securing an indebtedness owing to the grantee by the grantor, equity will regard the grantor as still retaining an interest in the premises, regardless of the form of the instrument.
3. ———: ———: LEASE: RIGHTS OF GRANTOR. Where a warranty deed, absolute upon its face, is executed and delivered by the grantor to the grantee, and simultaneously therewith a lease in writing is executed by the parties in which it is agreed that the grantor in the deed shall have one year in which to repurchase the premises, the only interest retained by the grantor in the premises thus conveyed is the right to pay the debt within the time limited and receive a reconveyance of the title.
4. ———: ———: ———: ———: TIME OF REDEMPTION. Where a warranty deed, absolute upon its face, is executed and delivered by the grantor to the grantee, and simultaneously therewith a lease in writing is executed by the parties in which it is agreed that the grantor in the deed shall have one year in which to repurchase the premises, upon failure of the grantor therein to repurchase the premises as agreed upon, a court of equity may enter a decree in the nature of strict foreclosure, and it has discretionary powers to award the grantor a reasonable time thereafter to make such payment.
5. ———: ———: STRICT FORECLOSURE: TIME OF REDEMPTION. Evidence examined, and *held* that the trial court abused its discretion in limiting the period to thirty days to pay the debt and receive conveyance.

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

A. C. Plantz, for appellants.

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

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is a suit in equity brought by the Northwestern State Bank of Hay Springs against DeWitt C. Hanks and Lydia J. Hanks, husband and wife, to quiet the title to the real estate described in the petition.

The plaintiff relies on an instrument in form of a warranty deed executed and delivered to it by the defendants, dated November 23, 1926. The defendants contend that in the execution of this instrument it was intended by the parties to be mere security for a debt owing from defendants to plaintiff, and is in legal effect a mortgage.

After hearing the evidence, the trial court by its decree found that, in the taking of said deed, it was intended by the parties as security for the indebtedness of the defendants to the plaintiff, together with advancements made by the plaintiff for the defendants in paying other obligations for the defendants. The court also found the amount due from the defendants to the plaintiff in order to redeem, and decreed that the defendants forthwith pay to the plaintiff the sum of $15,554.59, with interest at 10 per cent. per annum, and costs, and decreed further that, if the above payment was not made within thirty days from and after the entry of the decree, the defendants be forever barred and foreclosed of all right, title and interest and all equity of redemption in the premises and that, in case of failure to make such payments within the time limited, a writ of assistance issue to the sheriff of the county for restitution of the premises to the plaintiff.

Both parties filed motions for new trial and both motions were overruled by the court. Whereupon, the defendants prosecuted an appeal from the findings of the trial court to this court, asserting eleven separate assignments of error.

The Northwestern State Bank of Hay Springs will be termed plaintiff herein, and DeWitt C. Hanks and Lydia J. Hanks as defendants.

It appears that there was a forcible entry and detention proceeding brought by plaintiff against defendants prior to commencing this action, which was heard in this court, and is reported as *Northwestern State Bank v. Hanks*, 118 Neb. 442, and by stipulation of parties the testimony in the former case was and is, in the main, the testimony in the instant case. That case was decided upon a question not involved in this proceeding and hence the decision is in no way applicable to the issues involved herein.

The record fairly reflects the following facts: That on and prior to the 23d day of November, 1926, the defendants appeared to be suffering from considerable financial embarrassment and were indebted to the plaintiff and to various other persons; that on said date the defendants executed and delivered to the plaintiff an instrument in form a warranty deed, reciting as a consideration the sum of "One dollar and cancelation of indebtedness;" that simultaneously with the execution of this instrument the parties entered into an agreement, termed a lease, in which the plaintiff, as lessor, agreed to lease the premises to the defendants as lessees. The lease recited the consideration of one dollar and was for a period of one year, to begin on March 1, 1926, and terminating on the last day of February, 1927; that as a further consideration for the leasing of the premises the defendants agreed to pay all taxes levied against the premises for the year 1926. The lease contained a provision giving the defendants an exclusive option to buy and purchase the premises for a sum equal to the total amount of said indebtedness, which the plaintiff had assumed in accepting the warranty deed hereinbefore mentioned. The lease contained the further provision in which the lessor agreed to list the premises for resale with the Hay Springs Commercial Company upon terms to be agreed upon. In the lease the items of indebtedness which the plaintiff assumed for the defendants in the acceptance of the warranty deed, specifically stated, are as follows: Unpaid taxes for the year 1925 and prior years in the sum of $371.60, a certain judgment lien which

the plaintiff had against the defendants in the sum of $834.50, with interest at 10 per cent. per annum; the sum of $874.90, with interest in the sum of $192.25, which the plaintiff claimed against the defendants and which was involved in a suit pending between the parties at the time, an indebtedness growing out of a promissory note secured by a mortgage on the premises at the time in favor of one A. L. Johnson, which was then in foreclosure and had merged into a decree for the sum of $7,385.30, with interest at 10 per cent. from the 14th day of December, 1925.

The defendant DeWitt C. Hanks testified that the agreement between the parties in the execution of these instruments was that the deed was intended as mere security for the indebtedness which he owed the bank and other people and which the bank had paid for him, and that in accepting the deed the cashier of the bank stated to him that it was intended the same as a mortgage; and further that the plaintiff bank would give him the right to sell the land and get more money out of the place if he could; that the bank would buy his paper and hold it for awhile and give him a chance to sell the land and get something out of it. He further testified that when the bank discovered that one Abegg, the mortgagee in the mortgage which the plaintiff assumed, was foreclosing it and about to sell the premises, was when the plaintiff agreed with the defendant that they would take over his land under this arrangement, pay off the Abegg mortgage, and hold the land to secure their indebtedness and give him the option of selling it within a year, that he understood that the instrument was to be nothing more than a mortgage, and that no one representing the bank ever said anything about buying his land.

Lydia J. Hanks testified that the bank, acting through its cashier, only wanted the defendants to give it security for what the defendants owed it, and that the plaintiff bank wanted the deed only as a mortgage.

The witness Horn, who testified on behalf of the defendants and was present when the transaction involved in the

lease was consummated, testified that he heard nothing said about the purchase of the land.

It further appears without dispute that at no time during the course of these proceedings did the plaintiff tender back or deliver over to the defendants any of the defendants' notes or evidence of indebtedness which the plaintiff contends was paid in acceptance of the title under the deed. It further appears that the attorney for the defendants prepared a brokerage contract in which the defendants listed the land for sale and agreed to sell it, by which brokerage contract these defendants were then treated as the owners of the fee simple title to this land.

The witness Denman, who was cashier of the bank at the time the transaction was consummated and personally in charge of the negotiations out of which the deed and lease grow, as a witness for the plaintiff, testifies that the instrument was executed as a warranty deed because the bank wanted to avoid a foreclosure proceeding.

After careful examination of the whole record, we are convinced that a consideration of two propositions will satisfactorily dispose of the entire case: (1) Whether or not the trial court was justified, under the evidence, in finding that the warranty deed was given for the purpose of securing a loan and was in effect a mortgage; and (2) if a mere mortgage, whether or not the trial court was warranted in limiting the right of redemption of the mortgagors to a period of thirty days.

It is a well-settled and almost universally recognized doctrine that equity, in interpreting transactions between individuals and determining their rights, regards the substance and not the form. It is equally well settled that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form, or whatever name the parties choose to give it, it is, in equity, a mortgage. In the case of *Flagg v. Mann*, 2 Sumn. (U. S.) 486, one of the earliest cases on this subject, this doctrine was announced by Judge Story, and it has been adopted, except in a few isolated instances, by every jurisdiction

in this country. The rule grows out of the the broad equitable principle that it regards substance and not form.

"Whenever the intention is to take a security for a subsisting debt, or for money lent and to avoid or restrict the equity of redemption, chancery, seeking to protect the debtor against the rapacity of the creditor, and to do full and equal justice between the parties, will defeat such intention, by treating the transaction as a mortgage." *Dougherty v. McColgan,* 5 Gill. & Johns. (Md.) 281.

"The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or any other, it is always considered in equity as a mortgage." Story, Equity (3d ed.) sec. 1018.

This court has repeatedly held that, where two instruments are executed simultaneously, in determining the effect and intention of the parties they will be construed together. We are of opinion that the trial court was correct, in view of all the evidence and circumstances of the case, in determining that the instrument upon which the plaintiff seeks to quiet its title was intended as security for a debt, and that the grantors still retained equitable rights in the subject-matter thereof. If the decree of the court is correct as to this proposition, and we think it is, then the further question to be determined is whether or not the period of thirty days fixed by the decree for the debtor to redeem or to pay the debt and demand a reconveyance was unwarranted and inequitable under the circumstances.

The effect of a strict foreclosure is to terminate all the interest of the mortgagor upon his failure to comply with his contract, and usually where the doctrine is applied the courts are clothed with discretionary power to allow the debtor a reasonable time to pay the debt and thus redeem

his property. This court has permitted the application of the doctrine of strict foreclosure in numerous cases. *Gallagher v. Giddings*, 33 Neb. 222; *Patterson v. Mikkelson*, 86 Neb. 512; *Foster v. Ley*, 32 Neb. 404. This court has held many times that, where a deed absolute upon its face has been executed and delivered and was intended as a mortgage, notwithstanding such an intention, the legal title to the premises is vested in the grantee, and the only right the grantor can have under such circumstances is to pay the amount due and thus receive a reconveyance thereof. *Stall v. Jones*, 47 Neb. 706; *Zittle v. Schlesinger*, 46 Neb. 844; *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299; *First Nat. Bank of David City v. Speltz*, 94 Neb. 387.

It might be argued that this court in its earlier decisions has been somewhat inaccurate in its phraseology in discussing this subject. To hold that an instrument intended as security for a debt is a mortgage, and to hold further that the title to the mortgaged premises is in the grantee, seems to be slightly inconsistent in view of this court's definition of a mortgage.

"A mortgage is a mere pledge, or collateral security, creating a lien upon the mortgaged property, by conveying no title or vesting no estate either before or after condition broken." *Kyger v. Ryley*, 2 Neb. 20.

This doctrine has been reaffirmed in *Clark v. Missouri, Kansas & Texas Trust Co.*, 59 Neb. 53; *Orr v. Broad*, 52 Neb. 490, and in numerous other cases. A mortgage has been held by this court as a mere lien upon real estate for the purpose of securing an indebtedness, with the legal title retained by the mortgagor; and the equitable interest of the mortgagee is personal property only. The method of divesting the mortgagor of his title is by foreclosure and sale of the premises.

In a case where the instrument appears on its face to be an absolute conveyance, or warranty deed, and where the title has passed to the grantee, as this court has held it does, even although the parties intended it as security for a debt, we think under the holdings of this court the

grantor has conveyed to the grantee all the interest that he has in the premises, and retains only, by operation of equity, the right to pay the indebtedness to the grantee and receive a reconveyance of the title. If, under these circumstances, the instrument amounts to a mortgage, as the courts have said it does, then the procedure would be foreclosure and sale in order to divest the mortgagor of his interest in the premises. A sale, under such circumstances, could not be decreed for the purpose of divesting the mortgagor of his legal title, because he has already voluntarily divested himself of it by his deed of conveyance. It would not be strict logic to say that in case of a foreclosure and sale, and there were no bidders at the sale, the grantee would be required to purchase land of which he is already the owner, in order to protect his rights. The grantor's interest, under such circumstances, is a mere right to tender the amount of money the grantee has paid for the grantor, at the contract rate of interest, and receive a reconveyance of his title. Those cases which we have examined in which a sale of the premises was had are based upon foreclosure of a mortgage containing a defeasance clause, and not such an instrument as under consideration here. Where the mortgagor avails himself of the right of redemption under a mortgage with the defeasance clause, the only thing required of him to do is to pay the debt. In the event the grantor under the circumstances involved in this case desires to protect himself, he is required to do two things: Pay the debt, and obtain a reconveyance of his title, which, if refused, he could enforce in a court of equity. Applying the doctrines already announced by this court and treating the title as already vested in the grantee, it seems to us that the trial court could have logically rendered no other decree than one in the nature of strict foreclosure.

In the case of *Patterson v. Mikkelson,* 86 Neb. 512, the rule seems to be that courts of equity allow a decree of strict foreclosure in cases where it would be inequitable to do otherwise. The right of the court so to decree seems

to repose in its sound discretion. We find no abuse of discretion on the part of the trial court in rendering that part of the decree which is in the nature of a strict foreclosure.

The only remaining question left for us to consider is whether or not the trial court abused that discretion in limiting the period of the defendants' right to reconveyance of the premises to thirty days.

Courts of equity, in cases where it can be done without doing violence to an established principle of law, should afford debtors any reasonable opportunity to make good their engagements and thus avoid forfeiture of the title to their property. Under the circumstances, we conclude that the court abused its discretion in limiting this period to thirty days. We take the view that the time given the defendants to make payment of the indebtedness and secure a reconveyance of the premises should, under the circumstances, and in consideration of the rights of all parties, be reasonable; that nine months, the ordinary period of a stay of execution, is not unreasonable, and such time is hereby extended to nine months from the time the mandate of this court issues.

With these modifications, the decree is affirmed.

AFFIRMED AS MODIFIED.

ANNA ELLIG, APPELLEE, V. THOMAS POWELL, APPELLANT.

FILED JANUARY 8, 1932. No. 28017.

1. **Evidence** examined and found generally sufficient to support the verdict.
2. **Rape**: ACTION FOR DAMAGES: RESISTANCE: QUESTION FOR JURY. In a civil action to recover damages, based upon facts sufficient to constitute the crime of rape, the question of whether or not the plaintiff resisted the advances of the defendant to the extent of her physical ability is for the jury to determine.
3. ———: ———: PROOF. In a civil action to recover damages based upon facts constituting forcible ravishment of a female, no corroboration of the female's testimony is necessary; a mere preponderance of the evidence is sufficient to support a verdict.

4. ———: ———: DAMAGES. The verdict of $1,250 *held* not to be excessive.

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

Bartos, Bartos & Placek, for appellant.

John E. Lowe, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

CHASE, District Judge.

This is a civil action brought by Anna Ellig as plaintiff, against Thomas Powell, as defendant, to recover damages for an alleged assault and battery.

The facts upon which she relies for recovery, if it were a criminal prosecution, would amount to the crime of rape. The case was tried to a jury, resulting in a verdict of $1,250 for the plaintiff, whereupon the defendant filed a motion for a new trial, which was overruled by the trial court, and judgment on the verdict rendered. From the action of the trial court in overruling the motion for a new trial and entering judgment on the verdict, the defendant has appealed to this court. For the purpose of convenience the parties will be termed plaintiff and defendant as they were in the court below.

Several grounds for reversal are urged by the defendant. One is that the judgment is not supported by the evidence. It would serve no good purpose to detail at length this salacious story. We have carefully read the record, unsavory as it is, and reach the conclusion that from all the facts and circumstances disclosed thereby the evidence is amply sufficient to support the verdict as to this complaint of the defendant.

Another assignment of error is that the proof of resistance on the part of the plaintiff, required in cases of this character, was not sufficient to support a recovery.

The plaintiff testifies that on and prior to this episode she was living on a farm with her parents in Johnson coun-

ty; that she and the defendant, together with another young couple, had been attending a charivari at a place some miles distant from her home; that these four persons rode in a Ford coupé, the other couple in the front seat, and plaintiff and defendant in the rumble seat; that on the night in question, on their return to a point near the plaintiff's home, they passed an orchard, and some one of the party suggested that they get out of the automobile in which they were riding and go into the orchard in search of apples. This they did, the plaintiff and defendant, after entering the orchard, going in one direction and the other couple in another; that while the plaintiff and defendant were in the orchard, in the absence of the other couple, the plaintiff testifies that the defendant purposely tripped her, causing her to fall upon the ground, and while in that position he forcibly ravished her. The plaintiff detailed numerous acts in attempt to prevent the assault, from which the jury could rightly conclude that she resisted the aggression of the defendant.

The defendant, in his testimony, denied ever having been at the orchard at all on that occasion, and also denied that he committed any assault upon the plaintiff whatever. The other two persons in company with them both testify that they never stopped at the orchard, as detailed by the plaintiff.

The defendant in his brief contends that the record does not disclose any resistance sufficient on the part of the plaintiff to justify a recovery. It must be remembered that this is a civil action as distinguished from a criminal prosecution. Defendant cites *Kramer v. Weigand*, 91 Neb. 47, in support of his contention. A careful reading of this case convinces us that it completely disposes of defendant's contention against him. The question of whether or not the plaintiff resisted to the extent of her physical ability was a question for the jury to determine, and the jury, having had all the evidence before them, in finding for the plaintiff, must have reached the conclusion that the plaintiff resisted the defendant to the extent of her physical

ability. The decision of the jury upon questions of fact of this character is final, when submitted under appropriate instructions, and we find no complaint as to the instructions given by the trial court.

In the case above mentioned, which was a case of forcible ravishment, the same as the one at bar, the court made use of the following language:

"It is well-settled law that the weight of evidence showing a failure to make an outcry or to complain of an assault are questions for the jury in a civil action."

As to this contention we hold that the question of whether or not the plaintiff resisted the embraces of the defendant to the extent of her physical ability was a question to be determined by the jury, whose finding will not be disturbed unless it appears that the conclusion reached is manifestly wrong.

The defendant assails the verdict for the further reason that it is based on the uncorroborated testimony of the plaintiff. It has been held on numerous occasions, by this court and others, that in civil actions a mere preponderance of the evidence is sufficient upon which to base a finding. The court submitted the issues upon this question to the jury under instructions not questioned by the defendant, and the jury, by their verdict, found that the evidence preponderated in favor of the plaintiff. We find no cases cited and we have discovered no rule of evidence harsh enough to require a female, before she can recover damages in a civil action against one who, if prosecuted criminally, would be a rapist, to produce a witness either to the overt act or to a circumstance so closely connected therewith as would amount to corroboration. An act such as the one complained of, from the very instincts of human nature, is not likely to be committed in the presence of witnesses, or under such circumstances that corroborating evidence could ordinarily be obtained to support the truth of the plaintiff's claim.

The defendant further argues that the verdict is excessive and the amount thereof should be reduced by this

court. It appears that the plaintiff was a young woman, 24 years of age, very little accustomed to the ways of the world, as her parents had guarded her conduct quite closely up to this particular occasion, chaste for aught the record discloses to the contrary. The jury found that she was forcibly ravished, her chastity violated, and ruthlessly maltreated by the defendant without her consent and against her will. It was her right, as a matter of law, to go through life with her purity undefiled, and be secure from any forcible invasion of her person by another. To have such rights wantonly trespassed upon ought not to be regarded as a trivial matter.

In view of all the facts shown by the record, we are unable to agree with counsel that the judgment is excessive. The judgment therefore is

AFFIRMED.

IN RE ESTATE OF JANE BROWN.
WILLIAM B. BROWN ET AL., APPELLANTS, V. LAURA MAE KENDALL MURRAY, APPELLEE.

FILED JANUARY 13, 1932. No. 28046.

Wills: PROBATE: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* to sustain finding that the proposed written instrument is the will of Jane Brown, deceased.

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

Stiner & Boslaugh and *Edmund P. Nuss,* for appellants.

William M. Whelan, contra.

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

PER CURIAM.

From a judgment determining that a proposed written instrument is the will of Jane Brown, deceased, and that it should be proved and allowed as her will, contestants have appealed.

One of the objections to the probate of the will is that the instrument was not executed in the manner prescribed by statute. The assignments of error on this appeal relate only to the sufficiency of the evidence to prove the due execution of the will.

For many years Mrs. Brown had been a resident of Adams county, Nebraska. In November, 1918, she accompanied her brother, Ben Prideaux, to California to spend the winter. On April 24, 1919, just preceding return to her Nebraska home, Mrs. Brown and her brother went to the office of J. B. Johnson, a real estate dealer, in Pasadena, California, where Mr. Johnson prepared the instrument in controversy. It was signed by Mrs. Brown as her will in the presence of her brother and Mr. Johnson. The two latter, at her request, signed the instrument as attesting witnesses. Mr. Prideaux, the brother, died a year later.

On the trial of the issues in this case competent witnesses, familiar with the signatures of Mrs. Brown, the testatrix, and of Mr. Prideaux, one of the witnesses to the instrument, testified that the signatures were the genuine signatures of the testatrix and of Mr. Prideaux. The evidence of the only surviving attesting witness, Mr. Johnson, was taken by deposition in California. On his examination, a written instrument was presented to him, which he identified, and testified that he had prepared for Mrs. Brown as her will; that she signed it as such in the presence of Mr. Prideaux and himself, and that he and Mr. Prideaux, at her request, signed the instrument in her presence as attesting witnesses. Neither the instrument nor a copy thereof was made a part of Mr. Johnson's deposition. Contestants argue that there is no competent evidence that the written instrument, about which the witness Johnson testified, is the one presented for probate. Counsel, who represented contestants in the trial court, was present at the taking of Mr. Johnson's deposition, and cross-examined him with reference to several provisions in the will, and referred to the provisions by the numbered paragraphs where they appeared in the will. The provisions referred to in

the cross-examination are identical with those in the will received in evidence on the trial. Moreover, the instrument in controversy is written on the back of a letterhead of Mr. Johnson, and that circumstance was referred to in his cross-examination. There is no evidence that Mr. Johnson ever prepared for Mrs. Brown any other will or any other written instrument. Doubtless, had there been any question as to the identity of the instrument, examined and testified to by the witness Johnson, with that offered for probate on the trial, counsel for contestants would have disclosed that fact and offered testimony with reference thereto.

We are of the opinion that the evidence is not only sufficient to sustain a finding that the written instrument offered is the one concerning which the witness Johnson testified, but that the evidence is such as to compel that finding. The evidence would have warranted no other finding.

The record is free from error. Judgment

AFFIRMED.

FRANK G. JACKSON, APPELLANT, V. ARNDT-SNYDER MOTOR COMPANY, APPELLEE.

FILED JANUARY 13, 1932. No. 28044.

Replevin: MEASURE OF DAMAGES. In a replevin action where the ownership of a truck is concededly in the plaintiff and the defendant's right of possession therein is created by virtue of a lien for truck repairs, the value of the right of possession and not the value of the truck is the measure of damages. *Held*, that the court erred in finding that the defendant is entitled to a return of the truck within three days, or the value thereof, instead of the value of the defendant's possession.

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

Grant Lothrop, for appellant.

O'Hanlon & O'Hanlon, contra.

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

DEAN, J.

Under a writ of replevin issued by the county court of Washington county, Frank G. Jackson, a minor of 19 years, by his next friend, Jay L. Jackson, recovered possession of a Chevrolet truck from the defendant, the Arndt-Snyder Motor Company. In its answer the defendant company admitted plaintiff's ownership of the truck, but contended that the truck was delivered by the plaintiff to the company for the purpose of having certain repairs made thereon, and that, under the provisions of section 52-201, Comp. St. 1929, the truck was being retained until the charges thereon were paid. Section 52-201, *inter alia,* so far as applicable provides that any person who makes repairs on an automobile shall have a lien thereon while the automobile is in his possession "for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain said property until said charges are paid."

The plaintiff in his reply alleged that when the truck was purchased from the defendant it was warranted to be free from defects, but that the material and workmanship thereon were later found to be defective. It is also alleged that the defendant therefore agreed to make the necessary repairs on the truck in consideration of the payment, by the plaintiff, of the remainder then due on the purchase price of the truck. The county court entered a judgment in favor of the defendant, and ordered that the truck be returned within three days or that, failing to so do, the plaintiff pay the defendant $275 as the value thereof, $85 as damages for wrongful detention, and costs of suit. The judgment was affirmed by the district court. Plaintiff has appealed.

We have not been favored with a brief by the defendant, but the record appears to disclose that the judgment is for reversal. As hereinbefore noted, the judgment provides that the defendant shall recover the "value" of the truck

as well as damages for its wrongful detention. On this feature the trial court decreed that the right of possession was in the defendant, but no finding was made in respect of the value of such possession.

Section 20-10,103, Comp. St. 1929, provides that, in a like case, it shall be determined "whether the defendant had the right of property or the right of possession only." And in section 20-10,104, Comp. St. 1929, it is provided that, if the judgment is for the right of possession only, such judgment shall be for the value of such possession in case a return of the property cannot be had, damages for withholding such property, and costs.

Under the pleadings it is admitted that the ownership of the truck was in the plaintiff, and therefore the value of the defendant's right of possession became the measure of damages, and not the value of the truck. And since ownership in the plaintiff is conceded and the defendant's right of possession is created by virtue of a lien for repairs on the truck, it appears to us that the court erred in finding that the defendant is entitled to a return of the truck or the value thereof instead of the value of his possession. *Brownell v. Fuller,* 57 Neb. 368; *Tyson v. Bryan,* 84 Neb. 202; *Welton v. Baltezore,* 17 Neb. 399. "Where the defendant in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damage, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property." *Creighton v. Haythorn,* 49 Neb. 526. And in an earlier case we held: "In an action of replevin where the verdict is in favor of the defendant, whose ownership is special by reason of a chattel mortgage or other lien, the measure of his damages in case a return cannot be had is the amount due him upon his lien, if within the value of the property as found by the jury. But such damages should in no case exceed the value of the property." *Cruts v. Wray,* 19 Neb. 581. And the rule in this jurisdiction has long prevailed that, "In an action of replevin, where the property has been delivered

to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the alternative form is imperative." *Manker v. Sine,* 35 Neb. 746. See *Field v. Lumbard,* 53 Neb. 397; *Goodwin v. Potter,* 40 Neb. 553.

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed herein.

REVERSED.

BANKING HOUSE OF F. FOLDA, APPELLANT, V. J. M. HIGGINS, APPELLEE.

FILED JANUARY 13, 1932. No. 27946.

Witnesses: COMPETENCY. When an interested witness has testified to a conversation between deceased and his wife, and objection is made that it violates section 20-1202, Comp. St. 1929, if thereafter letters are introduced by the representative of the deceased in reference to the transaction with the deceased, and its pleadings are amended by inserting statements therefrom, any errors in the rulings of the court are thereby cured.

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

J. A. Donohoe, for appellant.

J. J. Harrington, contra.

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

PAINE, J.

This is an action upon a promissory note of $575, which was tried to a jury. There was a very sharp conflict in the evidence, and finally a verdict was returned in favor of the defendant and signed by ten of the jurors.

Plaintiff and appellant, a state banking corporation, of Schuyler, Colfax county, brought suit against the defend-

ant and appellee in Holt county, Nebraska, upon a promissory note reading as follows:

"Schuyler, Nebraska, Nov. 18, 1926. $575.00

"Ten days after date, for value received, I, we, or either of us, promise to pay to the order of W. J. Higgins Five Hundred and Seventy Five Dollars. Payable at Schuyler, Nebraska, with interest at the rate of 10 per cent. per annum, payable annually from date until due, and ten per cent. after maturity until paid. The makers, sureties and indorsers of this note hereby waive presentment for payment, notice of nonpayment, protest and notice of protest of this note and each of us hereby charge our own separate estate for the payment of this note.

"For Hay Dumas, Nebr. J. M. Higgins."

Said note being indorsed on the back with the words, "Wm. J. Higgins." The original of said note appears on page 65 of the bill of exceptions. The words "For Hay" appear to be in the same handwriting as the body of the note, but not in the same handwriting as the signature of the maker of the note. The words "Dumas, Nebr.," are in lead pencil, and appear to be in another handwriting.

The appellee filed his answer, admitting the execution and delivery of the promissory note, and admitting that he had paid nothing upon said note. And, as a defense, the appellee alleges that there was no consideration given for the note; that the circumstances under which it was given were these: That, on the date of the note, the payee, W. J. Higgins, a distant cousin, came to the ranch home of the appellee, stated that he was hard up and needed $575 for a week or ten days, and that if the appellee would give him an accommodation note for that amount he would never have to pay the note or any part thereof, and that payee would guarantee to return the note within a short time; that, relying upon such statements and representations, appellee executed and delivered the note sued upon. Appellee alleges that, some time after the note was past due, he saw the note in the possession of W. J. Higgins, to whom it was given, and that at that time it had not been indorsed

by him to the appellant or any one else, and that the appellant is not an innocent purchaser for value before maturity in due course of business, and that there is nothing due to the appellant upon said note. The note was given on November 18, 1926, and the payee of the note came back to the ranch in Garfield county in January, 1927, bringing the note with him, for the purpose of getting some security on the note. The reply was a general denial. Appellant conceded at the opening of the trial that the burden of proof was upon the appellee, who was given the opening and closing.

Upon a question by the court, the appellee made answer as follows: "Golly, there isn't much to say besides what has been said; he told my wife if I would give him collateral on his note, a few things that was not already mortgaged to Mr. Folda, my horses, harness, saddle and a few hogs, if I would give him collateral on this note that he could realize some money on it; he could take it back to the bank and borrow on it, and that say in the course of ten days or two weeks, or such a matter, he would return the note; that I would be helping him that much. Which I generally refused to do." The Court: "That last remark, which I generally refused to do, may be stricken out and the jury will disregard it."

Hildred Higgins, the wife of the appellee, testified that she was at the ranch house, which was in Garfield county, Nebraska, in January of 1927, and related the conversation between herself and the payee, and that there was no consideration whatever given for the note originally, but it was just an accommodation that the payee might borrow money on, and to be returned in a very short time.

J. Folda, of the appellant bank, testified that the note sued upon was one of several notes turned over to the bank on April 13, 1927, as additional collateral security for an older note, which was then renewed, in the sum of $8,363.54, given by W. J. Higgins, and that the bank advanced an additional sum of $400 by reason of securing the note in suit as additional security.

The appellant's counsel presents as a ground for reversal that the court, over his objections, allowed the appellee to testify to a conversation with the deceased payee of the note, W. J. Higgins. Section 20-1202, Comp. St. 1929, in regard to conversations with deceased persons, forbids evidence of conversations between the deceased person and the interested witness. The appellee first seeks to avoid the force of the statute by giving the conversation that occurred between his wife and the deceased, W. J. Higgins. We have quoted in this opinion an important answer made in such testimony, from which it appears that the wife actually took a leading part in finding out why W. J. Higgins wished to get the note signed by her husband, and the reading of her testimony shows that she was very much interested in her husband's signing this note, and the reasons for it.

It has been held by this court that, where the transaction was not between the witness and the deceased person, but between the latter and a third party, in which the witness took no part, then it is admissible. *Kroh v. Heins*, 48 Neb. 691. In *DeWulf v. DeWulf*, 104 Neb. 105, two young girls, who heard a conversation between the deceased and their mother, were allowed to testify to it, as they took no part in the conversation. See *Hajek v. Hajek*, 108 Neb. 503. The appellee, however, went into the very same transaction, and introduced letters to prove that, instead of the note being an accommodation note, without consideration, it was given in payment for hay. And, further, near the close of appellant's evidence, the court allowed it to amend its petition by striking out paragraph 3, reading as follows: "That in the due course of business, and for a good and valuable consideration to him in hand paid by the plaintiff, Banking House of F. Folda, the said W. J. Higgins duly assigned, indorsed, transferred and delivered said note to the plaintiff herein by the name of Wm. J. Higgins and that the plaintiff is now the owner and holder thereof," and inserting therefor a longer paragraph, in which he set out statement from the correspondence between appel-

lant and appellee's attorney, M. F. Harrington, reading: "Now he has given a note * * * to W. J. Higgins for a certain interest in hay," and many others in reference thereto. And these facts, we think, bring the case clearly within the holding in *Warnick v. Warnick*, 107 Neb. 747, in which this court held: "Where a witness, having a legal interest in the result of an action, and therefore incompetent under section 7894, Rev. St. 1913, testifies to a conversation or transaction with a deceased person, and the adverse party, the representative of such deceased person, thereafter introduced in evidence documents relating to the same transaction, concerning which such witness testified, *held*, that, although the testimony of said witness may have been incompetent when received, it was made competent through the action of the representative of the deceased in introducing such documentary evidence." And in *Cline v. Dexter*, 72 Neb. 619, it was held that, after letters were introduced on behalf of the deceased, it was error to exclude testimony in reference to the transaction by the adverse party. We do not find reversible error in the exclusion of certain letters and other rulings made by the trial court.

Instruction No. 4, given by the court, reads as follows: "Gentlemen, under the law and the evidence there is for your determination only the question of whether or not the note in suit was given for hay, or as an accommodation note. You will return a verdict for the plaintiff for $805 unless the defendant has proved by a preponderance of the evidence that the note sued upon was given without consideration and as an accommodation."

While this court might not have arrived at the same conclusion that ten members of the jury did, because of the statements in M. F. Harrington's letter, whether the same were authorized or not, yet the trial court limited the case to the determination of a single question of fact, and we will not disturb the finding of the jury thereon. The judgment of the lower court is hereby

AFFIRMED.

MARY E. MAST, APPELLEE, V. ADA MURRAY ET AL., APPELLANTS.

FILED JANUARY 13, 1932. No. 28103.

1. **Deeds**: CANCELATION: FRAUD. Where the evidence shows, as in this case, that a deed of a valuable interest in real estate was made by an aged woman of limited education and no business experience, without consideration, and there is evidence she did not know the instrument signed was a deed, but was led to believe and did believe it was a lease of her life estate therein, *held*, sufficient to establish fraud, and equity will cancel such deed.
2. ———: ———: RENT. On the cross-appeal of appellee, *held*, that by reason of the contract set out in the opinion appellee is not entitled to recover rents prior to March 1, 1929.
3. ———: ———: ———. That part of the decree providing for interest on the annual rental beginning on March 1, 1929, modified, and interest allowed on the annual rental from March 1, 1930, when the rent for the year 1929 became due.

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

A. L. Tidd, for appellants.

J. A. Capwell, D. O. Dwyer, W. L. Dwyer and *W. A. Robertson, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This is an action in equity brought by the appellee, Mary E. Mast, against the appellants, Ada Murray and her husband, Edward Murray, for the cancelation of a certain quitclaim deed executed by the appellee, Mary E. Mast, to the appellant, Ada Murray, and for an accounting for rents. Fraud and want of consideration were alleged as grounds for the cancelation of said deed. Appellants, by their answer, denied fraud, and alleged consideration. The trial court found for the appellee, canceled the deed, found that appellee was entitled to an accounting for the rents of the real estate involved, for the years 1929, 1930, and

1931; found the reasonable rental value of such lands per year to be $2,000, and, after deducting the credits which appellants were found entitled to, that there was due and owing to appellee from the appellants the sum of $4,945.47. From said judgment the appellants, defendants in the court below, have appealed.

The appellee prosecutes a cross-appeal claiming that she should have been allowed rents and profits for the years 1926, 1927, and 1928. The questions presented for consideration on the appeal and cross-appeal are: (1) Was the deed from Mary E. Mast, appellee, to Ada Murray, appellant, obtained by fraud and deceit? (2) Was said deed without consideration? (3) Was the appellee entitled to rents and profits for the years 1926, 1927, and 1928?

It appears from the record that appellee is the mother of the appellant, Ada Murray. The appellee, at the time of the execution of the deed in question, had a life estate in 280 acres of farm land in Cass county, Nebraska. That is the interest it is claimed appellee conveyed by the quit-claim deed in question to the appellant, Ada Murray. Appellee's life estate in said lands was devised to her by the last will and testament of her husband, Abraham Mast, deceased. When his will was offered for probate a contest was threatened by some of his heirs. To avoid a contest, a contract was entered into on March 11, 1916, by the appellee and the heirs at law of the testator, in which they all agreed to permit the will to be probated, and further agreed that appellee should take the life estate as provided in said will and waive her right to elect to take under the statutes of Nebraska; that on the death of appellee there should be paid to the appellant, Ada Murray, and Arnold Mast, her brother, such sum as would be necessary to make the said Ada Murray and Arnold Mast equal to all the other heirs for advancements and payments made to them by Abraham Mast during his lifetime, and that the remainder of the estate, real and personal, should be divided equally among the children of Abraham Mast, deceased, and that the children of his deceased daughters, Nettie

Pierson and Mary C. Dill, should take the share of their mothers. Under this agreement the children of Abraham Mast, then living, took a one-seventh interest in his estate and the children of each of his two deceased daughters took her one-seventh interest. Under this agreement the will was probated, and a decree entered assigning shares as provided therein.

The appellants rented from the appellee, for the year 1921, about 145 acres of the land in which she had a life estate; they moved on said land and gradually increased their leased acreage each year until in 1924, when they occupied the entire farm as tenants, except the house and a small piece of ground surrounding the same, where appellee lived with her son, Arnold Mast. During that time they had the land rented for two-fifths of the grain raised thereon and $5 an acre for the pasture land. They sold the crops raised on the land, paid the taxes, and paid appellee, in small amounts as she needed the same, what they claim was the balance due her for rent. Appellants were thus occupying the land as tenants in the year 1925 at the time the deed in question was made.

The quitclaim deed was made on the 18th day of November, 1925, and the consideration named therein is $500. The evidence upon the question of fraud and the consideration for the making of the deed is conflicting. Only a brief summary of the evidence upon this question will be attempted.

The evidence in behalf of the appellee shows, at the time the deed was signed, she was about 70 years old, had very little education and no business experience; that on the day the deed was signed appellants took her to Plattsmouth in their automobile and she and her daughter went shopping, and on her return to their car she heard her daughter say to her husband, "Is it all right?" and he said, "Yes." And she said, "Well, we will go over there," and then she said to appellee, "We will go over to the office." Appellee says she did not know where she was going, but that they took her over to Judge Beeson's office, and that, after writ-

ing awhile on the typewriter, he inquired what the consideration was, and that she did not know what he meant, and her daughter said "$500." When he finished writing, her daughter said to her, "Ma, sign that now," and she said she would "fix things up and take care of things." The evidence further shows that at the time of the signing of the deed the appellant, Ada Murray, said something about paying rent, and when she said $500 appellee believed that she would "get the rent." It further appears that appellee did not understand that she was signing a deed of her life interest, but believed the same to be a lease; that she did not have her glasses with her at the time that she signed the deed and could not see very well, everything "looked black to her." Her signature, as it appears upon the deed, indicates the truth of her statement, that she could not see very well at the time. It further appears, from appellee's evidence, that prior to the time of the signing of the deed in 1925 several persons solicited her to lease her land, that she imparted this information to her daughter, and that her daughter told her that she wanted her to sign it over to her. The appellee denies that she ever received the $500 named as consideration in said deed or any part of it. In this she is corroborated by the testimony of W. A. Robertson, an attorney whom she employed to get the appellants to reconvey her life estate to her. Mr. Robertson's testimony is to the effect that he demanded of Mrs. Murray that she reconvey her mother's life interest to her, and that Mrs. Murray stated, at that time, that she had never paid anything for it and that she would deed it back if a guardian was appointed for her mother so that Arnold Mast could not get the rent. She is also corroborated to some extent by the testimony of Judge Beeson, who testified that at the time the deed was executed he had no recollection of any money being paid to the appellee.

The evidence on the part of the appellants is that they went to the office of Judge Beeson at the request of appellee and it was at her solicitation that the deed was made; that as a consideration therefor they were to pay her $500;

that she was to be protected on a note that she had signed with her son, Arnold Mast, for $2,000, payable to the Farmers State Bank of Plattsmouth, and appellants agreed to furnish her support during her life. Appellants testified that on the day the deed was made the daughter paid appellee $100 in cash, as a part of the $500 consideration named in the deed, and that about 90 days thereafter, at their home, they paid her the balance of $400 in cash; they requested no receipts for these alleged payments and received none. A reading of their testimony upon the question of these payments is not convincing as to its truth. The appellant, Edward Murray, testified that he paid the $2,000 note of Arnold Mast on which appellee was surety to protect her, and that formed a part of the consideration for the giving of the deed. In regard to that transaction, the evidence shows that on April 23, 1926, the president of the Farmers State Bank of Plattsmouth called at the home of appellee and her son, Arnold Mast, and demanded of them payment of the $2,000 note, which appellee had signed as surety; that after some talk the appellant, Edward Murray, was called in, and it was agreed between him and Arnold Mast that he would purchase Arnold's one-seventh interest in the land and pay his indebtedness to the Farmers State Bank of Plattsmouth, amounting to a little over $3,000, and also the $2,000 owed by Arnold Mast to the Nehawka Bank. That afternoon they went to the Nehawka Bank and Edward Murray gave the president of the Farmers State Bank of Plattsmouth a check payable to that bank for $2,200 drawn on the Murray State Bank, and the president of the Farmers State Bank thereafter gave the Nehawka Bank his check for the amount due that bank. Afterwards Arnold Mast executed a note for $3,000 and a mortgage on his undivided one-seventh interest in the land to the Farmers State Bank of Plattsmouth to take up the indebtedness that they held against him, a part of which was the $2,000 note signed by appellee. After so doing he executed a deed to the appellant, Edward Murray, for his said one-seventh interest in said land, in which the grantee assumed the payment of said $3,000 mortgage.

It appears that at the time the appellant, Edward Murray, purchased the one-seventh interest of Arnold Mast, the $2,000 note on which appellee was surety was secured by a mortgage given by Arnold Mast on his said interest to the Farmers State Bank, and that such mortgage was ample security therefor and so considered by the cashier of said bank. No reason existed for appellee to request appellants to protect her from having to pay said note. The payment of the $2,000 note, on which appellee was surety, by the appellant, Edward Murray, assuming the mortgage for $3,000 on the land as part of the purchase price, did not operate as any consideration for the conveyance of appellee's life estate. The one-seventh interest that he purchased is shown by the evidence to have been of the reasonable value of at least $175 an acre, and the amount that he paid therefor was much less than such value.

The appellee denies in her testimony that there was ever any arrangement whereby she was to give the deed in consideration of her support during life and relieve her from the payment of the $2,000 note on which she was surety; and it is somewhat significant that, if the agreement was such as appellants claim, when it was asked in Judge Beeson's office at the time the deed was made, what the consideration was, the daughter did not state, in addition to $500, it was for the support of her mother during her life and to relieve her on her liability on the $2.000 note.

The evidence on behalf of the appellee further shows that, after the execution of the deed, appellants remained on the premises under practically the same conditions as they had before, that they paid the taxes as they became due upon the land, gave her small sums of money as they had before, furnished her some groceries and some little clothing. After making the deed there was nothing in the relations of these parties which would indicate that any change in relationship was affected or to challenge appellee's attention to the fact that appellants were claiming to occupy the premises otherwise than as her tenants, until in August, 1929.

It appears that during the month of January or February, 1929, appellee suffered an injury, and that she was taken to the home of the appellants, where she remained until the latter part of August of that year. A day or two before appellee left the home of her daughter, her daughter informed her that she wanted to take the "barn away," and appellee told her, "You can't do that, I have no right to let the barns and buildings be destroyed," and that the daughter then said: "It is none of your business. It's mine and I'll do as I please with it." At that time her daughter also told her "that she had bought it for $500." This, appellee claims, is the first intimation that she had that her daughter claimed to own the life estate. Shortly after that, in September, 1929, the appellee consulted an attorney, W. A. Robertson, to ascertain what the claim of her daughter was based on. He investigated and found the quitclaim deed of record, and a few days thereafter made a demand upon the daughter to reconvey the life estate.

The life estate which the appellee conveyed to her daughter, Ada Murray, was a valuable interest in the real estate. At the time of the conveyance she had an expectancy of life of over nine years, the reasonable rental value of her life estate, as shown by the undisputed evidence, was at least $2,000 per annum.

We have held: "The consideration for a conveyance of a valuable interest in real estate must itself have some value, and if it is merely nominal, and there are indications of fraud or concealment of essential facts, equity will cancel such conveyance." *Krause v. Stevens*, 103 Neb. 463.

Where the evidence shows, as in this case, that a deed of a valuable interest in real estate was made by an aged woman of limited education and no business experience, without consideration, and there is evidence she did not know the instrument signed was a deed, but was led to believe and did believe it was a lease of her life estate therein, held sufficient to establish fraud, and equity will cancel such deed.

This being an action in equity involving questions of fact, which the law requires us to hear and determine as a trial *de novo* and to reach an independent conclusion without reference to the findings of the trial court, we have, in determining the weight of the evidence, where there is a conflict therein on a material issue, considered the fact that the trial court observed the witnesses and their manner of testifying. We have carefully examined the evidence and are convinced that the appellee executed the deed in question by being fraudulently induced to believe the instrument was a lease, that at the time of the signing of the same appellee did not know it was a conveyance of her life estate to her daughter, and that the same was without any consideration and in equity and good conscience should be canceled.

This brings us to a consideration of the cross-appeal of appellee.

The question presented by the cross-appeal is: Was the appellee entitled to rents and profits for the years 1926, 1927, and 1928? The trial court found that, by reason of a contract entered into by the appellee and appellants and others on the 7th day of October, 1929, she was not entitled to an accounting for rents and profits for the years mentioned.

It appears that before the contract, upon which the finding of the court was based, was entered into, appellee demanded of appellants a reconveyance of her life estate to her, and also a settlement for the rents and profits due her for the time they occupied the land under the quitclaim deed. Following said demand, a contract was drawn naming as parties thereto the appellee, the appellants and other heirs at law of Abraham Mast, deceased, and their spouses. The contract was signed by all the parties named, except one of the heirs having a small interest therein. As thus signed the contract was delivered.

The part of the contract on which the court denied appellee a recovery for rents and profits for the years 1926, 1927, and 1928 reads as follows:

"It is further agreed between the parties hereto that the said Edward Murray and Ada Murray are to pay to the said Mary E. Mast all rentals for the year commencing March 1st, 1929, and for all subsequent years during her life in case they continue as tenants of said premises. The said Edward Murray and Ada Murray being entitled to credit for any payments made by them in behalf of the said Mary E. Mast for any payments for living expenses, doctor's bill, necessary expenses, or advancements made to her for the year commencing March 1, 1929, and that in case the said Edward Murray and Ada Murray, or either of them, shall continue to farm said premises as tenants of the said Mary E. Mast, for and during her lifetime, and the said Mary E. Mast should depart this life after the said Edward Murray and Ada Murray or either of them have planted crops for said year, that the said Ada Murray and Edward Murray shall have the right to continue for said year as tenants of said place, and shall pay to the parties hereto, their *pro rata* share of the rentals in accordance with their proportion of the fee title to said premises, and that upon the expiration of said year, said lease shall terminate."

The quoted part of the contract is entirely independent of that part of the contract which provides for confirmation of the shares and interests of the parties, as fixed by the contract of March 11, 1926, the reconveyance by appellants to appellee of her life estate, and the conveyance by each of the heirs at law to one another, subject to said life estate.

The purpose of the quoted part of the contract was to settle a dispute between the appellee and appellants as to rents and profits during the time that appellants had been in possession thereof under the quitclaim deed. It is not contended by counsel for appellee but what the effect of said agreement was to relieve appellants of the payment of rents previous to March 1, 1929, but their contention is that such agreement was without consideration as far as appellee was concerned, and that it amounted to no

more than an offer to compromise and settle. The consideration moving to the appellee from the appellants was the renouncing of any claim by them for rents and profits under the quitclaim deed from March 1, 1929, and agreeing to attorn to the appellee for the rent for that year and all subsequent years that they might occupy the premises during her lifetime, and thereby recognizing the right of the appellee to the rents and profits from March 1, 1929, and for all subsequent years during her life by virtue of her life interest therein. In consideration of this, appellee renounced any claim that she might have for rents and profits previous to March 1, 1929. The consideration moving to the appellee was ample for her forgiving any claim that she might have for rents and profits previous to March 1, 1929. It was a settlement of the controversy between them as to rents and profits and not an offer to compromise. The finding of the trial court that appellee was not entitled to rents and profits for the years 1926, 1927, and 1928, by reason of said agreement, is right.

The amount allowed appellee for rents and profits by the trial court is amply supported by the evidence. The trial court took the lowest amount shown to be the reasonable rental value of the lands for each year and deducted all the credits claimed by appellants therefrom and found the balance to be the amount due therefor.

It is suggested by counsel for appellants that the decree of the trial court is wrong in that it provides for the payment of interest on annual rentals from March 1, 1929, before any rent was due. The decree provides: "That the plaintiff have and recover from the defendants the sum of $4,945.47 with interest at the rate of 7 per cent. per annum, on the annual rental when due beginning on March 1, 1929." It is the rule: "Where the rent is payable periodically as yearly, quarterly or the like, and there is no provision for payment in advance, it is not due and payable until the end of the year." 16 R. C. L. 928, sec. 436.

The agreement between the parties does not provide that the rent for the year 1929 should be payable in advance,

therefore the rent for the year 1929 did not become due until the 1st day of March, 1930. Interest should have been allowed only from March 1, 1930, when the rent for the year 1929 became due. The decree is modified so as to provide for interest on the annual rental, when due, beginning on March 1, 1930.

The decree, as modified, is affirmed.

AFFIRMED AS MODIFIED.

CHARLES LAKE, ADMINISTRATOR, APPELLANT, V. WILLIAM J. ROSE ET AL., APPELLEES: ELIZABETH TYNON ET AL., INTERVENERS, APPELLEES.

FILED JANUARY 13, 1932. No. 27963.

Principal and Agent: MORTGAGES: SUBROGATION. Where a confidential agent undertakes to invest the funds of his principal in loans secured by a first mortgage on real estate, and thereafter takes a mortgage on real estate to himself and a junior mortgage to secure a loan of the principal's funds, a court of equity will subordinate the mortgage lien of the agent to that of the principal.

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

Kelligar & Kelligar, for appellant.

Paul Jessen, Ernest F. Armstrong, F. G. Hawxby and *E. Ferneau, contra.*

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

LANDIS, District Judge.

This is an appeal in equity from a decree of foreclosure of two mortgages and a determination of the priority of the respective mortgage liens. Appellant and appellees agree that both of the mortgages should be foreclosed, and the only contention is as to priority of the liens created by these mortgages.

Subsequent to the decree of foreclosure, Ruhamah Jane

Lake, plaintiff below, died intestate, and this action was revived in the name of Charles Lake, administrator of her estate, who is appellant here.

Ruhamah Jane Lake, referred to in the record as Mrs. Lake, was at the time of the trial 81 years of age. She had no business experience; did her banking at the Nemaha County Bank, and relied entirely on the various officers of the bank at all times.

In 1921 Mrs. Lake had a small real estate holding and $4,500 in United States Liberty bonds. She says Miss Elizabeth Tynon advised her to sell the bonds and loan the proceeds on a first mortgage on farm land and get 7 per cent. interest. The bank sold the bonds October 7, 1921, for $4,022.46, and proceeded to invest the same for Mrs. Lake. This investment by the bank for Mrs. Lake consisted in transferring to her its notes of W. J. Rose for $338 and $3,700. At the time the investment was made W. J. Rose owed the bank $21,257.82. He was not a first class credit risk, and it is a fair inference from the record that these notes were of doubtful value. W. J. Rose is now insolvent.

On May 22, 1924, W. J. Rose executed a mortgage on 160 acres to the Nemaha County Bank to secure a $4,038 note. By its terms the mortgage provides that it is subject to a $16,000 mortgage and one for $13,200. The bank surrendered the $338 and $3,700 notes of W. J. Rose belonging to Mrs. Lake for the $4,038 note and mortgage. On the same date W. J. Rose executed another mortgage on the same land to the Nemaha County Bank to secure five notes aggregating $13,200. The $4,038 mortgage was due May 22, 1925. The $13,200 mortgage had a due date of May 22 for $3,000 in each of the years 1925, 1926, 1927, and 1928, with $1,200 due May 22, 1929. No interest was ever paid on the $13,200 mortgage indebtedness; no assignments were produced for these mortgages, and at the time of the failure of the Nemaha County Bank in September, 1929, each of them was of record in the name of the bank in the office of the register of deeds of Nemaha county, Nebraska.

During all times pertinent to this case Elizabeth Tynon was a stockholder and active officer of the Nemaha County Bank. In the bank was an account carried in the name of Wm. Tynon for convenience, but which was a family account belonging to Elizabeth Tynon, her brother, and five sisters. Elizabeth Tynon had full charge of this account; made all investments therefrom for the interested parties, and annually each received one-seventh of the interest earned.

On May 23, 1924, while acting for herself and her brother and sisters, Elizabeth Tynon drew a check on this family account for $13,200 to the Nemaha County Bank for the W. J. Rose notes and mortgage. Each of the Tynons thus acquired an undivided one-seventh interest in the notes and mortgage.

Mrs. Lake was paid interest every six months by the bank, whether collected or not from W. J. Rose. The record shows that at times this interest was paid by Elizabeth Tynon as an officer of the bank. After the bank failed Mrs. Lake, for the first time, finds she has a third mortgage instead of a first mortgage. By receiving her interest regularly for years she was lulled into the belief that the proceeds of her bonds were at all times secure in a first mortgage, and having complete faith in the bank and Elizabeth Tynon, she relied on them with the childlike confidence of age.

The record convincingly shows that the officers of the bank took an unfair advantage of Mrs. Lake. Elizabeth Tynon, an active officer of the bank, with full knowledge of the situation, while acting for herself and others who gave her full authority to so act, gained, under the circumstances, the unfair advantage of a record preference over Mrs. Lake's mortgage, and comes into a court of equity, with her brother and sisters, seeking to confirm the priority of the Rose mortgage owned by the Tynons over the Rose mortgage owned by Mrs. Lake.

William A. Tynon, Katherine Tynon, Louise Tynon, Margaret Tynon, Rose Tynon, and Josephine Tynon Vance,

being the brother and five sisters who own six-sevenths of the Rose mortgage, had no knowledge of the acts of the bank officers and their dealings with Mrs. Lake. Each of these have the same equities as Mrs. Lake, and though in equity and good conscience, under the peculiar circumstances of this record, the priority of the one-seventh interest of Elizabeth Tynon in the Rose mortgage cannot be sustained, yet the brother and five sisters should be protected along with Mrs. Lake.

Upon a trial *de novo,* we reach the independent conclusion that the undivided six-sevenths interest of William A. Tynon, Katherine Tynon, Louise Tynon, Margaret Tynon, Rose Tynon, and Josephine Tynon Vance, the owners of the Rose mortgage, other than Elizabeth Tynon, and such portion of the Rose mortgage owned by Mrs. Lake as equals one-seventh of the Rose mortgage owned by the Tynons, should be and is found to be concurrent second liens. The balance due on the Rose mortgage owned by Mrs. Lake to be a third lien. Elizabeth Tynon's undivided one-seventh interest in the Rose mortgage to be a fourth lien.

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

REVERSED.

JOHN A. MUTCHIE, APPELLEE, V. M. L. RAWLINGS ICE COMPANY, APPELLANT.

FILED JANUARY 13, 1932. No. 28092.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY.** Employee instructed by the manager of his employer to make a delivery of ice informed such manager that he had not had his evening meal, whereupon the manager told him to make the delivery, take the truck and go home for dinner, and then return the truck to the plant. In returning the truck from plaintiff's home to the plant it collided with another automobile and employee was injured. *Held,* that such injuries arose out of and in the course of employee's employment.
2. ———: ———: **WEEKLY WAGE.** Where employee had been employed over a period of several months on the basis of a

weekly salary, and less than one month prior to the happening of an accident resulting in injuries to the employee in the course of his employment, his salary was changed from a weekly to an hourly basis, the court, in determining such employee's weekly wage, will use as a basis of calculation his earnings during as much of the preceding six months as said employee worked for such employer in the same character of employment. Comp. St. 1929, sec. 48-126.

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

Sanden, Anderson & Gradwohl, for appellant.

Perry, Van Pelt & Marti, contra.

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

LESLIE, District Judge.

This action is brought under the workmen's compensation act by appellee, hereafter referred to as plaintiff, against appellant, hereafter referred to as defendant.

The plaintiff alleges that defendant was engaged in the ice business in Lincoln, and that on September 18, 1930, and prior thereto plaintiff had been employed by defendant in making deliveries and doing common labor; that on the 18th day of September, 1930, he received personal injuries resulting from an automobile collision, and that said collision and resulting injuries arose out of and in the course of his employment by the defendant.

The defendant by its answer denies that the injuries plaintiff sustained arose out of and in the course of plaintiff's employment by the defendant, and also filed a counterclaim against the plaintiff for $44.01 paid to the plaintiff by the defendant under an alleged misapprehension of fact.

On a trial had before the district court on appeal from the compensation commissioner, the district court found for the plaintiff, and that the plaintiff was entitled to recover from the defendant $12 a week on account of total disability from the date of the injury to May 1, 1931, a

total of 32 weeks, and $9 a week for 183 weeks, "or for the balance of the total of 215 weeks." From this judgment the defendant prosecutes appeal to this court.

Appellant's brief presents two questions for consideration by this court: (1) Does the evidence establish that the injuries resulted from an accident arising out of and in the course of plaintiff's employment with the defendant? (2) If so, was the award to plaintiff warranted by the evidence?

On the night in question the truck in which plaintiff was riding, and which belonged to the defendant, collided with another car on Forty-eighth street, in Lincoln, as plaintiff and his son were returning to the defendant's place of business from plaintiff's home in Havelock. The plaintiff and his son, a boy between 15 and 16 years of age, had been working for defendant that afternoon, and as they were about to leave the plant, an order came in for a delivery of ice to a station at Twenty-seventh and R streets, which plaintiff and his son were directed to make. It appears from the evidence that after leaving the plant they drove to Twenty-seventh and R streets, where the ice was delivered, and then to plaintiff's home in Havelock for dinner. After dinner the plaintiff, his son, who was driving the truck, and several friends, left plaintiff's home to return the truck to the plant. In doing this, they traveled over the route ordinarily taken in going from his home to the place of business of the defendant.

There is considerable conflict in the evidence as to the conversation had between the plaintiff and Rawlings, president and manager of the defendant company, before the order for ice came in.

Plaintiff's testimony is merely that Rawlings requested him to make a delivery, and that plaintiff reminded Rawlings that he had not yet had his evening meal; that Rawlings told him he might go from the substation at Twenty-seventh and R streets to his home in Havelock for dinner, bring the truck and ice bills back, and finish up any work needed to be done at the plant.

Rawlings testified, in substance, that after plaintiff and his son had finished the day's work plaintiff asked him if he would loan him a truck to go home with, and that he told him he would do so. That at that moment Walker, an employee of defendant company, came from the office with an order for a load of ice to be delivered at Twenty-seventh and R streets, and that Rawlings requested plaintiff to take the load, saying to him: "It will not delay you much, and we will pay you for it."

It is defendant's contention that after the plaintiff delivered the load at Twenty-seventh and R streets he was using the truck in his own service and not in the service of his employer. Shortly after learning of the details of the accident, Rawlings made a statement in writing as follows:

"Shortly before 9 o'clock p. m. on September 18, 1930, while John and Orville were still working at my ice plant, a call came in from Mr. Johnson at our substation at 27th and R streets. Johnson desired some ice brought to his station. I asked John and Orville to make the delivery. Something was said by John Mutchie to the effect that he had not yet had his evening meal, and he asked my permission to go from the substation * * * to his home in the south part of Havelock for something to eat before bringing the truck to the ice plant at 601 J street. I gave him permission to do so. I have often permitted him to go home for a meal when he was somewhere in the vicinity of his home at meal time.

"I believe Mr. Mutchie said something about getting permission to keep the car at home that night instead of bringing it back to the ice plant. I think I told him he might do that if it was too late when he had finished the delivery and his evening meal, but I would much prefer that he bring the truck back to the ice plant. I believe I reminded him that it was our custom and rule to have all the company cars left at the ice plant every night. I sent both Orville and John on this delivery to 27th and R Sts., and expected them to bring the truck back to the ice plant along with the receipted delivery ticket. * * *

"The accident occurred about ten o'clock on the evening of September 18th, I believe. Shortly after the accident I was informed of it. A few days later I paid both Orville and John up to date, and paid them for work until eleven o'clock on the evening of September 18th, inasmuch as I considered that they were working for me at the time of the accident.

"(Signed) M. L. Rawlings."

It is of no consequence that plaintiff may have asked defendant, before the order came in, to permit him to take the truck for his own use for the evening. It is undisputed that the order came for the ice; that Rawlings directed plaintiff to make the delivery; that he authorized him to go from Twenty-seventh and R streets to his home in Havelock for his evening meal, and that he instructed him then to take the truck back to the plant.

Had the accident occurred between Twenty-seventh and R streets and plaintiff's residence, it is questionable whether plaintiff could be said to have been in the service of the defendant at that particular time. However, the accident occurred on Forty-eighth street, between plaintiff's home and the ice plant, where defendant had instructed plaintiff to return the truck. Not only had he instructed him to return the truck, but to resume his labors at the plant if there was anything to do.

At the time of the collision the son, also an employee of defendant, was driving the truck, but under the supervision of plaintiff, to whom Rawlings had given instructions to return the truck to the plant. Since the plaintiff took the truck out in the service of defendant, and was returning it to the plant over the route he had been directed by defendant to travel, obviously his injuries arose out of and in the course of his employment, it seems to us.

It remains to consider the award made to the plaintiff. He had been employed by the defendant since July 1. Prior to August 23 he was paid $20 a week. From August 23 to September 18 plaintiff was employed on a different wage schedule, though engaged in the same character of employ-

ment. Subsequent to August 23 he delivered ice for the defendant from one of its trucks afternoons, evenings and Sundays, and was paid 30 cents an hour. Forenoons he delivered ice with a truck which belonged to his brother, and claims that his compensation for his forenoon activities was on a commission basis. Plaintiff paid his brother for use of his truck, and after doing this, and making settlement with defendant, testified his net commission was $18 to $20 a week.

Defendant's contention is that plaintiff was an independent contractor, and that his income for the work he performed forenoons was profit rather than commission.

The trial court found that plaintiff, in the operation of his truck forenoons, was an independent contractor, and we think the evidence supports this finding. The burden was upon the plaintiff to establish his agreement with the defendant, and the record, as we view it, does not show any contract between plaintiff and defendant with reference to plaintiff's employment by defendant forenoons. There is evidence that he got his ice from defendant, that defendant directed the route plaintiff should cover and the price that should be charged for ice sold, but this is insufficient to establish a contract of employment between the parties.

The trial court awarded plaintiff $12 a week on account of total disability from the date of the injury to May 1, 1931, or for a period of 32 weeks, and found that from May 2, 1931, plaintiff was entitled to 75 per cent. of $12, or $9 a week, "for 183 weeks, or for the balance of the total of 215 weeks." The defendant urges that the evidence does not justify an award on the basis of $18 a week, that $10.50 is the maximum that can be used as a basis for compensation. That is true if we consider only what was paid to the plaintiff during the month immediately preceding the accident. However, the law under which this action is brought provides:

"In continuous employments, if immediately prior to the accident the rate of wages was fixed by the * * * hour, * * * his weekly wages shall be taken to be his average

weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer." Comp. St. 1929, sec. 48-126.

Using as a basis for calculating plaintiff's earnings during the period of time he was employed by defendant from July 1 to September 18 we find it to have been approximately $18 a week, as the trial court found.

There seems to be no controversy as to the number of weeks (32) plaintiff was totally disabled, nor that defendant paid three weeks' compensation prior to commencement of this proceeding. No finding was made by the trial court as to the extent, or probable duration, of plaintiff's temporary partial disability.

Dr. George A. Lewis testified May 30, 1931, that his examination of plaintiff following the accident disclosed fractures of the tibia and fibula of the right leg, fracture of the right arm, and injury to the chest and back, and that he was at that time unable to do manual labor. When asked whether he had an opinion as to how long it would be before the leg would be all right again, he testified it would be mere speculation on his part, that the ultimate outcome would be speculative as to time.

Dr. Hollenbeck, another of plaintiff's physicians, testified on the same day that plaintiff was not then able to do full manual labor; that he was 75 per cent. disabled from manual labor; that his total disability ceased about May 1.

It is not contended by plaintiff that his injuries are of a permanent character. Section 48-121, Comp. St. 1929, provides:

"(1) For the first three hundred weeks of total disability, the compensation shall be sixty-six and two-thirds per centum of the wages received at the time of the injury. * * *

"(2) For disability partial in character * * * the compensation shall be sixty-six and two-thirds per centum of the difference between the wages received at the time of

the injury and the earning power of the employee * * * during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability."

We find no error in the judgment of the district court as to the amount of the award. It is not denied that plaintiff was totally disabled for a period of 32 weeks. His wages being $18 a week at the time of the accident, under the provisions of subdivision 1, sec. 48-121, Comp. St. 1929, the plaintiff was entitled to $12 a week during 32 weeks of total disability. According to the evidence of Doctors Lewis and Hollenbeck, plaintiff was partially disabled at the time of the trial to the extent of 75 per cent. They gave it as their opinion that this partial disability was temporary in character, but were unable to express an opinion as to the time over which it would extend. Subdivision 2, sec. 48-121, Comp. St. 1929, provides that for disability partial in character, the compensation shall be 66 2/3 per cent. of the difference between the wages received at the time of the injury and the earning power of the employee at the time the award is made. If plaintiff's disability was 75 per cent. and his wages at the time of receiving the injury were $18 a week, the difference between the wages he was receiving at the time of the injury and his earning power at the time of the trial was $13.50; two-thirds of this is $9, which was the award made by the lower court for the period following the total disability. The judgment of the lower court is correct as to the amount plaintiff was entitled to on account of total disability, and as to the amount to be paid to him during the period of temporary partial disability following total disability, but was in error in directing that it be paid over a period of "183 weeks, or for the balance of the total of 215 weeks." Plaintiff's claim for temporary partial disability is determined by subdivision 2, sec. 48-121, Comp. St. 1929, which provides that it shall be "during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing dis-

ability." The language of the decree was probably due to inadvertence, whoever prepared it having in mind the provisions of subdivision 3, sec. 48-121, Comp. St. 1929, which has to do with loss of a leg.

The decree of the trial court is affirmed in all particulars except as to the period of time during which plaintiff is entitled to compensation on account of temporary partial disability. The cause is remanded, with instructions to modify the original decree to conform to the views herein expressed.

Plaintiff's attorneys will be allowed a fee of $200 on account of services in this court.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

GEORGE DORAN V. STATE OF NEBRASKA.

FILED JANUARY 22, 1932. NO. 28077.

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

Herbert W. Baird, 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.

PER CURIAM.

This is a writ of error to the district court for Lancaster county. The plaintiff in error, George Doran, hereafter called the defendant, was convicted of a first violation of the liquor law, and was sentenced to pay a fine of $100 and serve 60 days in the county jail.

The offense on which defendant was tried and convicted is described in the charging part of the complaint as follows: "George Doran on or about the 16th day of April,

1931, * * * did * * * unlawfully and wilfully have intoxicating liquor in his possession with intent to sell or dispose of the same." This language clearly, directly and unambiguously charges the offense of unlawful possession of intoxicating liquor, as defined and described in section 53-111, Comp. St. 1929. For this offense the authorized punishment is a fine of $100 *or* imprisonment in the county jail not less than 30 nor more than 60 days. Comp. St. 1929, sec. 53-151.

It being clear that the error in the sentence is the only error upon which this case should be reversed, however, there is ample authority for remanding the case for a resentence of the prisoner in accordance with section 53-151, Comp. St. 1929.

This court held in *Knothe v. State,* 115 Neb. 119, that the attempt to impose both a fine and a sentence in excess of its powers renders such sentence wholly void, and that a void sentence is no sentence.

The judgment of the district court is therefore reversed and the cause remanded to the district court, with instructions to pronounce sentence in accordance with the law.

REVERSED.

BLANCHE L. SHURTLEFF, APPELLEE, V. BANKERS NATIONAL LIFE INSURANCE COMPANY ET AL., APPELLANTS.

FILED JANUARY 22, 1932. No. 28089.

1. **Statutory Provision.** "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.
2. **Evidence** examined, and *held* to support the judgment of the trial court.

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

G. E. Hager, for appellants.

John J. Ledwith, contra.

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

PER CURIAM.

This is an action at law by Blanche L. Shurtleff, appellee, hereinafter referred to as plaintiff, on a life insurance policy issued upon the life of her husband, Milburn C. Shurtleff, by the Bankers National Life Insurance Company, a Colorado corporation. The policy was a term policy, without cash or surrender value. The risk was reinsured by the Bankers National Life Insurance Company, a New Jersey corporation. There was a trial to the court, a jury being waived, resulting in a judgment for plaintiff. From the order overruling their motion for a new trial, the defendant corporations appeal.

There are substantially two questions presented by this record; one the action of the trial court in permitting an amendment to the pleadings by plaintiff, the other being whether the evidence presented to the trial court is sufficient to sustain the judgment.

The first amended petition of the plaintiff may be said to be in the usual form, and in it plaintiff alleged "that all of the conditions of said insurance policy were fully performed." This allegation was traversed by the defendants in their answer. They specifically alleged, in substance, the nonpayment of the quarterly premium due November 16, 1929; alleged that the insured gave his negotiable promissory note to the Colorado corporation on or about the 17th day of December in payment thereof, which was not in accord with the terms of the policy; that the defendants refused to receive the tendered note and immediately returned the same to deceased, and that on the 22d day of December, when the assured died, the insurance contract was not in force. By reply the plaintiff alleged facts which were claimed by her to establish that the defendants, by long, continued custom and practice of accepting the promissory notes of the insured in payment of premiums due on the policy in suit, had waived the payment of the premiums in cash, and were estopped to claim forfeiture

of the policy by reason of the failure of the insured to pay said premium in cash.

The defendants promptly moved to strike out the new matter contained in plaintiff's reply. The district court failed to rule on this motion, and proceeded with the trial. The defendants throughout the record preserved their rights by appropriate objections to evidence offered by plaintiff, which were overruled. After all the evidence adduced had been received, arguments had, and cause submitted to the court, the plaintiff filed a motion to set aside the rest and for leave to amend the pleadings to correspond to the proof in said action. This motion the trial court, over objections of the defendants, sustained. Plaintiff thereupon filed a second amended petition, setting forth therein the allegations that prior thereto had been contained in her reply, and thus, by amending, meeting the objections made by defendants to the former pleadings. To this pleading the defendants filed an amended answer, and to this amended answer thus filed plaintiff replied. The defendants challenge these proceedings as erroneous.

In the order of the trial court of December 13, 1930, setting aside the submission and permitting the filing of the amended pleading, it is set forth: "The new matters pleaded in the reply were, in substance, waiver and estoppel. The court is of the opinion that the matter pleaded should, in fact, have been alleged in the petition, and, inasmuch as detailed evidence was offered and received upon both of these questions, that a retrial and reproduction of all the same evidence would be an unnecessary consumption of time of both counsel and court. It is therefore ordered that the motion of the plaintiff to amend the petition by setting up the facts pleaded in the reply be sustained, and that the defendant be given leave to amend his answer thereafter, if desired, and that the defendant also be given leave to introduce such new evidence as it may desire. It is ordered that the plaintiff shall comply herewith within seven days and that the defendant be given until January 1st, 1931, to answer or plead to said amended petition."

The record thus discloses that by the order, quoted in part, as well as in the subsequent proceedings had, the substantial rights of the defendants were fully protected, and ample opportunity given to present their case under the amended pleadings. The statute controlling the disposition of assignments of error under consideration is: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.

On the merits, the insurance companies base their defense on the fact that a quarterly premium falling due on November 16, 1929, was not paid in cash on that day, or within 31 days thereafter. The policy in suit provides: "All premiums shall be payable in advance, * * * The payment of any premium or instalment thereof shall not maintain this policy in force beyond the date when the next premium or instalment thereof is payable." And "A grace of thirty-one days, without interest charge, shall be granted for the payment of every premium after the first." It is conceded in the record, however, that on the 14th day of December, 1929, and within the grace period, the assured executed a promissory note for the amount of the unpaid premium in the exact form as had been accepted by the company for the previous quarter, and forwarded the same to the home office of the company by mail. This premium note was there received by the company on the 16th day of December, 1929. In a letter dated December 17, 1929, this tendered note was returned by the company to the assured, their letter of transmittal stating: "This will acknowledge receipt of your note of $85.40, which we find it necessary to return to you because it is not on the form used by this company. We are also inclosing a new renewal premium note as is used by this company, together with a reinstatement blank because the grace period of your policy expired on November 16, 1929." It is conceded that the statement with reference to the expiration of the grace

period is an error. The "new renewal premium note," referred to in the company's letter and inclosed with it to the assured, was on the company's blank form, made out and ready for the assured's signature. The due date, amount and rate of interest on this instrument were evidently intended by the insurance company to be identical with the note tendered by the assured. It was received by the assured on December 20, immediately prior to the attack of illness in which he died. Evidence in the record justifies the conclusion that during the life of the policy in suit, excluding the first two payments (which were annual payments) and the one in controversy, the quarterly payments of premium on this policy were made as follows: Four were paid in cash, eleven by check, one by telegram, and four by promissory notes. From and including the first payment made by promissory note (6-13-27) to the transaction in suit, nine payments had been made, four of which were by use of promissory notes and five by check, and in the tenth and last transaction the defendant companies did not deny the right of the assured to pay by note, but their letter expressly approves a note on their own form intended to be substantially in accord with the note tendered by the assured, save as to certain provisions with reference to the consideration which were admittedly additional to the forms theretofore in use by the parties. We are not referred to any evidence of special negotiations had between the parties preceding the employment of any of the notes referred to in the record. The assured was himself engaged in the insurance business, and like the officers of defendants presumably was familiar with the customs therein, and, in reliance on that fact, each of the four notes used in satisfaction of quarterly premiums was apparently made, tendered, accepted, and employed by all in a manner quite consistent with a known, established course of business between the parties in this case. It is admitted in the evidence that the insurance companies were acquainted with the assured's financial standing, and understood that he was worth $25,000. And it is also an admitted fact that

the form of promissory note insisted upon by the insurance company was the result of some sort of an agreement between the executive officers in charge of the company's business, arrived at during the previous October, and had never before been required of the assured by the organization. Of this change in form of the renewal premium note, it is evident the assured had been given no notice, and had no actual knowledge. The controlling question, therefore, is: Does the evidence disclose an established course of business between the parties to this policy which the company violated?

"Forfeitures are not favored in the law; and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Hartford Life & Annuity Ins. Co. v. Eastman,* 54 Neb. 90. The defendants, conceding this principle, insist that the controlling rule is: "Evidence of the acceptance of one single overdue premium or assessment, or of a few separate instances, is insufficient of itself to establish a waiver of forfeiture claimed for nonpayment of a subsequent premium or assessment. * * * The rule stated in a prior section presupposes such an habitual and uniform custom as to warrant the presumption that the insured was justified in believing that he could safely delay payment, notwithstanding the terms of his contract; such custom as is shown by an examination of the cases may have extended over a number of years, and the instances may not have occurred consecutively, * * * or there may have been several consecutive instances immediately preceding the time of payment of the last premium or assessment, so those paid

when overdue may have sustained such a proportion to the whole number of payments during a given period of time as to warrant the presumption of a waiver." 3 Joyce, Law of Insurance (2d ed.) sec. 1368. In view of the admitted facts of the record, including the failure of the company to object to any of the tendered notes because they were not cash, and also the fact that it objected to the last note tendered solely because it was not a note on the company's form, a requirement of which the assured had no notice, we find the evidence is ample to sustain the conclusion that, under the course of business established, the assured was, in the instant case, justified in believing that by conforming thereto the forfeiture of his policy would not be incurred.

It follows, therefore, that the action of the trial court was correct, and its judgment is

AFFIRMED.

WILLIAM HARRY GILBERT, APPELLEE, V. WELCH RESTAURANT COMPANY: CITY OF OMAHA, APPELLANT.

FILED JANUARY 22, 1932. NO. 27970.

1. **Municipal Corporations**: INJURIES TO PEDESTRIANS: LIABILITY. A defective billboard erected on the top, and close to the side, of a two-story building cannot be designated a defect in a street or sidewalk within the meaning of sections 14-801 and 14-802, Comp. St. 1929, providing that a city of the metropolitan class shall be exempt from liability for personal injuries arising by reason of defective public ways or sidewalks, unless notice of such defective condition shall have been given within five days before the accident.
2. ———: ———: ———. A city of the metropolitan class will not be relieved from liability arising from injuries sustained by a pedestrian when a defective billboard fell from the top of a two-story building striking him and thereby inflicting serious and permanent injuries upon his person, when the record discloses that the defective condition of the billboard could have been discovered by the exercise of ordinary care and diligence on the part of the proper officers of the city.
3. **Evidence** examined, discussed in the opinion, and *held*, that the verdict is not excessive.

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

John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien and *Bernard J. Boyle,* for appellant.

Mullen & Morrissey, James H. Hanley, Paul P. Massey and *Arthur Mullen, Jr., contra.*

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

DEAN, J.

This is a personal injury action from Omaha wherein William Harry Gilbert alleged that on or about December 19, 1929, an electric display sign or billboard fell from the top of a two-story building to the sidewalk, striking him and thereby inflicting severe and permanent injuries upon his person. The building was owned by Gertrude M. Welch and George Seletos, and was then occupied by the Welch Restaurant Company. The city of Omaha was joined in the action as a party defendant. Subsequently a settlement for $14,000 was effected as between Gilbert and the defendants Gertrude M. Welch, George Seletos, and the Welch Restaurant Company. Thereupon the action proceeded as against the city of Omaha alone. Upon submission the jury returned a verdict for $6,500 in favor of the plaintiff. The city has appealed.

Counsel for the city contend that a defective structure on private property is not a defect in a public highway giving rise to municipal liability for injuries. Section 14-801, Comp. St. 1929, so far as applicable here, provides that no city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks, or other public places, unless notice of the nature and extent of the injuries shall have been given to the city within ten days after the injuries were incurred. It may here be observed that notice of the plaintiff's injuries was given to the city within the time above pointed out. And section 14-802, Comp. St. 1929, provides that cities of the metropolitan

class shall be exempt from liability for damages for injuries by reason of defective public ways or sidewalks, unless notice of the defective condition shall have been filed with the city authorities within five days before the accident. No notice was given in the present case of the defective condition of the billboard prior to the accident.

It may be noted that the defective condition of the billboard, owing to its elevated condition, was not perceptible to the public generally as a menace to pedestrians. Nor does it appear that the billboard constituted a defect in the street or sidewalk within the meaning of the above cited sections of the statute requiring notice of such defect. It has been held: "Objects which have no necessary connection with the roadbed or relation to the public travel thereon, and the danger from which arises from mere casual proximity and not from the use of the road for the purpose of traveling thereon, will not as a general rule render the road defective." *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718. See *Andresen v. Lexington*, 240 Mass. 517; *Bohm v. Racette*, 118 Kan. 670. See, also, *Muffley v. Village of St. Edward*, 110 Neb. 572; *Lund v. City of Seattle*, 99 Wash. 300; *Langan v. City of Atchison*, 35 Kan. 318. And it is elementary that it is the duty of municipal corporations to maintain its streets in a safe and proper condition for pedestrians, and this duty extends to such dangers as are contiguous to such streets. *Town of New Castle v. Grubbs*, 171 Ind. 482.

It does not appear that any permit was ever issued at any time by the city for the erection of the billboard in question here. Nor does it appear that the billboard was inspected at the time of its erection or at any time thereafter. But the fact that the city authorities did not know of the faulty condition of the billboard does not relieve the city from liability in the premises. In *Shippey v. Kansas City*, 254 Mo. 1, the city was held liable for injuries resulting from negligence in its failure to repair a defective billboard, "when it had timely notice of, or by the use of ordinary care and watchfulness could have discovered, the

defect in time to have prevented the injury" there complained of. And it was also held in the *Shippey* case that the city was not to be relieved from liability through negligence on the part of the proper officer to make a sufficiently frequent examination of the billboard to have discovered the defect in time to prevent the accident. We have held: "The making, improving, repairing, keeping in repair and in a safe condition, of streets and sidewalks by a municipal corporation relate to its corporate interests only, and it is liable for the wrongful or negligent acts of its agents in performing such duties." *Tewksbury v. City of Lincoln*, 84 Neb. 571. See *Sheets v. City of McCook*, 95 Neb. 139.

There is evidence tending to prove that the billboard here in question was insecurely fastened and that the braces were decayed and rotted. But the city complains of the admission of evidence in respect of the condition of the billboard, for the reason that it is alleged the city had no knowledge of any investigation nor was it ever advised in respect of the result of any inspection thereof. It appears, nevertheless, that a sign painter testified that, in the year prior to the accident herein, he refused to paint the billboard in suit, for the reason that it was impossible, owing to the decayed condition of the billboard, to safely and securely fasten a scaffold thereon. The evidence of this witness was clearly admissible from the fact that it fairly disclosed the decayed condition of the billboard. *Bemis v. City of Omaha*, 81 Neb. 352. The city contends that the defect in the construction of the billboard may have been latent and may not have been discovered had an inspection thereof been made. But, even if an inspection of the billboard had not revealed its true condition, the question was nevertheless one for the jury. We do not think the court erred in admitting the evidence in respect thereof. It does not appear to us that the city should be relieved from liability herein; and this from the fact that the defective condition of the billboard could have been discovered by the exercise of ordinary care and diligence on the part of the proper officers of the city in the inspection thereof.

The city complains that the verdict is excessive and that the settlement between the plaintiff and the defendants Welch, Seletos, and the Welch Restaurant Company sufficiently compensates him for his injuries. It is to be noted, however, that the plaintiff at the time of the accident was 27 years of age, married, and the father of two infant children. From the testimony of his physicians, it appears that the plaintiff's injuries are of a permanent nature. The record discloses that his skull was fractured, and that the bones were shattered and driven into his brain, from which fragments were removed. A considerable area of the brain is now exposed without covering, thereby causing a delicate condition. It also appears that the plaintiff's jaw bones were badly crushed and that it became necessary to replace some of his teeth which were out of alignment. The bones in the back of his left hand were broken, and his left knee also was broken, and the plaintiff will be unable to do any manual labor in the future. We do not think, in view of the record, that the verdict is excessive.

The city also makes this contention, namely: "With the theory of liability for failure to abate a nuisance withdrawn, the trial court substituted a theory of liability for negligence not involved in the petition and wrongfully submitted said theory to the jury." The petition, however, alleges that the city negligently permitted the billboard in question to remain in the unsafe condition and that the billboard therefore constituted a nuisance. Upon an examination of the petition, we do not think there is merit in the contention of the city, nor do we find that the court erred in submitting the question of negligence of the city to the jury.

The judgment is

AFFIRMED.

LOUIS RICHTMYER, APPELLEE, V. MUTUAL LIVE STOCK COMMISSION COMPANY, APPELLANT.

FILED JANUARY 22, 1932. No. 27867.

1. **Conversion**: MEASURE OF DAMAGES. In an action for conversion, the value of the property at the time and place of conversion, with interest from that time, is generally the measure of damage.
2. ———: ———: PLACE OF CONVERSION. Where property has been stolen from the owner, removed and soon thereafter consigned by the thief to a commission merchant who, without notice or knowledge that the property was stolen, received and disposed of the same in the usual course of business and was thereupon sued for conversion, the time and place of conversion which controls the value in such case is that of the receipt and disposal of the property by the commission merchant.
3. ———: ———: ———. In the instant case, evidence of the value at either the place of the original taking or of the disposal seems relevant.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Daniel J. Gross and *Ivan D. Evans, contra.*

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

BLACKLEDGE, District Judge.

This action is by the plaintiff, appellee, for the conversion of certain cattle which were stolen from his ranch in Cherry county; and its object, to recover the value of the cattle from the defendant, which as a live stock commission merchant, some seven days after the theft, received the cattle at Omaha on shipment from the thief, and sold them in the usual course on the market.

In the briefing and submission of the case in this court, all assignments of error are eliminated except the one which involves the proper measure of damage to be applied in the case.

The defendant contends that, the jury having found for plaintiff upon the identity of the cattle, it is liable to plaintiff in some amount, as having handled and disposed of the stolen property, but insists that the value for which it may be held to account is that in Omaha where it received and dealt with the property. It claims to have acted innocently and in good faith, without knowledge of the prior theft and conversion; and this fact is conceded by plaintiff, who states in his brief: "We wish to make it clear that we do not charge the defendant with any culpability."

The plaintiff contends, and the trial court adopted the theory, that the proper measure of damage was the value of the cattle in Cherry county at the time of the original taking by the thief, with interest from that date. Evidence was either received or excluded in the trial in accordance with that theory, and the jury were so instructed.

The cattle were pure bred registered Herefords, valuable for breeding purposes. They were sold on the market as ordinary beef cattle, netting the shipper some $1,000. Their value as pure breds in Cherry county is amply sustained by the evidence at $3,500, which the jury found. The defendant was not permitted to show the value of such cattle at Omaha.

Both parties concede that the general rule for the measure of damages for conversion is the value of the property at the time and place of conversion, with interest from that date. Here they part company, however, and each seeks to apply that statement, as an unbending and all-inclusive rule, to the facts of his own case. Plaintiff urges that his loss occurred at the original taking, and that this unalterably fixes the time and place governing the value to be allowed, regardless of the remoteness of time or place when and where they came into possession of defendant, or of the innocence or culpability of the defendant, who had no part in the original taking and became liable solely by having, in the usual course of business, handled and disposed of the stolen property, and regardless also of the condition or value of the property at the time defendant came into possession.

Plaintiff further urges that, in receiving the cattle consigned to it by the thief, defendant became the agent of the thief and so liable in the same measure as would be the original taker as principal; and that the taking of the cattle by Gross, his shipment of them to defendant at Omaha, and their subsequent sale and remittance of the proceeds were all consecutive steps in the conversion, the sale by defendant being merely the completion of the acts that constituted the conversion. The infirmity in this argument so far as concerns plaintiff's case is that it proves too much to result in any strengthening of plaintiff's position. For, if these were successive steps in the one conversion and the final sale the completion thereof, it necessarily follows that it, being made in Omaha, the time and place of that act, as well as the acts in Cherry county, must be considered in the application of the rule of damage. There is some merit in defendant's argument that it should not, as agent, be chargeable with acts of which it knew nothing, and which took place before any agency was, or under the facts in this case could have been, created.

That the general rule hereinbefore stated of the measure of damages for conversion is the law of this state, there can be no doubt. 26 R. C. L. 1147, sec. 61; 26 R. C. L. 1148, sec. 63; *Bennett v. McDonald,* 59 Neb. 234; *Woodworth v. Hascall,* 59 Neb. 124; *Halbert v. Rosenbalm,* 49 Neb. 498; *Kasper v. Walla,* 49 Neb. 288; *Carpenter v. Lingenfelter,* 42 Neb. 728; and many other cases.

It does not follow, however, that it is so unyielding and all inclusive that no account should be taken of the facts attendant upon the conversion, the entrance of defendant into the zone of liability, or the location or condition of the property at that time. Courts have often considered the condition of the converted property as it came into the hands of the defendant, and, upon comparison with its condition when originally taken, modified the measure of damage as it is hereinbefore stated. This has generally occurred in cases wherein the property had been increased in value by some process of trade or manufacture. In

some instances the plaintiff was awarded the value as increased, upon the ground that it was made by the wrongdoer himself who should not be permitted to thus profit by his own act and in effect compel an involuntary sale by plaintiff. *Wooden-Ware Co. v. United States*, 106 U. S. 432. In *Pine River Logging & Improvement Co. v. United States*, 186 U. S. 279, it is said: "The cases involving this distinction and in line with the *Wooden-Ware* case are abundant, both in the federal and state courts, and are too numerous even for citation."

In many cases the courts rest a distinction upon the ground that the defendant, not being an intentional wrongdoer, came innocently into possession of the property, and allow the defendant credit for any increase in value contributed by him, although holding him to account for the condition of the property as it came into his hands. *Winchester v. Craig*, 33 Mich. 205; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629; *Silsbury v. McCoon*, 3 N. Y. 379; *Stuart v. Phelps*, 39 Ia. 14. In *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189, it is said: "The sale of the wheat was its actual conversion by the defendant, and its value at that time, in the form in which he sold it, was the measure of damages, if the plaintiff was content therewith; though we think he was entitled to the highest price of the property at any time between the taking and the sale."

This court, as stated in the opinion by Letton, J., in *Clay v. Palmer*, 104 Neb. 476, has adopted a slight modification of the rule in *Wooden-Ware Co. v. United States*, 106 U. S. 432, and follows that of *Carpenter v. Lingenfelter*, 42 Neb. 728, to the effect that the original value only is to be given the owner, regardless of whether the increase was made by a wilful wrong-doer or by one in good faith.

In *Potter v. United States*, 122 Fed. 49, Sanborn, J., in discussing the matter of damages and the bad or good faith of the purchaser who had been sued, says: "The measure of damages for the conversion by an innocent purchaser from a wilful trespasser is the value of the property converted at the time of the purchase."

A number of Nebraska cases, in addition to those herein noted, have been cited in the briefs of counsel. None of them determine a situation as between the owner and an unintentional wrong-doer. They all were suits against the original wilful trespasser. No case has been cited to us which involves a decrease in the value of the property after the taking or at the time it reached the hands of defendant who is called upon to account, and a rather diligent search has failed to discover any judicial determination of that question.

Examination of the precedents does disclose, however, that the inquiry as to the value of the converted property is by no means limited to the immediate time or place of the original taking, but is to be governed largely by the facts of the particular case on trial. Whatever distinctions may be drawn by or from the *Wooden-Ware* case, and later adjudications by that court, they do approve inquiry as to value at a time and place more or less remote from the original taking. The same is true as to the cases cited from Michigan and Indiana, and is recognized in *Wallingford v. Kaiser,* 191 N. Y. 392, 123 Am. St. Rep. 600. In *Alexander v. Swackhamer,* 105 Ind. 81, 55 Am. Rep. 180, the court recognized the act in which the defendant actually participated, after the original taking, as constituting the ground for recovery. Alexander & Company innocently came into possession of cattle which had been fraudulently obtained from the owner. The court say: "When therefore Alexander & Company sold the cattle, they sold the property to which the plaintiff had a perfect title, and when they received the proceeds of such sale they received money which belonged to the plaintiff. This amounted to a conversion of the plaintiff's property for which they were liable." And although the value of property at the time of conversion is generally the measure of damage in such cases, to ascertain that value, however, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible. *Austin v. Vanderbilt,* 48 Or. 206, 120 Am. St. Rep. 800. See 26 R. C. L. 1147, sec. 61.

The court must consider here the rights of the two parties, each without culpability, in relation to the facts upon which the case rests. The plaintiff should of course have full recovery for the loss at the time sustained; and so he would if his suit ran against the original taker. The original taker is not a party to this action. The defendant became unwittingly involved by the circumstance of having dealt with and disposed of the property. If the property was of less value when and where defendant got it, one of two innocent parties must suffer loss. A fixed rule of law for the protection of property owners puts upon one so dealing with stolen property the duty, no matter how innocently he dealt, to account to the true owner for its value. Upon what theory of substantial justice can either of these be entitled to preferential treatment at the hands of the court? Upon what theory of right shall the defendant, without culpability itself, but bound nevertheless to render to the true owner the value of the property in which it dealt, be required to submit to an additional penalty for the wrongful act of another in which it had no part? It is presumed of course to know the value of the property in which it dealt at the time and place it got it, and to take the risk of dealing with the lawful owner; but by what just means can it be held further chargeable with knowledge of, or liability for, an additional value that it could not see and did not know, and which was not in fact then in the property?

This all leads to the conclusion that in such cases "the time and place of conversion" to be considered, and which controls on the question of value, is that fixed by the acts of the defendant in its dealing with the property, rather than the original taking in which defendant had no part. The trial court was in error in excluding evidence as to the value of the property at Omaha, and in instructing the jury that the value in Cherry county on the date of the theft was the only value to be considered. This gives to the plaintiff full compensation for his loss in so far as the defendant had any connection with it, holds de-

fendant responsible for the full value of that in which it dealt, without attaching additional penalty for the acts of another, and seems to us a just and salutary rule.

It is not to be understood, however, that the value of the property in Cherry county, so recently before the conversion by defendant, becomes immaterial in the case. The limits of the inquiry should not in this case be so confined. The value there at that time might well tend to show the value on shipment to Omaha. Also whether the cattle in question were pure breds or only beef cattle was one of the issues in the case. We judicially know the relative location of the counties and cities in the state and approximate distances and the general routes of travel; and that Omaha is the principal live stock market in the state and probably the one most accessible from Cherry county. It seems reasonable that in this investigation the values at either place would be relevant in fixing the actual value of the property at the time and place of the acts of the defendant in relation thereto.

For the reasons stated, the judgment of the district court is reversed and a new trial awarded.

REVERSED.

EMMA CORR, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JANUARY 22, 1932. NO. 27965.

Appeal: REMITTITUR. On appeal in an action for damages, a judgment on a verdict which the clear preponderance of the evidence shows to be excessive may be reversed unless appellee files a remittitur for the excess.

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

John F. Moriarty, Bernard J. Boyle and *Thomas J. O'Brien,* for appellant.

O'Sullivan & Southard, contra.

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

CHAPPELL, District Judge.

The City of Omaha appeals from the verdict of a jury and a judgment rendered thereon awarding appellee, Emma Corr, $9,500 as damages for the appropriation of certain real estate belonging to appellee for the purpose of extending its system of parks and boulevards.

The only assignments of error relied upon in this court are (1) that the verdict is not sustained by sufficient evidence; (2) that the damages are excessive.

Ordinarily, the damages are for the determination of the jury, and it is with the greatest reluctance the courts will, in a manner, substitute their judgment for that of a jury. However, at an early period this court said: "To justify an interference with the finding of a court or jury, the preponderance of evidence must be clear, obvious and decided; but when the preponderance is so great, it is the duty of the reviewing court to correct the mistake." *Fried v. Remington,* 5 Neb. 525. This court has consistently adhered to that position, and only recently has said: "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted." *Bentley v. Hoagland,* 94 Neb. 442; *Stewart v. City of Lincoln,* 114 Neb. 362. In the case of *Stewart v. City of Lincoln, supra,* Morrissey, C.J., in his opinion, says: "This court may be reluctant to disturb the findings of a jury, nevertheless, it has never refused so to do, where to sustain the verdict palpable injustice would result."

This court and courts in other jurisdictions have said that when a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the sense of justice and raises at once a strong presumption that it is based on prejudice, passion, or mistake, rather than on sober judgment, the appellate court should not hesitate to set it aside or direct a remittitur, even though the trial court has refused to do so. 2 R. C. L. 199, sec. 170; *Kurpgeweit v. Kirby,* 88 Neb. 72; *Garfield v. Hodges & Baldwin,* 90 Neb. 122; *Tyler v.*

Hoover, 92 Neb. 221; *Burge v. Adams Co.*, 98 Neb. 4; *In re Estate of O'Connor*, 105 Neb. 88; *Trute v. Holden*, 118 Neb. 449; *Wiles v. Department of Public Works*, 120 Neb. 689.

Without setting forth the evidence in detail or commenting particularly thereon, it is the opinion of this court, after careful examination of the evidence and the authorities, that a clear preponderance of the evidence shows that damages in the sum of $9,500 are excessive to the extent of $3,000.

For the reason above stated, the judgment should be reversed, and this will be done unless the appellee shall, within 30 days, remit the sum of $3,000, leaving a judgment for $6,500.

AFFIRMED ON CONDITION.

CHARLES F. BARTH ET AL., APPELLANTS, V. LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLEE.

FILED JANUARY 22, 1932. No. 27730.

1. **Quære.** Whether a motion for a new trial is a prerequisite to an appeal to the supreme court from an order of the state railway commission, *quære?*
2. **Appeal: TIME.** Time for perfecting an appeal to the supreme court from an order of the state railway commission cannot be extended by the filing of a motion for a new trial out of time.
3. ———: JURISDICTION. To give the supreme court jurisdiction on appeal from the state railway commission, a transcript of its proceedings must be filed within three months from the date of the final order.

APPEAL from the State Railway Commission: *Appeal dismissed.*

J. J. Thomas, Charles F. Barth, C. A. Sorensen, Attorney General, and *Hugh La Master*, for appellants.

Woods, Woods & Aitken, contra.

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

HORTH, District Judge.

The Lincoln Telephone & Telegraph Company, a Nebraska corporation, appellee herein, filed its application with the Nebraska state railway commission for authority to place into effect a revised and advanced schedule of rates at its telephone exchange in the city of Seward, after rebuilding its plant and converting the same from a manual to an automatic system.

Charles F. Barth and Harry A. Cummins and the Seward Chamber of Commerce of Seward, Nebraska, for themselves and others similarly situated, appellants herein, appeared informally at the hearings before the railway commission upon the application of the appellee, made written requests for the production of certain records of the appellee, cross-examined witnesses produced by the appellee in support of its application, called and examined witnesses in their own behalf, and after the railway commission had entered an order, under date of June 16, 1930, authorizing appellee to publish and collect a revised and advanced schedule of rates for automatic telephone service at the Seward exchange, appellants, under date of June 21, 1930, filed with the railway commission a motion for new trial and rehearing, which was on the 15th day of August, 1930, overruled by the railway commission. Appellants thereupon gave notice of appeal, and for the purpose of perfecting the same, and under date of October 1, 1930, filed with the clerk of this court their transcript.

The dates above given are material, for it is the contention of the appellee that appellants did not file their transcript with the clerk of this court within the time fixed by statute, and that by reason thereof this court has no jurisdiction to hear or consider the case, and it is this challenge to the jurisdiction of the court that first demands our attention.

The order of the state railway commission from which this appeal is undertaken bears date June 16, 1930. The motion for a new trial was filed June 21, 1930, and the transcript was filed with the clerk of this court on October

1, 1930. The law providing for appeals from orders and decisions of the state railway commission is set forth in section 75-505, Comp. St. 1929, and, in so far as it is material to the question here involved, reads:

"The procedure to obtain such reversal, modification or vacation of any such order or regulation made and adopted, upon which a hearing has been had before the commission, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district court to the supreme court of Nebraska. The evidence presented before the railway commission, as reported by its official stenographer and reduced to writing, shall be duly certified by the stenographer and the chairman of the railway commission as the true bill of exceptions, which, together with the pleadings and filings duly certified in the case under the seal of the railway commission, shall constitute the complete record and the evidence upon which the case shall be presented to the appellate court: Provided, however, the time for appeal from the orders and rulings of the railway commission to the supreme court shall be limited to three months."

When a motion for a new trial is a necessary step to perfect an appeal from the district court to this court, such motion, when no question of newly discovered evidence is involved, must be made within three days from the date the decision is rendered unless "unavoidably prevented." Comp. St. 1929, sec. 20-1143. Appellants seek to avoid the delay in making their motion for new trial within the time prescribed by law, by filing herein, on May 19, 1931, a supplemental transcript, by leave of court, consisting of an affidavit reading as follows:

"State of Nebraska, }
County of Seward. } ss.

"I, Chas. F. Barth, being first duly sworn on oath depose and say that I was one of the attorneys for the Seward Exchange subscribers.

"That I appeared in said proceeding for and on behalf of the subscribers thereof and the Chamber of Commerce

of the City of Seward; that the first notice which I had of the commission's order entered herein was on June 20, 1930, about the hour of 9:00 when the morning mail was delivered; that I then received the copy of the order of the commission transmitted to me by the secretary thereof under date of June 19, 1930, mailed from the office of the Railway Commission in Lincoln, Nebraska; on the same day I prepared a motion for new trial and rehearing and deposited the same in the mails directed to the Nebraska State Railway Commission; that it was impossible for me to have filed a motion for new trial or rehearing before the 20th day of June, 1930, as that was the day on which I first received notice from the commission, that the order was received in the morning and the same day the motion was sent out.

"(Signed) Chas. F. Barth.

"Subscribed in my presence and sworn to before me this —— day of May, 1931.

"(Signed) L. H. McKillip,
"Notary Public.

"(Seal) My commission expires Jan. 19, 1935."

No finding by the railway commission that appellants were "unavoidably prevented" from filing their motion for new trial within three days after the findings and decision of the railway commission from which they seek to appeal appears in the record. In *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286, paragraph one of the syllabus reads:

"A question raised and presented only by a motion for a new trial, made after the expiration of three days after the verdict or decision, or by an amendment made after such three days to a motion previously filed in any case not specially excepted by the provisions of section 316 of the Code, should not be considered by the trial court, and if it is, such consideration will not be held binding by this court."

In the body of the opinion in the above case, Justice Cobb, in speaking upon the question here under consideration, said:

"This amendment embodies a new and definite assignment of error. It was not made until the fourth day after the verdict was rendered, after the expiration of the time limited by the Code, without the finding by the court that the plaintiff 'was unavoidably prevented' from a compliance with the statute, as a palliation for the amendment."

In *Davis v. Taylor & Son*, 92 Neb. 769, paragraph two of the syllabus reads:

" 'Questions presented by an amendment to a motion for a new trial, made more than three days after verdict and without a finding of the court that the party was unavoidably prevented from presenting such questions within three days from the verdict, will not be considered by this court.' *Gullion v. Traver*, 64 Neb. 51."

Whether a motion for new trial was a necessary step in order to obtain a review of the findings and decision of the state railway commission is not decided; but, if it was necessary, such motion was not filed within the time limited by the Code and was, therefore, of no avail. If, however, the filing and overruling of a motion for a new trial was not a necessary proceeding for such a review in this court, then the transcript for appeal, having been filed in this court more than three months after the date of the findings and decision of the state railway commission from which appellants seek relief, would not give the court jurisdiction and the appeal should be dismissed. *Splittgerber Bros. v. Skinner Packing Co.*, 119 Neb. 135.

The appeal is, therefore, dismissed at appellants' costs.

APPEAL DISMISSED.

MATTHEW J. MORRISSEY, APPELLANT, V. TRAVELERS PROTECTIVE ASSOCIATION, APPELLEE.

FILED JANUARY 22, 1932. No. 28006.

1. Insurance: APPLICATION: FALSE STATEMENTS. Where an applicant for insurance in a fraternal beneficiary association makes untruthful statements to the association in an application for insurance prepared by himself as a basis for insurance, and

which statements are material to the risk of insurance, said association is not estopped to deny its liability under its policy or certificate of membership, even though the member of said association who solicited said applicant knew of the untruthfulness of said statements so made by said applicant.

2. ———: ———: ———: PRINCIPAL AND AGENT: NOTICE TO AGENT. The general rule which imputes knowledge of an agent to his principal does not extend to a case where a member of a fraternal beneficiary association solicits one to join said association and the one solicited prepares his own application and makes representations therein material to the risk of insurance that both the applicant and the soliciting member know to be untruthful.

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

J. W. Kinsinger, H. C. Henderson and *Lincoln Frost, Jr.*, for appellant.

Hall, Cline & Williams, contra.

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

LESLIE, District Judge.

The defendant is a fraternal beneficiary association and issued its policy in the form of a certificate of membership to the plaintiff April 25, 1930, upon application made in the usual manner by plaintiff through a member of the association. The certificate provides for death and accident benefits. About a month after the issuance of the policy the plaintiff met with an accident resulting in an injury to his right eye necessitating its removal. The defendant denies liability under its policy, and alleges that it was induced to issue it because of false representations by the plaintiff in his application with reference to his eyesight, and that said representations were warranties and material to the risk of insurance. One of the interrogatories propounded to the plaintiff in the application was: "Is your eyesight impaired?" To which plaintiff wrote as his answer, "No." The plaintiff admits the untruthfulness of his answer, and that at the time he had

a traumatic cataract of the left eye of such seriousness that he had practically no sight in it. He contends, however, that when he came to this question he asked the member who had solicited him what his answer should be, and that he said in effect: "Since you can see all right, the answer should be 'No.' "

The plaintiff contends that his answer was not a warranty, but a representation not material to the risk of insurance, and, further, that, the soliciting member knowing the condition of plaintiff's sight, and having suggested the answer, defendant is estopped to deny its liability.

The trial court, at the conclusion of all of the evidence, sustained the motion of defendant for a directed verdict.

Six assignments of error are relied upon by plaintiff, but we think it only necessary to consider whether the trial court erred in sustaining defendant's motion for a directed verdict.

It is admitted that the answer made by the plaintiff in response to the question, "Is your eyesight impaired?" was false and known to be by the plaintiff when he made it. Therefore, whether such answer was a warranty or a representation, if it was material to the risk and the policy would not have been issued had the plaintiff stated the truth as to his sight, the plaintiff cannot recover unless the defendant is precluded from claiming nonliability because of knowledge the soliciting member had concerning plaintiff's sight.

It is definitely settled by this court, through a long line of cases, that, in determining whether statements made in an application for insurance are warranties or representations, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties. *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842. It is equally well settled as the law of this state that a distinction is recognized between questions in an

application which call for statements of conclusions of fact not expressly within the knowledge of the applicant, and in regard to which the insurance company has equal means of ascertaining for itself the truth, and, on the other hand, questions which call for information regarding facts necessarily and peculiarly within the knowledge of the applicant. It is held that an incorrect or untrue answer in an application for life insurance in reference to matters of opinion will not void a policy, but that an untrue answer in an application for life insurance as to matters which are peculiarly within the knowledge of the applicant, and material to the risk, will void the policy. *Royal Neighbors of America v. Wallace,* 73 Neb. 409; *Swanback v. Sovereign Camp, W. O. W.,* 103 Neb. 34; *Seal v. Farmers & Merchants Ins. Co.,* 59 Neb. 253; *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146. That the information sought to be obtained by the answer to the question was peculiarly within the knowledge of the plaintiff is scarcely open to discussion. He has admitted that he had been afflicted with traumatic cataract of the left eye for many years, that the sight was destroyed, in effect; and that he had repeatedly been advised by medical experts to submit to an operation for the restoration of the sight of his left eye. It is contended by the defendant that it was its policy not to issue certificates of membership to applicants afflicted as plaintiff was, and that it would not have issued the certificate in question had his answer disclosed the true condition of the sight of his eye. The evidence amply sustains this, and the trial court correctly held that the answer was not a mere representation, but a warranty material to the risk of insurance, wholly untrue and known to be such by the plaintiff when he made it.

It remains to consider whether the knowledge of the member who solicited the plaintiff was imputed to the defendant association. The only evidence in the record as to the conversation between the plaintiff and Shepard, soliciting member, is found in the testimony of the plaintiff. It appears that Shepard was drowned a few weeks

after the issuance of the certificate of membership to the plaintiff. The plaintiff's testimony is as follows: "When I come to the line where it says, 'Is your eyesight impaired?' I says, 'What does that mean?' He says, 'You can see all right, can't you?' I said, 'Yes.' And he said, 'Put no there.' "

Our attention is called to the following cases in support of plaintiff's contention that where the agent had full knowledge of the facts the company is estopped to assert that the answers made are untrue. *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554; *German Ins. Co. v. Frederick,* 57 Neb. 538; *Busboom v. Capital Fire Ins. Co.,* 111 Neb. 855. It will be noted that in these cases the application was prepared by the agent to whom the facts had been truthfully stated by the insured, and that through fraud, mistake or negligence of the company's agent the facts had been concealed or misstated to the company by no misconduct of the insured. None of these cases can be made to apply to the facts in this case. Here the application was prepared by the insured, he knew what the facts were, and wilfully misstated them in his application.

It is not necessary to discuss extensively whether the member who solicited the plaintiff to join the association was its agent in the sense that information possessed by him was imputed to the association. The rule that the agent is presumed to have communicated all information possessed by him to the association is for the protection of applicants who act in good faith and have not knowingly misstated facts material to the risk of insurance. Knowing, as he must have, that the member-solicitor desired that the true condition of plaintiff's sight should not be revealed to defendant by a truthful answer, plaintiff had no reason to assume that Shepard would communicate information to the association that would discredit plaintiff's application. The law is well stated in the following cases: *Priest v. Kansas City Life Ins. Co.,* 116 Kan. 421: "There is some difference of opinion whether an insurance company is chargeable with knowledge of an appli-

cant's condition obtained by its * * * soliciting agent. But, assuming the imputed knowledge rule to apply to them as well as to other agents, it does not extend to cases where answers are given by the applicant which he and the agent both know to be false."

Bratley v. Brotherhood of American Yoemen, 159 Minn. 14: "It is urged that, as the deputy knew of the falsity, his knowledge was the knowledge of the company. * * * We cannot hold that the insurer is bound by statements contained in an application when not only the agent, but the assured, knows they are untrue, and the application is to be forwarded to the insurer as the basis of the contract."

McCormack v. Security Mutual Life Ins. Co., 220 N. Y. 447: "The law of imputed knowledge has its basis in the presumption that the agent will perform his duty. The presumption is not available for the protection of a wrongdoer who has no reason to expect, and did not intend that there should be, a revelation of the truth."

The question in the instant case called for a statement of fact material to the risk, and not for an opinion. Through collusion between the plaintiff and the soliciting member of the association, an untruthful answer was made to the defendant association by the plaintiff in an application prepared by himself. The member of the association knew of the falsity of the answer made by plaintiff, and plaintiff likewise knew that the member knew of the untruthfulness of the answer that plaintiff had made. In consequence of such collusion between the plaintiff and the member of said association, plaintiff was admitted to membership therein and procured insurance. Had a truthful answer been made by plaintiff, the policy or certificate of membership would not have been issued.

To hold in such circumstances that the association is estopped to deny liability because Shepard, soliciting member, knew that plaintiff had misinformed the defendant association as to the condition of his sight would be to reward wrong-doing, encourage fraud and collusion between

members of an association and those making application for insurance, and put the association at the mercy of unscrupulous agents and applicants.

The trial court properly sustained defendant's motion for a directed verdict, and its judgment is

AFFIRMED.

NELLIE A. DREAMER, EXECUTRIX, APPELLEE, V. VITA OBERLANDER, APPELLANT.

FILED JANUARY 22, 1932. No. 28058.

Husband and Wife: LIABILITY OF WIFE FOR NECESSARIES. Section 42-201, Comp. St. 1929, relating to the wife's separate property, makes the property of a married woman liable for debts contracted for necessaries furnished the family, but no personal liability is thereby imposed upon her. Where no property exists, no liability can arise under the statute.

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

C. C. Flansburg, for appellant.

Skiles & Skiles, contra.

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

WRIGHT, District Judge.

Action brought and judgment entered against appellant, a married woman, on a debt for necessaries of life, contracted by her husband.

The petition alleges a sale and delivery to the husband of groceries and meat; that the same were necessaries furnished to the family of appellant and her husband; that judgment had been recovered against the husband for the indebtedness, upon which execution had issued and returned unsatisfied for want of property whereon to levy and make the same, and the amount of said judgment, with interest and costs, was due from appellant, the wife, for necessaries of life. There was no allegation as to any

property or separate estate of the wife. The prayer was for judgment against the wife for necessaries of life in the amount alleged to be due, and costs.

Appellant answered, admitting the judgment against her husband for necessaries furnished her family; the amount due; that execution had issued thereon and been returned unsatisfied for want of property whereon to levy or make the same; that during the times mentioned her husband and she were and still are married and living together as husband and wife; denying that she contracted the debt, and alleging that, at the time the debt was contracted and at the time the judgment was obtained, she had no separate business, property or estate; that she is still a married woman and has no separate estate or property and has no personal liability on her part for her husband's debts.

To this answer a demurrer was sustained. Appellant elected to stand on her answer. Judgment was entered against her, from which she has appealed.

The question presented is the liability of a married woman for a debt contracted by the husband for necessaries furnished the family of the husband and wife where, under the admitted facts, the wife, at the time the debt was contracted and at the time the suit was commenced, had no separate property or estate. No claim can arise by reason of any contract with the wife, but the liability, if any, must rest solely on the provisions of the statute relating to separate property and the liability of a married woman, section 42-201, Comp. St. 1929, which is as follows:

"The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts; Provided, all prop-

erty of a married woman not exempt by law from sale on execution or attachment, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same."

The question finally turns upon a consideration of whether the statute imposes a personal liability upon the wife. Appellant insists that no personal liability is created; that when the estate does not exist the liability cannot arise, and that the proceedings under the statute are *in rem* rather than *in personam*. Appellee, on the other hand, contends that the statute imposes upon the wife a personal liability for the indebtedness, and not merely a charge upon her property, to be enforced by proceedings *in rem*.

Appellee calls our attention to the rule adopted in Illinois, Iowa, Colorado, Utah, Washington, and Oregon, to the effect that the liability imposed is personal under their respective statutes fixing the liability of married women for necessities. An examination of the statutes of these several states discloses that they are almost, if not quite, identical. That of Illinois reads: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Callaghan's Ill. St. Ann. ch. 68, sec. 15. The reason for the rule holding the wife personally liable under such a statute is well given in *Hayden v. Rogers*, 22 Ill. App. 557, where that court, in holding personal liability in the wife, argued:

"Independent of its provisions the husband is personally liable for indebtedness incurred for the expenses of the family, and the statute, by providing that the wife may be sued jointly with him in respect to such indebtedness, necessarily imposes upon her a liability precisely

commensurate with his. The liability, therefore, imposed upon her, is necessarily a personal liability, for upon no other principle can effect be given to this provision of the statute."

The supreme court of Alabama, in *Pippin v. Jones*, 52 Ala. 161, in construing a statute of that state providing that for articles of family supply or used in the family, which are suitable to the estate and condition in life of the family of such husband and wife, and for which the husband would, by the common law, be liable, the husband shall be severally and the husband and wife jointly liable and suable at law, and making the wife's separate estate liable for such debts, said:

"As to the wife, the suit at law is rather a proceeding *in rem* than *in personam*. The judgment rendered, as to her, ascertains and concludes no fact except that she has a separate estate, subject to its satisfaction. It is of consequence a rule of pleading, that to support the proceeding, the existence of this estate must be averred, and that it may be known on what the judgment is to operate, it must be described. The separate estate being an indispensable element of the proceeding, it must exist when the contract is made, out of which its liability arises; and its existence must continue to the institution of the suit. If when the contract is made, the estate does not exist, the liability cannot arise; and if it is exhausted or from any cause ceases to exist before institution of suit, there would be no foundation for a judgment as to the wife."

And again, in *Henry v. Hickman*, 22 Ala. 685, that court, in construing the statute, say:

"We cannot suppose that this act intended to create a liability in all cases against the wife, jointly with her husband, for supplies furnished to the family. It is applicable only to specific cases, to wit, where the wife has a separate estate."

Our legislature seemed content to provide merely that the property of a married woman shall be liable for the payment of all debts contracted for necessaries furnished

the family. The statute in no uncertain terms provides that the property of the wife, both real and personal, whenever and however acquired, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband *or liable* for his debts, with the exception, by way of proviso, that her property not exempt by law from sale on execution or attachment shall be liable for the payment of debts contracted for necessaries furnished the family of such wife, after execution against the husband for such indebtedness has been returned unsatisfied for want of property whereon to levy and make the same. No provision is made for joint and several liability, or for suit jointly or severally, but express provision is made that her property may be liable for the debt only after it shall have been established that the husband has no property whereon to make the same. This court, in *Dietz Lumber Co. v. Anderson,* 116 Neb. 205, has already determined that the statute does not create a personal liability; and in construing it took occasion to say:

"It will be noted that the statute in question renders the property of a married woman liable for debts contracted for necessaries of life for the family and is not a personal liability imposed upon her."

Having adopted this construction it would seem unwise to vacillate, for safety lies in an adherence to rules once established; moreover, we see no other construction which could reasonably be placed upon the statute.

Our attention has been directed to *George v. Edney,* 36 Neb. 604, and *Small v. Sandall,* 48 Neb. 318, where it is stated that the wife is made surety for the husband for the payment of necessaries furnished the family. In neither of these cases was the court called upon to construe the statute in the particulars here presented. To construe the expressions used in these cases as a determination by this court that the statute not only made the property of a married woman liable for necessaries furnished the family, but also created a personal liability as

well, would, it seems, amount to judicial legislation, which we do not think was intended.

Under the facts as admitted, there can be no personal judgment against the appellant for the debt of her husband. It is only her property which is liable. It being admitted that when the debt was contracted and when this action was commenced she had no estate or property of any kind from which the judgment or any part of it could be satisfied, it follows that the action became a useless gesture. No estate exists, therefore no liability can arise under the statute.

It is the accepted rule of this court that the statute creates no personal liability. The petition failed to disclose any property of the wife and the answer alleges no such property. The demurrer should have been overruled.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM BARTELS, APPELLANT, V. DRAINAGE DISTRICT NO. 2, DAKOTA COUNTY, APPELLEE.

FILED JANUARY 28, 1932. No. 28041.

Drains: ACTION FOR DAMAGES: PETITION: SUFFICIENCY. The provisions of section 31-551, Comp. St. 1929, construed and *held*: First, to require claimant of damages arising out of the negligent construction or maintenance of works by drainage districts organized under the laws of the state of Nebraska to file with the secretary of the board of directors thereof within the time in such statute prescribed an actual notice in writing covering the information therein required; second, that in an action against such a drainage district for damages so occasioned, when the petition does not show the filing of the written statement complying with the provisions of the statute, such petition fails to state a cause of action.

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

Gill & Gill and *George W. Leamer,* for appellant.

William P. Warner, contra.

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

PER CURIAM.

This is an action brought by a landowner against the defendant, a drainage district organized under the laws of the state of Nebraska, for damages occasioned by flood waters caused by the negligent construction and maintenance of the defendant's drainage ditch through the lands of plaintiff. The petition alleges that the damages sued for were suffered in 1927 and in 1928. But compliance with the requirements of section 31-551, Comp. St. 1929, is not alleged. It is indeed conceded in argument that no "actual notice in writing," as required by this section, was ever given by the plaintiff in this action. It also appears that several months elapsed after the infliction of the damages before this action was instituted.

A general demurrer to the petition on the ground that it failed to state facts sufficient to constitute a cause of action was sustained by the court, on the theory that the statute referred to requires the service of such a notice in the present case as a condition precedent to its maintenance. The plaintiff electing to stand on his amended petition, the proceedings were dismissed by the trial court. From this order plaintiff appeals.

The section referred to was enacted by the legislature of 1925 and constitutes chapter 127, Laws 1925. It carries as a title: "An act relating to drainage districts; to provide for the giving of written, detailed notice by claimant to drainage districts organized under the laws of Nebraska, covering damages to such claimants or their property, arising out of defects in the construction or maintenance of the districts' work and for the keeping of a record of such notice by the respective secretaries of said districts." Section 1 thereof provides in part: "That no drainage district organized under the laws of

Nebraska shall be liable for damages arising out of the construction or maintenance of any of the said districts' work unless actual notice in writing (here is set forth the statutory requirements of the same) shall be proved to have been filed with the secretary of the board of directors of said district, within thirty (30) days after the occurrence of such accident or injury, except in cases involving minors." It is conceded that the exception referred to in the words of the statute has no application in the present case. The meaning of this statute, construed as an entirety, especially when read in connection with its title, is plain. Its application to the subject-matter involved in this action is mandatory. It contemplates that "no drainage district organized under the laws of Nebraska shall be liable for damages arising out of the construction or maintenance of any of the said districts' work" unless and until the notice in writing prescribed by the terms of the statute is filed with the officer therein named. Compliance with its provisions is, therefore, a condition precedent to bringing and maintaining an action for damages under the conditions set forth therein. *Nothdurft v. City of Lincoln*, 75 Neb. 76; *City of Lincoln v. Finkle*, 41 Neb. 575; *City of Lincoln v. Grant*, 38 Neb. 369; *City of Hastings v. Foxworthy*, 45 Neb. 676; *Schmidt v. City of Fremont*, 70 Neb. 577; *McCollum v. City of South Omaha*, 84 Neb. 413; *Swaney v. Gage County*, 64 Neb. 627; *Bryant v. Dakota County*, 53 Neb. 755. In failing to embrace this necessary allegation, the petition demurred to failed to state a cause of action, and the trial court rightfully sustained the demurrer thereto.

It follows that the action of the trial court in dismissing the proceedings is correct, and the judgment is

AFFIRMED.

MARGARETHE OSTHERTHUM, APPELLANT, V. JOHN OSTHERTHUM ET AL., APPELLEES.

FILED JANUARY 28, 1932. No. 28117.

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

Wilmer B. Comstock and *John H. Comstock,* for appellant.

Max V. Beghtol, Glen H. Foe and *J. Lee Rankin, contra.*

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

PER CURIAM.

This is a suit in equity in which plaintiff, appellant, seeks to set aside, on the ground of fraud and undue influence, a deed made by her to her son, whose wife is joined as the other defendant.

Plaintiff, with her husband, John F. Ostherthum, and their two daughters and one son, came here from Germany in 1883. They settled near where Hallam in Lancaster county is now located. The son, John, who will be called the defendant, was then about eighteen years old. The next year the father bought the eighty acres involved here and took title to it. It has continually been owned by some member of the family. The father was not able to do much farm work. Defendant operated the farm and lived there not only during the remainder of his minority but until he was 28, when he married. Soon after that he purchased a farm nearby and has lived thereon, but has continued to operate the home place either as tenant or owner. Plaintiff continued to live there until May, 1928, when she fell and fractured her hip. She was brought to a Lincoln hospital, where she remained about ten weeks. Since that she has lived with her daughter, Helena Stover, whose home is near the hospital. Plaintiff is about 88 years old and is almost helpless. She is well cared for by her daughter, who has had experience as a practical nurse.

The father died in 1907, leaving the eighty acres to defendant by will which was duly probated, but the defendant, joined by his wife, quitclaimed the land to his mother before the estate was closed. He thereupon continued to farm the land as tenant until March 30, 1927, when plaintiff reconveyed it to him, reserving during her life one-third of the crops raised on the premises. It is this deed which plaintiff asks to have set aside.

When plaintiff went to the hospital she had a considerable sum—probably in excess of $2,000—in the bank. The hospital and medical expenses and what she had paid out for care since her removal to the home of her daughter had exhausted her resources before the case was tried, except that, assuming the deed to be allowed to stand, she owns whatever is derivable from her crop interest in the land. Some at least of that has been paid, as indicated by the evidence. This is not an action to require an accounting, and we mention the items in this paragraph merely to show its connection with her testimony. She testified, by deposition, that she was a cripple, helpless, cannot earn anything and must have the farm back. Defendant testified that he never asked his mother to deed the farm to him; and she testified: "John didn't ask me directly to give him a deed but I gave him the deed, but I wanted to have peace." When she was asked what she meant by that expression, she answered: "So he couldn't say he wouldn't get anything afterwards, so he couldn't keep representing to me that he wouldn't get anything afterwards." Several times she stated in her testimony that she made the deed to defendant because she wanted peace. Plaintiff's argument is that she wanted peace from the importunities of her son. Defendant's argument is that she wanted peace of mind because she wished to be just, and because of the demands of her daughter hereinafter set forth.

Reinhard Schaad, a neighbor, called on plaintiff the day before she made the deed. She told him Mrs. Stover had been there that week and was dissatisfied because of a

will plaintiff had made and that the daughter demanded as much as John. Plaintiff detailed how the son had stayed at home, worked like a slave while the girls had left home, how her husband's will had left the farm to the son, and that John ought to have the eighty acres. She asked the witness to see the son and tell him she wanted to go to Hallam the next morning and fix the matter up. He conveyed the message; the defendant took the plaintiff to Mr. Carsten at Hallam; Mr. Carsten drew the deed that day and she executed it.

Mr. Carsten testified that she had consulted him about the matter about two weeks earlier and he had advised her to think it over thoroughly before making the deed. She informed him she wanted to make out the papers she had talked about to him previously. He made out the deed, read it to her, asked her if it was of her own free will and accord; she answered in the affirmative, executed the deed, and after it was acknowledged and fully completed she handed it to defendant. That is the deed involved here.

The burden is on the plaintiff to prove the allegations of her petition. There is no presumption of fraud or undue influence so controlling the will of a grantor as to avoid his deed. Facts constituting such fraud or influence must be proved by a preponderance of the evidence.

Our foregoing statement of the evidence is but a brief abstract but fairly indicates its gist. We have read it and are of the opinion that the evidence fails to sustain the burden laid on plaintiff. The judgment of the district court is

AFFIRMED.

STATE CREDIT COMPANY, APPELLEE, V. NATIONAL OLD LINE LIFE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 28, 1932. No. 28021.

Insurance: RIGHTS OF MORTGAGEE AS INSURER. A mortgagee who for his own benefit applied for fire insurance on the mortgaged

chattel, disclosed the facts essential to underwriting, paid the premium and procured and retained a policy, all without the knowledge of the mortgagor, may, in a proper case, recover a loss in his own name under a mortgage clause making the loss payable to him as his interest may appear at the time of the loss, though mortgagor was named in the policy as insured and parted with title to and possession of the insured property before it was burned.

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

Chambers & Holland, for appellant.

Perry, Van Pelt & Marti, contra.

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

ROSE, J.

This is an action on an insurance policy to recover a loss caused by the burning of an automobile.

To secure a note, Helen I. Hayes mortgaged the automobile December 17, 1928, for $1,524. State Credit Company, plaintiff, purchased and owned the chattel mortgage upon which it claimed, as mortgagee, a lien for a balance of $857.25, the sum for which judgment was demanded under the insurance policy. The insurance risk was $1,700 for one year beginning December 22, 1928. Plaintiff, the mortgagee, applied for the insurance and paid the premium which was $16.15. Helen I. Hayes, mortgagor, was the person named in the body of the policy as insured. Attached to the policy when issued was a mortgage clause providing:

"It is hereby understood and agreed that loss, if any under this policy, shall be payable to Mrs. Helen I. Hayes and State Credit Co. as their interest may appear at the time of loss."

The automobile was destroyed by fire October 15, 1929. The National Old Line Life Insurance Company, under a former name, issued the policy as insurer. The defendants were insurer and Helen I. Hayes. The latter did not plead and default was entered against her.

The insurer admitted that it issued the policy, but interposed the defense that it was not in force at the time of the fire, alleging in substance that the insurance previously expired under the terms of the policy; that Helen I. Hayes, the insured mortgagor, had parted with title to and possession of the insured automobile; that a change in the ownership of the property had avoided the insurance, terminated the risk assumed, and relieved insurer from liability; that at the time of the loss insured had no insurable interest in the automobile; that the right of plaintiff, the mortgagee, to insurance expired with that of mortgagor. The facts pleaded as defenses were put in issue by a reply.

At the close of the testimony each litigant requested a peremptory instruction. The district court directed a verdict in favor of plaintiff for $622.95. From judgment on a verdict therefor defendant appealed.

Assuming that Helen I. Hayes, mortgagor, who was named in the body of the policy as the insured, had parted with her title to and possession of the insured property and consequently, under the terms of the insurance contract, had no interest in or insurance on the automobile when it was destroyed, the question presented by the appeal is the liability of insurer to plaintiff for the loss caused by the fire at that time.

The policy did not contain a union mortgage clause to the effect that a loss payable to mortgagee should not be avoided by any act or neglect of mortgagor or owner of the insured property. In absence of such a clause insurer contends that the trial court erred in directing a verdict in favor of plaintiff and that the judgment below should be reversed under the following principle of law as it appears in the brief of insurer: "Under a simple loss-payable or open-mortgage clause in a policy of insurance issued to the mortgagor, and payable to the mortgagee as his interest may appear, the mortgagee is simply an appointee of the insurance fund, whose right of recovery is no greater than the right of the mortgagor, so that a

breach of the conditions of the policy by the mortgagor, which would prevent recovery by him, precludes recovery from the insurer by the mortgagee."

In support of this proposition reference is made to many cases, including *Antes v. State Ins. Co.*, 61 Neb. 55. The rule quoted is recognized in Nebraska and in many other jurisdictions and is sound in principle, but in the cases generally in which it has been applied the insured mortgagor paid for the insurance and procured the policy for his own protection. Decisions in some cases, however, distinguish cases applying the general rule, or recognize an exception thereto, where a mortgagee for his own benefit applies directly to the insurer for insurance, pays the premium, and receives a policy containing a mortgage clause for the protection of mortgagee. On this subject the supreme court of Illinois ruled as follows:

"Where a party contracts for the insurance of property, pays the premium, and the policy makes the loss payable to him, the agreement to pay the loss is a contract with the person who pays the consideration, and he will have a right of action in his own name, although the insurance is in the name of another." *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245. See, also, *Lubetsky v. Standard Fire Ins. Co.*, 217 Mich. 654; *Houran v. Aetna Ins. Co.*, 183 Mich. 418; *Connecticut Mutual Life Ins. Co. v. Luchs*, 108 U. S. 498; 2 Cooley, Briefs on Insurance (2d ed.) 1287.

The same view seems to have been taken in *Liverpool & London & Globe Ins. Co. v. Davis*, 56 Neb. 684. An ordinary loss-payable mortgage clause may, under some circumstances, create between insurer and mortgagee an independent insurance contract not forfeitable by acts of mortgagor in conveying or further incumbering the insured property. The general rule and the exception or different rule may be consistently enforced in the same jurisdiction where the facts show the necessary distinction.

In the case at bar the evidence tends to prove the following facts: In a conversation between the president of the State Credit Company, plaintiff, and insurer's man-

aging officer, the latter said he would issue insurance policies to cover notes and mortgages purchased by the former. Without consulting mortgagor, and in her absence, plaintiff as mortgagee, having an insurable interest in the automobile, made the application for insurance, disclosed the facts essential to underwriting, paid the premium and received and retained the policy. Insurer did not return or tender back the premium or any part of it at any time. Mortgagor never paid plaintiff any part of the cost of the insurance. The policy was delivered to plaintiff, mortgagee, and, when issued, there was attached to it the mortgage clause making the loss payable to insured and plaintiff, naming them, "as their interest may appear at the time of loss." The interest of plaintiff at that time, or the value of the automobile with interest from the date upon which the petition was filed, was $622.95. The balance due on the note and mortgage was $857.25. Mortgagor had no interest in the automobile when burned. There was no fraud or bad faith in the procuring of the insurance. Plaintiff reduced the amount of the lien by collecting payments on the note and mortgage and did nothing to increase the hazard of insurer.

The mortgage clause, in connection with the policy as a whole, with the negotiations for insurance protecting the interest of mortgagee in the insured property, with the payment and retention of the premium, with the delivery of the policy directly to mortgagee and the latter's retention thereof and with all other surrounding circumstances, evidences an independent contract between insurer and mortgagee. They were the contracting parties. The consideration passed directly from mortgagee to insurer. Under the insurance contract mortgagee was individually insured and its contractual rights for which it paid the consideration retained by insurer were not forfeited or terminated because the name of mortgagor was by the insurer inserted in the body of the policy as the insured or because the policy lapsed as to her. Conditions terminating the insurance in the event of a transfer of

title or of an additional lien apply to mortgagor, the owner who had power to sell or incumber the property, not mortgagee. The mutual intention of insurer and mortgagee to enter into an independent contract insuring the latter's interest in the automobile is shown by their executed writings in the light of surrounding circumstances, and consequently plaintiff was not required to resort to equity for a decree reforming the policy by inserting therein the name of plaintiff as the insured to the extent of its interest as mortgagee. By request of each litigant for a peremptory instruction the issues of law and fact were submitted to the trial court for determination. The jury were properly directed to render a verdict in favor of plaintiff. Prejudicial error has not been found in the record.

AFFIRMED.

FARMERS STATE BANK OF ST. EDWARD, APPELLANT, V. FRANK P. FLAHERTY, APPELLEE.

FILED JANUARY 28, 1932. No. 28108.

Evidence examined, and *held* to sustain the verdict.

APPEAL from the district court for Nance county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye and *George W. Wertz,* for appellant.

J. R. Shields and *Wagner & Wagner, contra.*

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

GOOD, J.

This action was begun in the name of the Farmers State Bank of St. Edward on a promissory note in which it was named as payee, and which was signed by the defendant as maker. The bank was insolvent at the time the action was brought. Later, the receiver of the bank was substi-

tuted as plaintiff. Defendant answered, admitting the execution of the note, and alleged that it was given as an accommodation to the bank and without consideration. A trial resulted in a verdict and judgment thereon for defendant. Plaintiff has appealed.

Plaintiff contends that the verdict is contrary to the evidence, and, further, that if the note was without consideration it was given for the purpose of deceiving the bank examiner and state banking authorities, and was a fraud upon the then existing and prospective depositors and creditors of the bank.

On several points the evidence is in sharp and irreconcilable conflict. The finding of the jury for defendant on conflicting evidence compels this court to take the view of the evidence most favorable to defendant. There is evidence tending to support the contention of plaintiff that the note was given for a valuable consideration, but the evidence of the defendant is to the effect that in September, 1926, he gave a note for $5,900 to the bank, without any consideration whatever and purely as an accommodation to the bank; that this note was twice renewed without the payment by him of any interest and without his receiving any consideration for either renewal. The second renewal note is the one in controversy in this action.

It would serve no useful purpose to set out in this opinion a résumé of the evidence. Suffice it to say that there is ample evidence in the record to sustain the finding that the note was given as an accommodation and without consideration.

Plaintiff contends that even if the note was without consideration it was given in pursuance of a fraudulent design and scheme between the defendant and the then cashier of the bank, to make it appear that the bank was solvent and in a sound condition, when, in fact, it was not, and that this worked a fraud upon the then existing and prospective depositors and creditors of the bank. The evidence discloses that at the time the original note was

given the bank was a going concern and, so far as appears, was entirely sound. It is true that it was represented that the bank desired additional money and preferred raising it by use of accommodation paper, rather than enforce payment on obligations due the bank from farmers of the vicinity who had suffered loss of crops; but there is nothing to disclose that the bank was in an unsound condition either at the time of the original note or of its first renewal. The second renewal, being the note in question, was executed after banking hours on the same day that the bank finally closed its doors. The banking authorities could not have been deceived by the execution of this renewal; nor could any creditor of the bank been injured thereby.

The facts disclosed by the record fail to support the contention of plaintiff that the note was executed for the purpose of deceiving the state banking authorities, or of working a fraud upon the creditors of the bank; or that it did, in fact, deceive the state banking authorities or work any injury to any creditor of the bank.

The record appears to be free from error. Judgment AFFIRMED.

IN RE ESTATE OF NIELS THOMAS SMITH.
GERHART J. SMITH ET AL., APPELLEES, V. SCENA M. CHRISTENSEN, APPELLANT: MARY SMITH ET AL., APPELLEES.

FILED JANUARY 28, 1932. Nos. 27987, 27988.

Wills. A provision in a will that the share of a daughter in her father's estate shall be held in trust, and only the income thereof paid to her during the lifetime of her present husband, is *held* to be a valid restriction.

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

F. L. Carrico, for appellant.

King & Bracken and *Carl T. Curtis, contra.*

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

PAINE, J.

These two actions each grew out of handling the estate of Niels Thomas Smith, and each depends somewhat upon the fourth paragraph of his will. Case No. 27987 was an action in partition, brought by two adult sons for the partition of the property owned by their father, Niels Thomas Smith, in which Scena M. Christensen, a daughter, filed an answer, praying that the fourth paragraph of the will of her father be declared void, and that she be declared the owner in fee simple of her share of said property. The district court entered a decree confirming the shares of the various heirs, and found against the defendant, Scena M. Christensen, finding that the fourth paragraph of the will was not void, and that she had no title in fee simple except as provided in said will, and directing partition of the property, and appointing G. L. Godfrey to partition said property, who gave bond, as required by law; and thereupon the case was brought to this court on appeal.

In case No. 27988, Scena M. Christensen filed objections to the distribution of the property under the will of Niels Thomas Smith, which had been duly admitted to probate, and prayed that her share of her father's property be paid to her absolutely, and that no part be held by a trustee, and that the paragraph in the will directing the holding of said property by trustee was illegal. Upon an adverse finding by the county judge, appeal was taken to the district court, and an order entered by the district court affirming the action of the county judge and dismissing the objections of Scena M. Christensen, and supersedeas was fixed in the sum of $200. Carl T. Curtis, guardian *ad litem*, files his brief as an appellee.

Niels Thomas Smith was a thrifty farmer in Kearney county, Nebraska, who accumulated real and personal property of the value of about $50,000, and left eleven adult children and the minor heirs of one deceased child.

At the time of his death on November 2, 1929, he left a will, which was executed by him on November 9, 1928, before M. D. King and B. H. Bracken as witnesses, and the determination of each of these cases rests upon the construction of the fourth paragraph in said will, reading as follows: "Fourth. I give, devise and bequeath to my daughter Scena M. Christensen the same share of my estate that she would receive according to law if I died intestate. Provided that her share shall be held in trust for her and the income only paid to her during the lifetime of her present husband. Upon the death of her husband during her life said share shall then become hers in fee simple and be assigned and paid to her at once. Provided further that if she shall die before her present husband her share shall then go to her children in equal shares. Provided further that said children shall not receive their share until they shall attain the age of 25 years but the same shall be held in trust for them and paid to them upon attaining such age the same as provided in the second paragraph hereof for the children of my daughter Petrea Spors. Provided further should any of these children die before he or she reaches the age of 25 years, then his or her share as the case may be shall belong to and be paid to the survivors in equal shares. This trust shall be executed in the same manner and by the same trustee appointed in accordance with paragraph two hereof."

That part of paragraph 2 of the will affecting trustees reads as follows: "I direct that the court in which this will is probated shall appoint a proper person trustee and require him to give bond in such proper sum as the court may direct and require him to report to the court his acts and doings in the execution of said trust."

It is contended by appellant that a condition in a will which discourages or interferes with the marital relation existing is void as against public policy. To support this contention, we are cited to *Weathersby v. Weathersby*, 13 Smedes & Marsh. (Miss.) 685; *Cruger v. Phelps*, 47 N. Y. Supp. 61; *Witherspoon v. Brokaw*, 85 Mo. App. 169; *Con-*

rad v. Long, 33 Mich. 78; *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391; *O'Brien v. Barkley*, 28 N. Y. Supp. 1049.

The first case cited above was decided by Justice Clayton at the January term, 1850, in Mississippi. The trust condition for the benefit of slaves, falling under the inhibition of the law, was defeated, but the son, Ludovick Weathersby, was invested with the absolute title to the slaves.

In the case of *Cruger v. Phelps, supra,* the action involved a contested provision in the will, which provided that the daughter, whose husband resided in New York, forfeited her right to the income of the residuary estate in case she traveled or resided outside the continent of Europe during her husband's life or until she was divorced from him. This provision was held void as against public policy and good morals.

In the case of *Witherspoon v. Brokaw, supra,* Mrs. Brokaw provided that one-half of her property should go to the daughter of her niece "so long as she shall be kept from the control and custody of her said father, and no longer." This provision was held to be void.

In *Conrad v. Long, supra,* the will of A. S. Conrad provided that one-half his property should pass to his sister upon condition that "she should conclude not to live with her present husband, Henry Long, as his wife," and such provision was held void as against public policy.

In *O'Brien v. Barkley, supra,* Robert Shaw made a generous bequest to his daughter, Eleanor Elizabeth, upon the express condition "that she do not, at any time after my decease, associate, cohabit, or live with one James O'Brien." The court held the provision void as against public policy.

In the Nebraska case of *Hawke v. Euyart, supra,* this court held that a certain devise, conditional upon the reformation of a wayward son, would be upheld. But another devise in the same will was held void. It appears from the record that this son had married a Mrs. Sadie Gladstone upon September 16, 1884, which fact was doubtless known to the testator at the time he added a codicil

and republished his will upon July 29, 1885, and this court held that in such a case a provision in the will that the funds should not be transferred until said son "has permanently freed himself from all influence, connections, associations, cohabitations and relations of every name, character, and description of and with a certain notorious and disreputable woman known by the name of Mrs. Sadie Gladstone, and with all relatives, friends and intimates of that woman," was a condition against public policy. It should be evident that the case at bar presents no such facts as *Hawke v. Euyart*, for the provisions herein are usual and ordinary, and carry out a valid purpose of the testator.

It is contended by the appellant that paragraph 4 interferes with the marital relation existing between Scena M. Christensen and her husband, and is void as against public policy, and that the trust sought to be established is so indefinite and uncertain as to powers and duties that it is impossible for a trustee to carry out the trust; yet we have examined with care the authorities cited, and have not found any one of them to hold to the doctrine that is contended for in this case. We do find that in the case entitled *Matter of Seaman*, 218 N. Y. 77, Ann. Cas. 1918B, 1138, it is held that, while conditions in restraint of marriage are void, yet a provision preventing the vesting of an estate absolute if she marries a certain individual, or, in any event, until his death, will not be held invalid as tending to excite her to cause his death, but will be held to be a valid restriction.

The appellees contend that similar provisions have been sustained by many courts, citing *Thayer v. Spear*, 58 Vt. 327; *Snorgrass v. Thomas*, 166 Mo. App. 603; *Daboll v. Moon*, 88 Conn. 387, Ann. Cas. 1917B, 164; *Shick v. Whitcomb*, 68 Neb. 784.

The bill of exceptions is very short, and it may be said that there is scarcely any question of fact that is in dispute in the case. The will provided that his property

should be divided between his children in equal shares, the same as though he had died intestate, and provides for a trustee retaining three of these shares until certain events take place.

This court fails to see wherein the provision objected to is void as against public policy, and is satisfied that the trustee, under the provisions for such reports of his acts and doings as the county judge may direct, can carefully handle and manage the property until these contingencies arise. The judgment of the district court in each of the above cases is hereby

AFFIRMED.

ELMER C. LOY, APPELLEE, V. STORZ ELECTRIC REFRIGERATION COMPANY, APPELLANT.

FILED JANUARY 28, 1932. No. 28065.

1. Trial: REMITTITUR. Where there is a controverted issue of fact and the findings of the jury, under the instructions of the court, warrant a recovery, it is error for the trial court to require the successful party to file a remittitur of such recovery.
2. Account Stated. A statement of account made out by one party and presented to another in the course of dealings had between the two must be expressly assented to by the latter party as to its correctness to make an account stated. A denial of the account, or a dispute as to its correctness, takes it out of the category of cases of an account stated.
3. Sales: CONTRACT: BREACH: MEASURE OF DAMAGES. The measure of damages on breach of an agreement for the sale and purchase of an article of personal property is the market price of such article on the day and place appointed for its delivery, less that part of the contract price not paid.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Howell, Tunison & Joyner, for appellant.

Lawrence I. Shaw, contra.

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

MESSMORE, District Judge.

This is an action wherein appellee, plaintiff below, sued appellant, defendant below, upon five causes of action growing out of appellee's employment by appellant as a salesman in Omaha.

The third and fourth causes of action set out in appellee's petition were abandoned by him in this court. The petition further alleges that on May 1, 1929, appellant, hereinafter called the company, employed appellee as a salesman and orally agreed to pay him a salary of $100 a month, plus 5 per cent. commission on his sales; that appellee worked under said contract until July 1, 1930, but was not paid his salary for the last half of June of that year, and praying for damages in the sum of $50 on his first cause of action.

His second cause of action is to the effect that about July 1, 1930, said oral contract of employment was canceled by mutual agreement of the parties, and appellee agreed, beginning July 1, 1930, to work on a strictly commission basis; that during July, 1930, he earned in commissions $183.40, but was paid only $100 thereof, and asks for damages in the sum of $83.40.

The fifth cause of action alleges that the company agreed to sell appellee, at wholesale price, a model G-100 electric refrigerator for $286; that appellee paid $275 of said price and was to pay the balance of $11 on delivery of said refrigerator to him; that the company has refused to deliver said refrigerator; that the retail value of the same is $475 and asks damages for said amount, less $11, leaving a balance due appellee on said cause of action of $464.

The company answered by denying all the allegations of the second amended petition, except such as were admitted; further, that it employed appellee as a salesman on a strictly commission basis of 12 per cent. on f. o. b. factory prices; agreed, as long as it was willing, to furnish appellee $100 a month, to be charged against his earn-

ings and to be repaid if the same exceeded his earnings; that it advanced appellee $2,096.40, and that his earned commissions were $1,568.20, leaving a balance due the company of $528.20; that appellee bought certain merchandise of the company, sold the same on his own account and turned part of the proceeds over to the company, for which he was credited with the sum of $320.19, leaving a net balance due the company of $208.01; that the company furnished appellee a true and correct statement of said account, that he accepted the same and agreed to pay it; that said account constituted an account stated; and the company prayed judgment against appellee for the sum of $208.01. On the trial, however, the company withdrew its request for judgment on its counterclaim in excess of the amount required to defeat appellee's causes of action and prayed for judgment for costs only.

Trial was had to a jury, which found for appellee, as prayed, on each of his five causes of action. Judgment was entered thereon. A motion for a new trial was filed and overruled on condition that appellee file a remittitur of all sums in excess of $464, the same being the amount claimed under his fifth cause of action, which remittitur was duly filed.

On appeal to this court we have for consideration appellee's recovery on his fifth cause of action, above set out, and appellee asks further, having abandoned his third and fourth causes of action in this court, that his recovery on the first and second causes of action be allowed and the remittitur of said causes of action filed in the lower court be held for naught.

The record discloses the identity of appellant company and the employment of appellee by the company; also his statement of the agreement that he was to receive $100 a month and 5 per cent. commissions on all sales as a salary, and any balance up to and including 12 per cent. of his commissions was to be paid to him as a bonus; that he was not paid for the last half of June, 1930, which left a balance of $50 due him. He was corroborated in this

testimony by the witness Davies, retail sales manager of the company; that said witness and one Nellor, vice-president and general manager of the company, had worked out a basis for the retail department whereby $75 or $100, whatever it might be, plus 5 per cent. was computed against 12 per cent., and if a man's total sales on a commission of 12 per cent. exceeded the amount he actually drew he was to receive the balance in cash as a bonus.

Appellee's exhibit 1, claimed to be an account of salary drawn in December, 1929, and received in evidence as an ultimate fact as to whether or not it was salary or something else, was testified to by one Freda Lohrberg, private secretary of Mr. A. C. Storz, president of the company.

Appellee's evidence disclosed further that he went on a strictly commission basis in July, 1930, and terminated his employment with the company in the latter part of said month. It was stipulated that his commissions from the sale of refrigeration machines during that month would entitle him to the sum of $183.40, $100 of said amount being paid appellee.

In reference to the purchase of the G-100 machine from the company, appellee testified that he agreed to purchase it from the company at a price of $286; that he sold his old machine, taking in payment therefor a contract for $250, which he turned over to the company, also receiving in payment of said machine a check for $25, which he indorsed over to the company; that he still owed the company $11 on the purchase price of the new machine; that said machine was not delivered to him by the company.

Contra to this testimony the company offered the testimony of Mr. Nellor, who, at the time of employment of appellee by the company, was its vice-president and general manager, to the effect that appellee was employed on a straight 12 per cent. commission basis and that $100 was paid him monthly as a drawing account; that said $100 was to be charged against his commissions for such period as the company was willing to do so. The company also introduced documentary evidence to show that appellee

was employed as a permanent salesman on a commission basis.

Several officers of the company testified to the account the company had with appellee in the course of its employment of him and the correctness of the account, which was substantially as stated in the counterclaim and set-off filed by the company. This account was denied by appellee. The company sought by evidence to show that there was no denial of the account on the part of appellee and that he accepted the same as true.

Appellant relies upon an account stated to defeat the claims of appellee and cites the cases of *Brewer v. Wright,* 25 Neb. 305, and *Jorgensen v. Kingsley,* 60 Neb. 44. In the latter case it was held that an account stated is merely an agreement between persons who have had previous transactions, fixing the amount due as the result of an accounting.

The general rule is that when parties have accounts against each other, and a statement of the account is made out by one party and presented to the other, and the latter expressly assents to its correctness, the law will regard it as a stated or settled account, and it will be binding on both parties. This rule was set out in an instruction of the trial court in the case of *Brewer v. Wright, supra,* which instruction was criticized by this court, but only to the extent that it might not apply to the case in which it was given; however, the instruction stated the general rule of an account stated in Nebraska.

In the instant case, while witnesses for the company stated that appellee agreed and assented to the account as stated by the company, there is a denial in the evidence of appellee on this point which takes this case out of the category of cases of an account stated; in other words, a dispute arises as to the correctness of this account.

In an account stated the person seeking to establish such an account may recover only by showing both the account and the unqualified assent of the other party thereto. *Sterling Lumber Co. v. Stinson,* 41 Neb. 368; *Cahill, Swift*

Mfg. Co. v. Morrissey Plumbing Co., 3 Neb. (Unof.) 865.

In the case of *Haish v. Dillon*, 71 Neb. 290, it was held that in stating an account, as in making any other agreement, the minds of the parties must meet, and the transaction must be understood by the parties as a final adjustment of the respective accounts between them and the amount due. In the instant case the minds of the parties did not meet on the alleged account and the transaction was denied, so then it was not understood. Every element of the account was presented to the jury in the counterclaim of the company, with the exception that $208.01, the sum formerly claimed due it from appellee in said counterclaim, was withdrawn from their consideration, and the counterclaim was left in the case in an amount required to defeat appellee's cause of action. The jury had the benefit of the claim made by the company and determined against it.

The company, for one of its assignments of error, complained of the misconduct of appellee's attorney in his argument to the jury. An examination of the record shows that the court informed the jury that they were not interested in the remarks of counsel, and under the admonition of the court we believe there is no prejudicial error in this respect.

The lower court, in ruling on the motion for a new trial, required appellee to file a remittitur of the amounts awarded him by the jury on his first four causes of action, which he did. Appellee abandoned his third and fourth causes of action in this court, which leaves the first and second causes of action upon which the remittitur is operative. Section 20-1929, Comp. St. 1929, provides: "That whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that said remittitur should not have been required either in whole or in part." We are inclined to believe that the lower court erred in requiring appellee to file a remittitur of these causes of

action. There was sufficient evidence offered to sustain the findings of the jury on both the first and second causes of action, which were properly submitted to the jury.

The company cites as error the giving of instructions No. 6 and No. 8 which relate to the measure of damages for failure to deliver the G-100 electric refrigerator to appellee, and calls the court's attention to the fact that the wholesale price of the machine was $286 and that appellee was dealing with a wholesaler when he was dealing with the company.

It is held in almost every court of last resort in the Union that, where a breach of a contract consists of the failure of the seller to deliver goods, the measure of damages is ordinarily the difference between the contract price and the market price. The contract price in the instant case was $286 and the jury found the market price of the machine to be $475 on the day appointed for its delivery. Appellee was entitled to have the machine in question delivered to him. He had severed his connection with the company. It retained the machine. If he made a bargain, he was entitled to the fruits of his bargain.

In *Denver, T. & G. R. Co. v. Hutchins,* 31 Neb. 572, it was held that, where the seller of personal property fails and refuses to deliver the same to the buyer, the measure of damages for a breach of contract is the difference between the contract price and the market value of the property at the time and place where it should have been delivered.

Under the Uniform Sales Act, section 69-467, Comp. St. 1929, it is stated, in subdivision 3 of said section, in an action for failure to deliver goods: "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver."

From the foregoing we believe that the measure of damages in the instant case was correctly stated by the trial court and that the jury's verdict in that respect should not be disturbed.

Remanded, with instructions to enter judgment in favor of appellee on his first and second causes of action, the remittitur to stand as to his third and fourth causes of action, and affirmed as to the fifth cause of action.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

A. B. GORDON, APPELLEE, V. ROSAMOND CLARK, APPELLANT.

FILED JANUARY 28, 1932. No. 27911.

Appeal: ESTOPPEL. A party who invites, urges and consents to an order cannot later be heard to complain that there was error in such order.

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

R. M. Switzler, for appellant.

Cranny & Moore, contra.

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

RYAN, District Judge.

On October 29, 1929, A. B. Gordon recovered a judgment against Rosamond Clark in the circuit court of Nodaway county, Missouri. On July 5, 1930, he commenced an action in the district court for Douglas county, Nebraska, on the foreign judgment. At that time Rosamond Clark was a resident of Missouri and service was secured by attaching certain money in the hands of one A. M. Anderson, who, at that time, had money in her possession claimed belonging to the defendant, Rosamond Clark. It appears that Rosamond Clark had commenced an action against A. M. Anderson and others to obtain this money. Other

parties intervened and claimed the money or a part thereof. It also appears from the transcript that the plaintiff in this action, A. B. Gordon, was, by order of court, brought into this other action as an intervener, and on September 12, 1930, the court entered an order, sustaining the garnishment of the plaintiff, A. B. Gordon, finding against the claims of the other interveners, and further finding that the defendant, A. M. Anderson, had in her possession the sum of $1,550, which was the property of Rosamond Clark, and further ordering A. M. Anderson, the garnishee, to pay said sum to the clerk of the court, "to be held subject to and applied on any judgment rendered in favor of A. B. Gordon and against Rosamond Clark in the case shown in Appearance Docket 264, No. 65."

There is no bill of exceptions in this case and the transcript is incomplete. It appears, however, from the briefs and the statements of counsel, that this order, so far as the payment of the moneys into court, was made in pursuance of a stipulation of the parties to this action. The stipulation does not appear in the transcript.

The defense interposed by the appellant, Rosamond Clark, who for the sake of convenience will be referred to as the defendant, admitted the allegations of plaintiff's petition in regard to the securing of the Missouri judgment and the amount thereof, and alleged that the judgment sued on is a deficiency judgment, growing out of the foreclosure of a deed of trust in Missouri. It further alleges that, at the time of the execution of the note described in plaintiff's petition, defendant was a married woman, being the wife of Fred H. Clark, one of the makers of said note; that the property sought to be reached by the plaintiff herein, namely the sum of $1,550 on deposit with the clerk of court, is property acquired by defendant after the execution of said note and mortgage, said money being proceeds from the sale of a farm owned by her in the state of Nebraska since April 12, 1929, and that, as such, it is not subject to seizure by the plaintiff. The answer also pleads section 7323 of the Revised Statutes of Mis-

souri for 1919, as follows: "A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party: Provided, a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property." Upon trial of the case on November 3, 1930, judgment was rendered in favor of the plaintiff upon the Missouri judgment in the sum of $3,898.21.

On November 5, 1930, the defendant filed a motion in the district court, setting up the facts alleged in her answer and including section 7323 of the Revised Statutes of Missouri for 1919, and moved the court for an order releasing to her the sum of $1,550, held by the clerk of court under the order of September 12, 1930, pursuant to the stipulation of the parties. November 15, 1930, the plaintiff, A. B. Gordon, filed a motion, asking the court to strike the motion of the defendant for the reason that the same is immaterial, and for an order directing the clerk of court to pay to the plaintiff the $1,550, in his possession pursuant to the stipulation entered into in the case of Clark v. Anderson. The motion further sets out section 7328 of the Revised Statutes of Missouri for 1919, as follows: "All real estate and any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under

her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife: Provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, incumber or otherwise dispose of the same for his own use and benefit, but such property shall be subject to execution for the payments of the debts of the wife contracted before and during marriage, and for any debt or liability of her husband created for necessaries for the wife or family; and any such married woman may, in her own name and without joining her husband, as a party plaintiff institute and maintain any action, in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action, as aforesaid, with the same force and effect as if such married woman was a femme sole: Provided, any judgment for costs in any such proceeding rendered against any such married woman, may be satisfied out of any separate property of such married woman subject to execution: Provided, that before any such execution shall be levied upon any separate estate of a married woman, she shall have been made a party to the action, and all questions involved shall have been therein determined, and shall be recited in the judgment and the execution thereon." December 29, 1930, the court sustained the plaintiff's motion to strike the defendant's motion and ordered the moneys held by the clerk of the district court for Douglas county to be paid to the plaintiff. From this order the defendant, Rosamond Clark, appeals to this court.

Appellant contends that although the validity of a contract is to be determined by the laws of the place where it is made, or by the law of the place of performance, the

remedy for the enforcement of the judgment is governed by the law of the place where the remedy is being sought. She contends that, inasmuch as the law of Nebraska will not permit the after acquired property of a married woman to be subjected to the payment of a judgment on a debt contracted prior to the acquisition of the property, the money in the hands of the clerk of the district court for Douglas county cannot be reached for the payment of this judgment. However, there is nothing before us to show that the money involved herein is the proceeds of after acquired property, except the statement in appellant's motion, which, of course, is no proof of the averment.

But, whatever the facts may be in that regard, it appears from the record that the appellant stipulated with the appellee, in the case of Clark v. Anderson, that the money involved in this action, to wit, the sum of $1,550, and which was the subject of the garnishment in said action, should be paid to the clerk of the district court for Douglas county, "to be held subject to and applied on any judgment rendered in favor of A. B. Gordon and against Rosamond Clark in the case shown in Appearance Docket 264, No. 65." If, therefore, there was any error in the order of the court which was appealed from, it is apparent that the appellant herself invited it, when she entered into the stipulation above referred to. It has been repeatedly held, and is the law of this state, that a party cannot invite, urge and consent to an order and judgment and then later complain of the alleged error so invited. *In re Estate of Mattingly,* 121 Neb. 90; *Campbell v. Crone,* 10 Neb. 571; *Missouri P. R. Co. v. Fox,* 60 Neb. 531.

This seems to be conclusive of the issues raised in this appeal, and it is unnecessary to decide the other questions raised. The judgment of the district court was correct and is

AFFIRMED.

THEODORE J. WEBER V. STATE OF NEBRASKA.

FILED JANUARY 28, 1932. No. 27990.

1. **Information.** An information which charges an offense substantially in the language of the statute is sufficient.
2. **Penal Statutes: CONSTRUCTION.** It is elementary that penal statutes are inelastic and must be strictly construed. They are never extended by implication.
3. **Evidence** examined and *held* insufficient to sustain a conviction.

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

W. T. Wills, for plaintiff in error.

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

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

RYAN, District Judge.

The plaintiff in error, Theodore J. Weber, was convicted of the crime of wife and child abandonment in the district court for Boyd county under section 28-458, Comp. St. 1929, and from a judgment of guilty on the verdict and a sentence of one year's imprisonment in the penitentiary he has brought the case to this court for review. For convenience in this opinion the plaintiff in error will be referred to as the defendant.

On February 26, 1931, the county attorney filed an information in the district court for Boyd county, reading as follows: "That Theodore J. Weber late of the county aforesaid, did, on the sixth day of March, A. D. 1930, in the county of Boyd and state of Nebraska aforesaid, Theodore J. Weber then and there being, then and there unlawfully and wilfully, feloniously and without cause, abandon his wife, Merna J. Weber and his minor child under the age of sixteen years and did, unlawfully and wilfully, feloniously neglect and refuse to provide for said wife and said minor child under the age of sixteen years, without just cause, contrary to the form of the statute in

such case made and provided, and against the peace and dignity of the state of Nebraska."

Section 28-458, Comp. St. 1929, reads as follows: "Whoever, without good cause, abandons his wife and wilfully neglects or refuses to maintain or provide for her, or whoever abandons his or her legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglects or refuses to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months."

It will be seen that the information is substantially in the wording of the statute except that it fails to allege whether the child was legitimate or illegitimate. This court has several times held that an information in the wording of the statute is sufficient. In this case there was a substantial compliance, since the statute embraces both classes of children, and the assignment is without merit.

It is also contended that there is no evidence showing abandonment on the part of the husband. The evidence disclosed that the defendant and the complaining witness, Merna J. Weber, were married at Yankton, South Dakota, on May 3, 1928, while both of them were attending the high school at Butte, Nebraska. At that time the complaining witness was seventeen years of age and the defendant was nineteen. They made their home with the defendant's parents until about the 1st of September, 1928. The defendant then went to North Dakota to work and his wife stayed with her parents until the first part of November, 1928, when they both went to Tyndall, South Dakota, where they worked about three weeks. They returned to Butte early in December, 1928, and spent the winter of 1928-1929 with the defendant's parents. About the 1st of February, 1929, they moved to a farm southwest of Butte, belonging to the defendant's parents. Neither the defendant nor his wife were possessed of any property or money; the defendant's mother loaned them

money enough to start farming. The child was born on April 5, 1929. They lived together on this farm until some time in August, 1929, when the complaining witness left the defendant. There is some conflict in the testimony as to the cause of this action on the part of the complaining witness. She testified that on certain occasions the defendant had beaten and bruised her and called her names. The testimony with regard to any particular abuse or ill treatment practiced upon the complaining witness by the defendant is rather indefinite. Her testimony is rather general on this point and consists of such statements as this: He was mean to me, and he would call me names and knock me around and beat me and hit me and strike me and I didn't care to take any such abuse. The defendant positively denies that he ever struck his wife or subjected her to any physical abuse, and testifies that, after the baby was born, she refused to work and thought only of spending money. All three of the times she left him, she went directly to the home of her parents, and, if there were any evidences of any physical abuse upon her person at those times, no witness other than herself has testified to them. The quarrels do not seem to have been very serious and complaining witness returned to the defendant's home on September 13, 1929.

She then remained with the defendant until the fore part of December, 1929, when they again quarreled and she again left him and started an action for divorce against him. The divorce action was abandoned, on the very salutary advice of the trial judge that they go back and try once more to make a home. Mrs. Weber returned to her husband about December 29 or 30, 1929. This time they lived together until March 4, 1930, when another quarrel occurred and the complaining witness again left the defendant. The circumstances of this last quarrel are very much in dispute. Complaining witness testifies that the defendant took the baby from their home to the home of his parents and informed her that she could not get the baby until she went to law. The defendant's version of it

is that the baby had been sick; that the complaining witness was not giving it proper attention; and that the baby was taken and left with his parents from about the 12th of January until March 4. The defendant was at home and in the house when the complaining witness left on March 4, 1930. It appears that she did not see him nor attempt to see him, nor to communicate with him in any way, until she filed the complaint against him for nonsupport on October 3, 1930.

After March, 1930, the defendant contributed nothing to the support of his wife. His mother did, however, send some money to her at different times. The amount of this is in dispute. Complaining witness testifies it was $25, and the defendant's mother says it was $50. After the complaining witness left the defendant's home, the defendant found a letter written by her that day to an uncle, as follows:

"Dear Uncle George: I don't really think I have a right to call you that any more but I used to. You know or rather remember Will Fritz? I am his second girl and was up to see you the time I was in the Hills. The light headed one that looks like her mother. Would you do me a favor or have your daughter do it. Let me know what kind of luck a person would have up in that country finding a job. I have had trouble with my husband and we are separating. I have to have something to do and happened to think of you folks.

"Hoping to hear from you real soon,

"I remain,

"Mrs. Merna Weber.

"Butte, Nebr."

In the later part of March, 1930, the defendant took up his residence in the state of Nevada, at Reno, and on June 24, 1930, commenced a divorce action against the complaining witness at that place. The expenses of obtaining the divorce seem to have been borne by the defendant's mother. She held a chattel mortgage upon the personal property of the defendant, which was foreclosed

after their marital difficulties. There are many other matters set out in the bill of exceptions, but this, in brief, is a résumé of the stormy married life of these young people.

Under this state of facts, it is hard to conceive how it can be said that the defendant is guilty, beyond a reasonable doubt, of the crime of wife and child abandonment. The evidence clearly shows that he was in the family home at the time the wife left; he did not order her to go; she left of her own accord and made no attempt to communicate with him thereafter except through the strong arm of the law. In the case of *Preston v. State,* 106 Neb. 848, speaking of abandonment, this court said:

"No inflexible rule can be laid down in cases of this kind; each must be decided on its own merits. The statute was intended for a wise purpose, but is capable of abuse and being made an instrument of intolerable oppression. It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication."

It is apparent from a reading of the record in this case that these young people entered into the marriage state hastily and without a proper realization of the seriousness of the step they were taking, or of the mutual obligations and duties incident to it. It is also apparent that neither of them ever made a proper effort to adjust themselves to each other's shortcomings, nor made proper allowance for them. It is equally apparent that both of them have been badly advised. Outside of the advise of the learned trial judge, whose humanitarianism is well known, they appear to have received no wholesome advice. The complaining witness was ill advised when she commenced the divorce action in December, 1929. After she left the defendant's home on March 4, 1930, the defendant went to Reno, Nevada, and obtained a divorce. That was an ill advised action on his part and his conduct in that regard cannot be too strongly condemned. It, however, took place after his wife had left him and the evidence fails to show

any connection between it and their separation. The testimony is, in our judgment, insufficient to support a conviction.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

RAPER, District Judge, dissents.

D. M. JUDKINS-DAVIES, APPELLANT, V. FRANK SKOCHDOPOLE ET AL., APPELLEES.

FILED JANUARY 29, 1932. No. 28007.

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

J. E. Ray and *Earl L. Hunter,* for appellant.

Mayer, Kroger & Mayer, contra.

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

PER CURIAM.

This is a controversy as to the priority of certain mortgage liens on a quarter section of land in Sherman county. In a foreclosure proceeding the district court decreed Arthur C. Mayer's $3,500 mortgage to be a first lien on the south half of the quarter section and his $2,500 mortgage to be a first lien on the north half of the quarter section. This was in accord with the stipulation of all parties on the trial. The decree also adjudicated the $5,000 mortgage of F. J. Coates to be a second lien on the whole of the quarter section and the $2,400 mortgage of the plaintiff to be a third lien on the whole of the quarter section. Plaintiff appealed on the ground that the court erred in not ranking her lien ahead of that of Coates.

Plaintiff is a doctor at Ingleside in Adams county. She kept an account in the Citizens State Bank of Ravenna. A. E. Erazim, of Ravenna, in the north part of Buffalo

county near the Sherman county line, was the cashier and in active management of the bank. F. J. Coates, residing at Grand Island, was the president of the bank, and generally visited it once a month for a few hours. The evidence shows that, from time to time since 1924, plaintiff's surplus funds from her account in the bank had been invested locally at Ravenna in mortgages, warrants and unsecured temporary loans. These investments, totaling a substantial amount, were placed by Mr. Erazim, who reported to Mrs. Davies from time to time as to the securities in which he had made investments for her. None of the matters were handled by any one else. He himself borrowed $1,400 of her and gave his note therefor. The business was done by correspondence. No criticism was made as to any of the dealings except as to the $2,400 mortgage.

In June, 1927, the Penn Mutual Life Insurance Company commenced a foreclosure of an $8,000 mortgage on this land, owned by defendant Frank Skochdopole, and on which the bank then held a second mortgage of $5,000. To refinance and pay off the liens on the land, Skochdopole, on April 6, 1928, made the two Mayer mortgages, aggregating $6,000; and on April 21, 1928, made a new mortgage to the Citizens State Bank of Ravenna for $5,000, containing a recital—"subject to first mortgages of $2,500 and $3,500 respectively." At the same time he made the $2,400 mortgage to A. E. Erazim containing the recital—"subject to previous incumbrances." On May 4, 1928, Erazim assigned this mortgage to plaintiff and on May 11, 1928, the bank assigned the $5,000 mortgage to Coates. Both mortgages had been sent by mail for record at the county seat in the same envelope without any instructions as to which should be filed first or which should have priority. Both were filed for record at the same moment, as shown by the indorsements made by the county clerk. But the $2,400 mortgage was first entered on the numerical index, and in recording them the $2,400 mortgage was on the next page preceding the record of the $5,000 mortgage.

Erazim testified it was his plan when it was made to have the $5,000 mortgage subject to the Mayer mortgages and the $2,400 mortgage as a third mortgage. He testified that, when he sold the $5,000 mortgage to Coates, he told Coates it was a second mortgage, and Coates bought it and paid for it in that belief. Coates testified that Erazim told him there were rather heavy cash withdrawals from the bank and he needed cash to keep up the cash balance and Coates informed him he would supply it. They went through the note case until they came to the Skochdopole $5,000 note. Erazim informed him how it was secured and told him it was a second mortgage. It was on a piece of land Coates knew. He took that and other notes and gave a check for the full amount of the various notes, paying $5,000 and accrued interest for the note and mortgage. The note and mortgage were assigned to him and he took them home to Grand Island. The bank closed about a year and a half later. He needed money and tried to sell his mortgage to plaintiff. Once at the home of a friend of both parties in Ravenna, and again at Mayer's office in Grand Island, Coates testified, he and plaintiff discussed the mortgage on the Skochdopole land and she never claimed hers was prior to his until later when her attorney looked the matter up and found hers was recorded ahead of his. Plaintiff testified she never knew until after the bank failed and she received the papers that hers "was not a first mortgage."

The mere fact that the $2,400 mortgage was indexed and recorded just ahead of the $5,000 mortgage does not, of itself, give it priority. Section 76-217, Comp. St. 1929, in the circumstances of their delivery by mail without instructions, requires them to "be considered recorded from the time of such delivery." By its terms the $5,000 mortgage was expressly made subject only to the Mayer mortgages, and by its terms the $2,400 mortgage was expressly made subject to all previous incumbrances. The evidence further shows that Erazim did all the business with both Skochdopole and Mrs. Davies and Coates had no

part in relation to either except as he learned from the securities and from Erazim; that it was understood between Erazim and Skochdopole that the $2,400 mortgage was subject to the others; and that, at the time the parties purchased the mortgages, the land was worth $16,000.

It thus appears that it is a disputed question of fact, to be determined from the evidence, which of the two mortgages is prior. We are impressed by reading it, as we were on its recital on the oral argument, that the trial court, who saw and heard the witnesses, was right in the finding and order as to the priority. Therefore, the judgment of the district court is

AFFIRMED.

MALCOLM R. BLACK, APPELLANT, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLEE.

FILED JANUARY 29, 1932. No. 28084.

Evidence examined, and *held* to support the judgment entered herein.

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

John J. Ledwith and *Fred M. Deweese*, for appellant.

Crofoot, Fraser, Connolly & Stryker and *James T. English, contra.*

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

PER CURIAM:

This is an action instituted by appellant Black to recover the sum of $1,500 and interest, alleged to be due under a fire insurance policy issued by the appellee to one L. K. Forney and subsequently assigned to appellant. The subject of insurance was a dwelling-house located on a farm in Clarke county, Iowa, which was destroyed by fire on February 24, 1928. There was a trial to a jury, resulting in a verdict for the insurance company. From the order of the trial court overruling his motion for a new trial, plaintiff appeals.

It appears that on the 14th day of November, 1927, Malcolm R. Black, appellant, as the then owner of the real estate involved, executed a warranty deed in proper form purporting to convey the land described therein, being the land on which the house in suit was located, to J. L. Ritchardson and Anese Ritchardson, husband and wife. This deed was filed for record in the office of the county recorder of Clarke county, Iowa, on November 23, 1927, and was mailed by the county recorder to the grantee therein named, who thereafter retained it. Appellee alleges that, this conveyance having been made and entered into prior to the date of the fire, the appellant at the time of the fire had no title to the real estate, and by reason of the conveyance, under the terms of the policy in suit, was not entitled to recover thereon.

The facts in the record disclose without question that in February, 1927, the appellant acquired the land on which the house then insured by the terms of the policy in suit was situated.

On October 28, 1927, the appellant, as owner of the premises, and as "party of the first part," entered into a sale contract in writing with one J. L. Ritchardson and wife, as "party of the second part," which in terms evidenced the fact that the "party of the first part" had sold to the "party of the second part" the farm therein described (on which the building in question was situated), "together with all appurtenances thereto belonging and now thereon," for $11,182.50, $250 of which was cash, $450 payable on or before March 1, 1928, and the balance by the assumption by second party of mortgages in said contract described and referred to. By the terms of this written instrument the second party also agreed to carry $2,000 insurance on the property, payable in case of loss to first party. First party also agreed therein to furnish "a warranty deed and a good and merchantable abstract of title, on or before March 1, 1928." and to pay for insurance on buildings up to March 1, 1928, and agreed to give possession by March 1, 1928.

Some time after the making of this contract, Ritchardson was asked to accept a warranty deed in terms transferring the land to him subject to the unpaid balance of the $15,000 mortgage to the Lincoln Joint Stock Land Bank of Lincoln, and thereupon, with his wife, to execute an extension agreement extending the time of the payment of the unpaid balance. The substance of his answer to this proposition may be epitomized as follows: "I told him they could change the deed over to me before March 1st, if it didn't interfere with the contract any, that the contract went ahead the same. You see I was to pay $432.50 more money before I was to get the deed and I wasn't to pay this over until the 1st of March." Thereupon Black executed the deed of November 14, 1927, hereinbefore referred to. Following this Ritchardson and wife, it appears, executed the extension agreement. It is also stipulated that the mortgage so extended remained on record until February 23, 1928. On that date J. L. Ritchardson and wife, Anese, executed two mortgages to the Lincoln Joint Stock Land Bank, one securing the sum of $6,500 was thereupon recorded in book 55 of mortgages at page 203, and the other securing the sum of $4,000 (both covering the same premises) was recorded in book 55 at page 204. After these mortgages last referred to had been recorded, the Lincoln Joint Stock Land Bank executed and filed a release of the first described mortgage, dated February 29, 1928, which was recorded in book 22 of mortgages at page 443 of the mortgage records of Clarke county, Iowa. It may be said that there is no evidence as to the facts of the transaction, which the existence of the last two mortgages referred to suggests must have taken place between the execution of the extension agreement heretofore referred to and the 23d day of February, 1928. It is also stipulated that no consent was ever asked of, or given by, the defendant insurance company to the conveyance of the property in question, or of any new or change of incumbrances on the land.

The policy in suit contains the following provision: "IV.

Unless otherwise provided by agreement of this company this policy shall be void: * * * (d) If the interest of the insured be other than unconditional and sole ownership; or (e) if the subject of insurance be a building on ground not owned by the insured; or (f) if any change other than by death of the insured, whether by legal proceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or (g) if the subject of insurance or a part thereof (as to the part so incumbered) be or become incumbered by lien, mortgage or otherwise created by voluntary act of the insured or within his control." It was also stipulated by the parties that the contract sued on was an Iowa contract, and governed by the statutes of Iowa as construed by the supreme court of that jurisdiction. In this respect the record proceeds as follows: "It is hereby stipulated and agreed between the parties that the following statutes were effective on the date of the alleged loss by fire of the plaintiff's house, and they are still effective and are the pertinent statutes relied upon by both parties in this action, and they are set forth in the Code of Iowa for 1924 as follows: (Then there is set forth verbatim sections 8976, 8977, 8978, 8980, 8981 of the Code of Iowa for 1924)."

The questions presented for review are: Has the trial court properly construed the statutes of the state of Iowa which are set out in the record as applied to the facts embraced in the bill of exceptions by stipulation and evidence? and, is the verdict supported by sufficient evidence? This tribunal may not take judicial notice of the terms of the statutes of a foreign state nor of the construction given such statutes by the superior courts of such foreign state. Thus, in the instant case, both the terms of the statute of a foreign state, and their accepted construction in its tribunals, are alike questions of fact to be established by proper proof. Conceding that the stipulation in the record fully covers the matter of the terms of the statutes

of Iowa, there is nothing in the stipulation relating to their accepted construction by the courts of that state. "The unwritten or common law of any other territory, state, or foreign government, may be proved as facts by parol evidence, and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law." Comp. St. 1929, sec. 20-1269. See, also, *Steinke v. Dobson,* 90 Neb. 616; 5 Ency. of Evidence, 830, 831; 23 C. J. 131.

In the case before us the bill of exceptions fails to show that any proof was made in the trial court as to the proper construction of the laws of Iowa as made by the supreme court of that state. Taking this omission as a fact, in connection with all the facts which appear in the record, it does not affirmatively appear that the trial court erred in the instructions excepted to, and it is plain that the verdict of the jury has ample support in the evidence which was submitted to them.

The action of the trial court we deem, in all things, correct, and its judgment is

AFFIRMED.

EDWARD A. JOHNSON, APPELLEE, V. JOHN WESKAMP, APPELLANT.

FILED JANUARY 29, 1932. No. 28098.

1. **Appeal:** PLEADING: ISSUES. "The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue." *Hensley v. Chicago, St. P., M. & O. R. Co.,* 118 Neb. 690.
2. **Equity.** "A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it, and thus avoid unnecessary litigation." *Buchanan v. Griggs,* 20 Neb. 165.
3. **Evidence** examined, and *held* to sustain the findings and decree.

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

Cordeal, Colfer & Russell and *F. J. Schroeder,* for appellant.

Butler & James, contra.

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

GOOD, J.

This is an action in equity to establish the boundary line between the southeast and the southwest quarters of section 25, township 5 north, range 29 west, in Frontier county, Nebraska, and to quiet title to the said southeast quarter in plaintiff.

Plaintiff is the owner of the southeast quarter and defendant the owner of the southwest quarter of said section. The boundary line between the two quarters was not definitely known, and each entertained a different view as to the location thereof. In the petition it was alleged that the parties had agreed to establish the boundary line at a point 160 rods east from a fence maintained on or near the west boundary line of defendant's quarter section, and that this line should be the true boundary. Plaintiff prayed the court's approval and decree that such boundary should be the true boundary. Defendant denied this agreement and alleged, in substance, that they had agreed to establish the boundary line by measuring 480 rods west from the east line of section 30, in township 5, range 28, said section lying immediately east of and adjacent to section 25. The court found that neither of the agreements contended for by the parties was established by the evidence, but found from the evidence that the true boundary line was at a point intermediate between those contended for by the parties. Defendant alone has appealed. Since plaintiff has not appealed, the finding that the agreement alleged by him was not established by the evidence must be accepted as correct.

Defendant complains that the court erred in finding that the agreement by him alleged, with respect to the boundary line, was not sustained by the evidence. This contention is without merit. The record is devoid of proof that would support any such agreement as contended for by defendant.

Defendant further contends that the findings and judgment are supported neither by the pleadings nor by the evidence, the principal argument being that the issue as to the true boundary line was not presented by the pleadings.

The record discloses that both parties offered evidence, which was received without objection from either, tending to show the location of the true boundary line. Both parties treated the pleadings as putting in issue the location of the true boundary line. They tried that question to the court, although it may not have been formally and technically presented by the pleadings. Defendant contends for the rule that the allegations and proof must agree. Such is the general rule, but it has some well-recognized exceptions.

In *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690, it was held: "The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue." Holdings to like effect by this court have been made in *Auld v. Walker*, 107 Neb. 676; *Sjogren v. Clark*, 106 Neb. 600; and *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840. Applying this rule, we think the court was justified in treating the pleadings as raising the issue as to the location of the true boundary line between the two quarter sections.

Another rule, quite applicable to the situation presented in this case, is: "A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties

before it, and thus avoid unnecessary litigation." *Buchanan v. Griggs,* 20 Neb. 165. This rule was followed and applied in *Seng v. Payne,* 87 Neb. 812; *Bell v. Dingwell,* 91 Neb. 699; and *Shevalier v. Stephenson,* 92 Neb. 675.

In the instant case, the court had jurisdiction of the controversy to quiet plaintiff's title to the southeast quarter of said section 25. Necessarily, it was required to determine where the boundary lines of that quarter were. In fact, that was the principal point in dispute. We think the court was vested with jurisdiction, under this rule, to determine the true boundary line.

Defendant urges that the evidence does not sustain the findings of the court. The court found that the northeast and the southeast corners of the southeast quarter were marked and designated by stones placed there by authority, and that the southwest corner of said quarter section was marked by pits and a mound, indicating the original government quarter corner. The northwest corner of said quarter section was found to be 38.80 chains west from the northeast corner of the southeast quarter and to be 39.80 chains east from the west section line of said section 25. The record discloses that the south half of section 25 contains approximately 314 acres, instead of the customary 320 acres to a half section. The result of establishing the boundary line, as found by the court, awards to plaintiff approximately 156 acres and to defendant 158 acres.

We are satisfied, from an examination of the entire record, that the finding of the court, with respect to the boundary line between the two quarter sections, is amply sustained by the evidence, and we concur in that finding.

No error prejudicial to defendant has been found. Judgment

AFFIRMED.

ALBERT J. BLOCHOWITZ ET AL., APPELLEES, V. FRANK J. BLOCHOWITZ ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27915.

1. **Deeds**: DELIVERY. A delivery of a deed of conveyance is sufficient if the grantor deliver it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument; and the wife of the grantor may be such "third person," to whom such lawful delivery of the deed may be made by the husband for the use and benefit of their children.
2. **Evidence** examined and *held* to establish the legal delivery of the deeds in suit.
3. **Deeds**: SETTING ASIDE: MENTAL CAPACITY. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.
4. ———: ———: UNDUE INFLUENCE. Undue influence which will avoid a deed is an unlawful and fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.
5. **Witnesses**. Even though a witness is shown to have testified falsely in some respects, his testimony as to matters concerning which he is corroborated by evidence of a credible nature should be considered and may be believed.
6. **Evidence**: ADMISSIBILITY: UNDUE INFLUENCE: MENTAL CAPACITY. Where the issue is undue influence and testamentary or mental incapacity, admission in evidence of former wills as tending to prove that the contested will, or other form of conveyance, was in substantial conformity with the testator's (and grantor's) former expressed purpose, made at a time when his competency is unchallenged and the existence of undue influence is not charged, is approved.
7. ———: ———. A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testa-

tor (and grantor) had a constant and abiding scheme for the distribution of his property.

8. **Evidence** examined and *held* to establish the validity of the deeds in suit.

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

Mockett & Finkelstein, Thomas J. Dredla and *Roy B. Ford,* for appellants.

John J. Ledwith and *Hall, Cline & Williams, contra.*

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

EBERLY, J.

This is a proceeding in equity to cancel four warranty deeds which the amended petition charges "were executed on April 4, 1929," by Joseph Blochowitz when he "was eighty-five years of age, and because of his extreme age and the condition of his health he was mentally incompetent to execute such conveyances;" as to which it is further alleged that they "were procured by fraud and undue influence, practiced by the defendants John A. Blochowitz, Frank J. Blochowitz and George Blochowitz * * * and * * * were never delivered." The plaintiffs are Albert J. Blochowitz, Lena M. Yankton, and Anna Geistlinger, who are respectively the brother and sisters of the defendants named above. Rosalia Blochowitz, widow of Joseph Blochowitz, who is the mother of all of the other parties to this litigation, is also made a party defendant. She joined with her husband in the execution of the four conveyances in suit, but, as to her, the pleadings make no charge of participation in fraud or in the exercise of undue influence; neither is her competency challenged, nor is it alleged that she was in any manner deceived or defrauded in the transaction, or that she was the subject of undue influence. The allegations of the amended petition were traversed by appropriate pleadings, and upon the issues thus formed a trial was had, which resulted in a decree

for the plaintiffs. Motions for new trial were filed by defendants, which were by the court overruled. Defendants appeal.

This court is now, by statute, to determine the issues *de novo* from the six volume record before us.

The consideration of the disputed evidence must be made in the light of the following facts: Joseph Blochowitz and his wife, Rosalia, were natives of Poland, but of German stock. They migrated to the United States in the year 1880, and purchased a quarter section of land in Lancaster county in January, 1884, on which they thereafter made their home. To them seven children were born, one of whom died in infancy, and six of whom were living at the time of the death of the father on February 20, 1930. There is no dispute in the evidence that life in this family was a life of unremitting service and toil. From the age of thirteen years the sons were required to carry on as men. The labors were incessant, the hours were long, entertainment and relaxation were unknown, with frugal fare and meager compensation. All parties concede that for many years, even after the sons attained their respective majorities, the father received and appropriated the fruits of the common toil, managed and controlled it as his own property, and ruled his household like the patriarchs of old, with a conceded power and supremacy unchallenged by its membership.

Reference in the briefs is made to the fact that the savings of Joseph Blochowitz and his wife, accumulated during the seventeen years after the purchase of their Lancaster county home, were unwisely loaned to the proprietor of a lumber yard at Crete, Nebraska, resulting in a total loss. So, after this incident, about the year 1898, the Blochowitz family continued their toil in pursuit of a fortune. In the meantime, in March, 1894, an additional eighty-acre tract had been acquired by the father. Thereafter further purchases of real estate were made by him until in July, 1904, when he bought the S. E. ¼ of section 14, township 8, range 5, he had become the owner of 640

acres of land, all situated in the immediate vicinity of the home place, and most of it thereto adjoining. The record indicates that the real estate was all paid for prior to 1910. In 1901 Lena Blochowitz, then eighteen years old, was married to Theodor Yankton, and in the same year her sister, Anna Blochowitz, then fifteen years of age, was married to Mathias Geistlinger, and both daughters thereafter removed to new homes with their husbands, and thereafter ceased to labor under the father's direction or for the benefit of his family. In 1903, according to the record in this case, the earliest will of Joseph Blochowitz was executed. It bears date September 4, 1903, is in due form, and by its terms Lena Yankton and Anna Geistlinger are to receive the sum of $100 each; Frank and John Blochowitz are each devised a quarter section of land, and Albert and George are each to receive eighty-acre tracts. In November, 1906, Lena Yankton is paid $1,000 cash by her father, which is receipted for, "as inheritance from Joseph Blochowitz and wife." In this connection it may be said that on January 26, 1920, Anna Geistlinger is paid a like amount by her father, and an identical receipt executed by her. On the 10th day of April, 1907, Joseph Blochowitz executed the second will, which is also in due form. By the terms of this instrument Lena Yankton and Anna Geistlinger are to receive legacies in the sum of $100 each, Frank and John Blochowitz are each devised 160 acres of land, to Albert is devised 80 acres, and a like amount is given his brother George. Rosalia Blochowitz is named as residuary legatee, and "all former wills and codicils by me made" are revoked. On the 10th day of October, 1910, another will was executed by Joseph Blochowitz. It is in due form; expressly revokes "all former wills by me made," bequeaths to Lena Yankton and Anna Geistlinger the sum of $100 each, and devises to Frank Blochowitz the S. E. ¼ of section 14; to John Blochowitz the S. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼, all in section 11; to Albert Blochowitz the N. E. ¼ of section 14; to George Blochowitz the E. ½ of the N. W.

¼ of section 14, and the N. ½ of the N. E. ¼ of section 11, all in township 8, range 5, East of the 6th P. M.

In 1913 Frank J. Blochowitz and immediate family, by direction of his father, moved upon the S. E. ¼ of section 14, and thereafter improved, farmed and continued to reside thereon, the record title thereto continuing in the father. On April 4, 1929, Joseph Blochowitz and his wife executed four warranty deeds, each in due form, which purport to convey the following Lancaster county lands: To Frank J. Blochowitz the S. E. ¼ of section 14, reserving the payment of $600 to be made annually by grantee to grantors during their lifetime; to John Blochowitz the N. E. ¼ of section 14, reserving a $400 annual payment to be made by grantee to grantors during their lifetime; to Albert Blochowitz the N. ½ of the N. E. ¼ of section 11, reserving payment of $400 annually to grantors by grantee during lifetime of grantors; to George Blochowitz the E. ½ of the S. W. ¼ and the S. ½ of the S. E. ¼, all in section 11, also the E. ½ of the N. W. ¼ of section 14, reserving annual payment of $800 to be made by grantee to grantors during their lifetime, and also the reservation of two rooms in the premises by grantors during their lifetime. On April 4, 1929, after having signed and acknowledged the above conveyances, Joseph Blochowitz also executed a last will and testament. This instrument, in due and usual form, bequeaths to Anna Geistlinger and Lena Yankton the sum of $500 each, declares: "All of my four sons, Frank J., John, Albert, and George, are entitled to no further part of inheritance as all each and every one of them have received all that they are entitled to," revokes all former wills, but contains no residuary clause.

"Execution" of the four instruments in suit being admitted by the pleadings, the determination of the disputed question of their legal delivery is logically first for decision.

The testimony of George A. Hagensick, a witness called by, and testifying for, plaintiffs on this subject, is that

the four deeds in suit had been executed in his office on the 4th day of April, 1929, by Joseph Blochowitz and his wife. On the same day, after the drafting, signing and acknowledging of the deeds, Blochowitz had also executed his last will and testament, which it may now be said has been duly admitted to probate. Witness testifies that after this work had been completed he informed the Blochowitzes that, "if those deeds were not recorded, they should be turned in the hands of a third party." Mr. Blochowitz thereupon turned over the four deeds and his will, which were then contained in an unsealed envelope, to his wife, saying, "You keep those papers for the boys and girls." Mrs. Rosalia Blochowitz, also called as a witness on behalf of plaintiffs, in her testimony thus elicited fully corroborates the statements of witness Hagensick, and it cannot be denied that at the conclusion of this transaction she received and thereafter kept "for the boys" the deeds in question after the death of her husband until they were by her turned over to her son, Frank J. Blochowitz, and pursuant to her directions recorded.

Appellees challenge the legal sufficiency of these facts to sustain a delivery. In support of their position they cite the following from 1 Devlin on Deeds, 382: "There is no delivery of a deed made by a husband and wife to their children, where it is placed by the husband in the hands of the wife (who is one of the grantors) for safe keeping, and is retained in their possession and control." It would seem obvious that the facts contemplated by this language are not the facts involved in the instant case. The sole authority cited by the author in support of the text quoted is *Morris v. Caudle,* 178 Ill. 9. But the true application of the principle announced in the text and decision referred to is disclosed in the following quoted from the opinion in *Morris v. Caudle, supra:* "After the deed was executed, the grantor, Caudle, took it home with him and then handed it to his wife, and it was kept in the house where he and his wife resided, under his control,

until the last of July, 1885, when the wife sent it to the county seat to be recorded. If, upon the execution of the deed, Caudle had delivered it to his wife to be by her held for the grantees therein named, we would not hesitate to hold that the instrument was delivered."

A careful reading of *Joslin v. Goddard,* 187 Mass. 165, *Gaines v. Keener,* 48 W. Va. 56, and *Meador v. Ward,* 303 Mo. 176, also cited by appellees, is convincing that they are wholly inapplicable to the facts of the instant case. Indeed, the case last cited is in principle wholly opposed to appellees' contention.

The true rule appears to be that it is not essential to the validity of the deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument. *Roepke v. Nutzmann,* 95 Neb. 589; *Johnson v. Becker,* 251 Mich. 132; *Sneathen v. Sneathen,* 104 Mo. 201; *Kittoe v. Willey,* 121 Wis. 548; *Gilmore v. Griffith,* 187 Ia. 327; *Hill v. Naylor,* 99 Neb. 791. In Nebraska the conveyance of real estate and the delivery of deeds conveying the same may be made direct by husband to wife. *Lavigne v. Tobin,* 52 Neb. 686; *Currier v. Teske,* 84 Neb. 60; *Furrow v. Athey,* 21 Neb. 671. And the wife of the grantor may be such "third person," to whom lawful delivery may be made by the husband for the use and benefit of their children. *Sneathen v. Sneathen,* 104 Mo. 201; *Kittoe v. Willey,* 121 Wis. 548; *Gilmore v. Griffith,* 187 Ia. 327; *Stout v. Rayl,* 146 Ind. 379.

However, appellees further contend that the probative force of the evidence of Hagensick and Rosalia Blochowitz on the subject of the delivery of the deeds is largely, if not wholly, destroyed because of the fact that as to certain details their evidence in the present case is wholly at variance with evidence given by them in certain depositions prior to the present trial. It may be said that there was a case pending in the county court of Lancaster county involving the probate of the will drawn at the time of the

execution of these deeds in suit. In this proceeding the parties in the instant case were also parties thereto. It also appears that the plaintiffs in the instant case procured the deposition of Hagensick to be taken, in which it is claimed in response to interrogatories he testified as follows, as to the delivery of the deeds in suit (after detailing the drafting and execution of the deeds and will): "Then I took the papers that were left there, the deeds and the will, and put them in an envelope and handed them to Mr. Blochowitz, and he said, 'No, give them to the Mrs.,' and (when he handed them over to her) he said, 'You take care of these.'" And to the question propounded to him, "Is that all he said?" this witness answered, "Yes." There are other answers in this deposition of similar tenor. But it also appears that after the taking of this deposition Hagensick was called as a witness in the probate proceeding then pending in the county court of Lancaster county, and to which the parties to this instant case were also parties. In that proceeding he testified as follows: "Q. Now, do you think of anything further, Mr. Hagensick, that was done there that afternoon in the making of this instrument? We just want to get everything that happened you know. Have you told the court everything that was said, and everything that was done there after the instrument was signed? A. I had the deeds and I took the deeds and this will and put them in an envelope and told Mr. Blochowitz, if these deeds are not delivered to the boys, they should be placed in the hands of a third party. I handed them to Mr. Blochowitz, and he, in turn, handed that envelope to Mrs. Blochowitz, who was sitting to the right side of him, and he said, 'Here are these papers. Take care of them for the boys and girls.'"

To the instant case Hagensick is not a party. So far as disclosed by the record he has no financial interest therein. He was called as a witness by plaintiffs, and examined in their behalf concerning the delivery of the deeds in suit by Blochowitz to his wife. His testimony was in all respects a substantial reiteration of the testimony given by

him in the county court. He was called and examined by plaintiffs as their witness with full knowledge of what that evidence had been. Thereafter upon the basis of, and with reference to, the first deposition, over objection, he was in effect cross-examined in a manner appropriate to impeachment, and the statements in such deposition on the subject of delivery of the deeds were, over objection, read to the witness in the presence of the court and thus in effect received in evidence as contradicting the statements then testified to by him. In this the trial court erred. The controlling rule applicable to the situation is: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120. But in the instant case the plaintiffs, in the light of the facts fully known to them when they called this witness to the stand during the trial here under review, could not have been "misled" or "entrapped" by the statements appearing in the first deposition, in view of his subsequent testimony in the county court. It is incredible that they, then, in any manner relied thereon or were deceived by the testimony in this case actually given, and that they were actually "surprised" thereby is a conclusion wholly unsupported by the record and inconsistent with common sense. The prerequisites to invoking the application of the rule quoted were wholly absent, and the trial court therefore, it is considered, erred in failing to sustain objections seasonably made to this line of examination pursued by plaintiffs, who are in turn under the facts in this case bound by the evidence elicited by them, otherwise uncontradicted, unmodified by the evidence thus erroneously received.

It also follows that, giving full force and effect to the competent evidence before us, we are required to hold that a legal and effective delivery of the four deeds has been established by a clear preponderance of the evidence.

We have carefully read and considered the testimony of this record as to the mental capacity of the grantor on the date the deeds were executed. The testimony on this branch of the case covers a great many pages, and it would be impossible to give even a fair summary of it without extending this opinion to unwarranted length. The plaintiffs having alleged the incapacity of the grantor to make the deeds, the burden was upon them to establish such fact. This they have not done. Our conclusion of the record upon this phase of the case is that it falls far short of adequate proof of lack of mental capacity to make the deeds. The rule of law is well settled that, to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he would not understand and comprehend the purport and effect of what he was then doing. *Clark v. Holmes,* 109 Neb. 213; *Schley v. Horan,* 82 Neb. 704; *West v. West,* 84 Neb. 169.

The transactions evidenced by these warranty deeds are also challenged by appellees as being the fruits of fraud and undue influence. It is true that the parties involved are father and sons; that their mutual business transactions were continuous, close, confidential, and involved. Conceding for the moment only that the relations disclosed were of such a character, when taken in connection with the facts by plaintiffs claimed to exist, as to raise an inference or presumption of a present undue influence, or even a present constructive fraud, still the ultimate controlling principle is: "The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render

it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." *Hacker v. Hoover*, 89 Neb. 317; *Brugman v. Brugman*, 93 Neb. 408; *Little v. Curson*, 114 Neb. 752.

According to the theory of plaintiffs, as outlined in their briefs, and to some extent presented in argument, the will of the donor was by unlawful and fraudulent influence controlled in the instant case; that prior to the induction of Albert J. Blochowitz into the United States military service in 1917, while the father was mentally competent, he, the father, transacted his own business, and all of the property was in his own name. In addition to 640 acres of land in Lancaster county, and a South Dakota farm, he at that time had also acquired, and then owned, mortgages and bonds to the extent of $100,000, or "a little better, which were kept in a tin bucket in father's and mother's bed room;" that "before the war (when Albert was 16 or 17 years old) Albert was told by Joseph (his father) that each son was to get a quarter section of land," and there was to be an equal division of the bonds and mortgages. When Albert got back from the army in 1919, "He found that he was outside the family circle. Things were different." The father acted "kind of sore;" that the father's business was then largely transacted by the defendant sons, a condition which thereafter progressively continuously increased; that advancing age weakened and impaired the father's mental faculties and judgment; that the defendant sons, taking advantage of the situation and especially of the confidential relations existing, succeeded in poisoning the mind of the aged father against the absent soldier son, and, as the fruits of the exercise of this undue influence, had on numerous and various occasions between the departure of Albert for the army and the death of the father in February, 1930, not only obtained the conveyances of April 4, 1929, in suit in this case, but secured for themselves that which in the end resulted in the acquirement of substantially all personal property owned by the father in his life, to the exclusion of plaintiffs herein.

It must be kept in mind, however, that in the instant case the issues framed by the pleadings relate exclusively to the real estate. The cancelation of the deeds in suit is substantially the sole relief sought by the plaintiffs.

At the trial of these issues in this case the defendants were called by plaintiffs as their witnesses. There is oral evidence given by the defendants, while testifying as plaintiffs' witnesses, which, if believed, fairly established that the execution of the warranty deeds in suit was solely due to the gratitude, affection and confidence of the grantors thereof to and in the several grantees named therein, and was made pursuant to a substantially constant and abiding scheme of the father for the distribution of his property; and which fully negatives the idea that any undue influence by or on the part of such grantees had been used "to confuse the will or control the judgment" of the grantors, and which also expressly negatives the use by the defendant sons with the father of any influence adverse to the plaintiffs or any of them.

Opposed to this the plaintiffs appeal to the record, which discloses that upon the commencement of proceedings in the county court of Lancaster county to probate the will of April 4, 1929, and after the commencement of the present action to cancel and annul the warranty deeds of that date, and notwithstanding the defendants were lifetime residents of Lancaster county, and at all times subject to the commands of process issued from its courts, the plaintiffs proceeded to take the depositions of the defendants, evidently for a purpose not embraced in the express words of our controlling statute. Later in the probate proceedings in the county court of Lancaster county the defendants were again called and testified as plaintiffs' witnesses. Still later on the trial of the instant case in the district court for Lancaster county the defendants were by plaintiffs called as their witnesses, and as such testified. On each of these three occasions the scope of the evidence covered appears to have been substantially the same. In addition, by the use of leading questions, accorded counsel

for the plaintiffs by the trial court in making their case in chief, these defendants, as plaintiffs' witnesses on this third occasion, were in fact, if not in form, subjected to a comprehensive cross-examination, which covered not only their then testimony, but embraced as well the statements contained in the prior depositions and the evidence given by them in the county court. Plaintiffs further insist that this evidence establishes an admitted relation of trust and confidence between the grantors and grantees at the time of the execution of the deeds. Admitting that defendants, having been called and testified as plaintiffs' witnesses, may not be impeached, plaintiffs now insist, however, that these witnesses, due to conflicting statements testified to by them on these respective occasions, stand so discredited as to deprive their evidence of its probative force and effect, and that therefore the burden of evidence imposed upon them by the existence of relations of trust and confidence with grantors has not been sustained. However, the rule appears to be: "Even though a witness is shown to have testified falsely in some respects, his testimony as to other matters concerning which he is corroborated by evidence of a credible nature should be considered, and may be believed." 40 Cyc. 2590.

There is no controversy as to the situation in the Blochowitz home prior to the World War, and that competency of the father at the commencement thereof is unchallenged, and the existence of fraud or undue influence therein is not charged.

In this situation, "The law, founded on a full knowledge and just appreciation of the general course of human affairs, indulges a strong presumption against any sudden change in the moral as well as the mental and social condition of man. When the existence of a person, a personal relation or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before till the contrary is shown, or till a different presumption is raised from the nature of the subject in question." Lawson, Law of Pre-

sumptive Evidence (2d ed.) 229. See, also, 1 Moore on Facts, 517.

Upon this as an ultimate basis courts have almost uniformly adopted the conclusion that, where the issue is undue influence and testamentary incapacity, admission in evidence of former wills as tending to prove that the contested will, or other form of conveyance, was in substantial conformity with the testator's former expressed purpose, made at a time when his competency is unchallenged and the existence of undue influence is not charged, is approved. *Bowers v. Kutzleb,* 149 Md. 308; *Lindsey v. Stephens,* 229 Mo. 600; *Whisner v. Whisner,* 122 Md. 195; *Kerr v. Lunsford,* 31 W. Va. 659; *Hughes v. Hughes' Executor,* 31 Ala. 519; *Thornton's Exrs. v. Thornton's Heirs,* 39 Vt. 122; *Ross v. McQuiston,* 45 Ia. 145; *Payne v. Payne,* 97 W. Va. 627; *Barlow v. Waters,* 16 Ky. Law Rep. 426; *Love v. Johnston,* 34 N. Car. 355; *Sanger v. Bacon,* 180 Ind. 322; *Nieman v. Schnitker,* 181 Ill. 400; *Thompson v. Ish,* 99 Mo. 160.

An examination of the above cases discloses that, while some jurisdictions on the issue of undue influence hold as inadmissible the contents of a former will in support of a contestant, "where the terms of such will are variant from the will in suit" (*McCune v. Reynolds,* 288 Ill. 188), yet all the cases above cited are in agreement that, "In a will contest case the proponents may introduce a prior will executed when the testator's testamentary capacity was not questioned and which conforms substantially to the instrument contested, for the purpose of refuting charges of undue influence or want of testamentary capacity by showing that the testator had a constant and abiding scheme for the distribution of his property." *Pollock v. Pollock,* 328 Ill. 179.

True, in the instant case the final instrumentalities of conveyance made use of were warranty deeds, and not testamentary in character. But the vital questions remain the same. Then, too, in the recent case of *Holtman v. Lallman, ante,* p. 183, where the controlling questions

were, as here, the validity of a warranty deed and of certain gifts of personal property, attacked on the ground of undue influence and mental incapacity, and the district court admitted in evidence the provisions of a prior will of grantor, the discussion of the effect thereof, in the opinion of this court, by fair implication approves the action of the trial court.

It is to be noted that the wills of the decedent executed by him in 1903, 1907, and 1910, respectively, offered by the contestees, among other purposes, for showing his continuity of mind, were received in evidence without objection; their authenticity is unquestioned, and they are regular and in usual form. The formality of the execution of these instruments is not an issue in this case, and the testimony of the attesting witnesses thereto is unnecessary and immaterial. *Sanger v. Bacon,* 180 Ind. 322. Each of these wills, now in evidence as valid instruments, in view of the admitted facts before us, must be taken not only to establish, as of the date they were respectively executed, the state of personal relations between the testator and the devisees therein named and his then intentions with reference to the disposition of his property made thereby, but also to afford strong and persuasive evidence of the substantial and uninterrupted continuance thereof in all respects until each of such instruments was formally or actually superseded or revoked.

A deed procured by the exercise of undue influence upon the grantor may be set aside upon a proper and timely application of the party aggrieved. 18 C. J. 236.

Having these principles in mind, we now come to the consideration of the controlling facts on the issue of undue influence.

Rosalia Blochowitz, the mother, accepts the provisions for her support contained in the deeds, and in effect joins in the prayer that they be sustained. To the daughters, Lena M. Yankton and Anna Geistlinger, the wills of 1903, 1907 and 1910 provide identical legacies of $100 each, and no more. The will of 1929, executed substantially contem-

poraneously with these deeds, raised these legacies to the sum of $500 each. Their friendly relations to their father in his lifetime, as well as the constant and abiding scheme for the disposition of his property adopted by him, evidenced by all the wills now before the court, so far as they were concerned, wholly negative the possibility of undue influence in any manner affecting the provisions made in their behalf by the testator. Inequality of distribution of itself raises no presumption of the exercise of undue influence. *In re Estate of Stuckey,* 105 Neb. 641; *In re Estate of Kees,* 114 Neb. 512.

Indeed, courts of high standing recognize the fact that it is to be expected, and is not unnatural, but a common practice, for men of European birth to give the greater portion of their property to sons, particularly where the daughters are married. *Fortner v. Helgeson,* 188 Wis. 594.

Nor does the charge that the deed to the eldest son was tainted with undue influence or fraud find any substantial support in the evidence. Until attaining the age of 33 years this boy had been subjected unreservedly to his father's direction and absolute control. He had labored for his father continuously, receiving practically no compensation for his toil. There is no evidence of any break in the friendly relations between this son and the father, and in the record before us there is no possible question as to the steady, fixed purpose of Joseph Blochowitz in the matter of rewarding the eldest son in the manner effected by the deed executed here in suit. Indeed, the plaintiff son admits that he was informed by the father prior to the war, but after the 640 acres had been acquired, that each of the sons would receive a quarter section of land. By the terms of each of the wills of 1903 and 1907, Frank J. Blochowitz was devised a quarter section of the Lancaster county land. In the will of 1910 he was devised the S.E.¼ of section 14, township 8, range 5, which as to him remained in full force and effect until the execution by his father and mother of the deed to him in suit. In this questioned deed he receives this land last described, no more, no less, no other.

The admitted facts of the record thus effectually negative the operation of undue influence in the conveyance to Frank J. Blochowitz.

Nor do we find any lack of evidence in the record sustaining the deed of conveyance to John A. Blochowitz, the second son, whose age is 42. He, too, according to the admitted declarations of his father, was to receive a quarter section of the 640 acres then owned by the latter. The wills of 1903, 1907 and 1910 evidence the intent of the father that John was to receive the home place. This quarter section was valued by plaintiffs' witnesses at $125 to $130 an acre. By the warranty deed in suit herein there is conveyed to John, not the home place, but the N.E.¼ of section 14, township 8, range 5, which plaintiffs' experts value at $100 an acre. The testimony of Albert J. Blochowitz, hereinafter referred to, affords a convincing reason for this change, so that this transfer also may fairly be said to be substantially in accord with the long, fixed and continued purpose of the father evidenced by his admitted oral declarations, as well as by the provisions of the wills referred to. Aside from this, the comparative value of the two tracts in no manner indicates that an undue influence was exerted by or in behalf of John A. Blochowitz to secure the substitution of the land conveyed by deed for the land devised by the wills.

The warranty deed of April 4, 1929 in suit, conveys to George Blochowitz the "home place" and also the E.½ of the N.W.¼ of section 14, township 8, range 5. This comprises 240 acres. The 80-acre tract last described was devised to George in each of the father's wills of 1903, 1907, and 1910. With reference to intentions of the father as to the disposition of the "home place," the following appears in the record: Albert Blochowitz, testifying in his own behalf on his direct examination, speaks of what he calls "a will," which was exhibited or read to his mother, his brothers, and himself at the home place by his father "twenty or more years ago," and of the contents of this instrument says: "He (Joseph Blochowitz) had the will

made and he read it that each one of the boys should have 160 and the two that get places with improvements should have $5,000 less than those who get places without improvements." "He read it to us. He had the will right there, and the girls should have $500, and the balance should be divided. * * * They should have $500 where the boys get a quarter. Q. And all the other property be divided equally among the boys? A. Yes, sir." On cross-examination this witness testified that no particular piece of land was described in the will as being devised to any one; but that it provided with reference to the home place, "Well, the one that would stay at home would get the home place." He (Joseph Blochowitz) said "either the youngest or the one who was married last would get the home place." This witness also testified that he does not remember the provisions made in behalf of the mother; but that, after the will had been read and explained by the father, it was submitted to the sons and by them approved. It is quite possible, in view of the fact that the lands devised were not described or identified in the writing referred to, that the witness was mistaken in the character of the instrument submitted to them for consideration. No such will is in the record. The provisions, as testified to by him, are such as might well be embraced in a preparatory memorandum for the making of a will, but would hardly be found in the completed instrument as it would come from the hands of a competent draftsman. But, whether a will or a memorandum preparatory to making one, it evidenced the father's adopted plan, then declared by him at a time when his competency was unquestioned, and fraud and undue influence concededly absent, that under the situation as existing at the date of the deeds the youngest son should ultimately receive the family home.

But little or no support in the evidence is to be found sustaining the theory that a serious estrangement between the father and the plaintiff son occurred, growing out of, or because of, the latter's participation in the World War.

True, the father, while the conflict was still on, tried to secure Albert's release from military service, and at one time stated that "he had lots of work to do, and most generally when they go to war they never come back." And at another time said, "The war is bad business;" and at still another time, in a conversation concerning Albert's being then in the army, remarked, "It was bad; the boys are just spending money there; they spend too much money." He thought "they should not have any wages when they get their clothes and board, that ought to be sufficient." These different statements are all that plaintiffs' evidence discloses on this subject. We find no direct evidence, however, that the subjects of these remarks were ever referred to, discussed, or considerd by Joseph Blochowitz, after the war, save and except the unsupported testimony of the plaintiff son that once after his return, when he and his father were alone together, "he told me that John and Frank had told him that I was running around in France and spending all my money."

We may not approve of the father's efforts to deprive the nation in time of war of the military service of the son. Even so, this court would certainly be wholly unjustified in penalizing the entertaining and voicing of the views expressed by the father, and his instigation of the proceedings taken in behalf of the son, by, in effect, judicially depriving this father, and those similarly situated, of testamentary capacity and of the power to make such disposition of their property, accumulated by industry and thrift, as their judgment may dictate. Indeed, without criticism of the son, it may be said that it is undisputed in the record that he did write home from France for money, in addition to his army pay.

The evidence, however, is without contradiction that a serious disagreement did occur between the father and the plaintiff son in reference to a proposal that the father would, or should, turn over to this son a quarter section of the Lancaster county land which the latter should farm and improve. While it is not expressly stated in the record,

yet the uncontradicted facts sustain the inference that the same relations between the father and the plaintiff son were implied in this proposal that existed between the family and the other sons who had been given land to farm, and there is nothing which indicates that, had it been accepted, Albert would have been differently treated. But it was not accepted. It is patent that Albert desired a quarter section which it subsequently appears was then intended by the father for another son. He (Albert) was at the time of the consideration of the proposal refused any "papers" or assurance by the father that would guarantee him continued possession of, or ultimate title to, the land involved, but was advised that his brother John had the superior right thereto. Solely due to this fact, it seems, the son spurned the offer, and thereafter wholly withdrew from the communal family and from participation in its communal affairs. He thereafter conducted his business affairs on an individualistic and wholly independent basis. The other sons remained with the father and carried out and respected his plans and directions in the family affairs. This situation had continued almost ten years at the time of the execution of the deeds in suit. There is no testimony that any of the other sons were present at, or in any way participated in, or were connected with, the basic disagreement. The entire record, we feel, unmistakably indicates that the results of which the plaintiff son complains are due, not to any malign influence exerted against him by his brothers, but to the natural and inevitable effect of a nine year abandonment of the communal family enterprise, of which the father was the directing head. He, who for almost ten years ceased to contribute to the common enterprise and wholly withdrew therefrom, in conscience foreclosed himself of the right to expect equality of consideration by the father in the distribution of the avails thereof.

Plaintiffs introduced evidence as to the existence of fiduciary relations between the defendants and their father during the continuance of which, by transactions had between them, it is claimed, the father was divested of his

ownership of a large amount of bonds, mortgages and securities, and in which the same became the property of such defendant sons. It seems to be contended that this line of testimony not only establishes the nature of the relations existing between these parties, but sustains the charge that the real estate transfers were tainted by the exercise of undue influence on the part of the transferees. The evidence in the record, however, does not support this contention. In *Holtman v. Lallman, ante,* p. 183, wherein similar issues as questions of undue influence and fraud were presented, the pleadings embracing both conveyances of real estate and gifts of personal property, this tribunal determined the law, by implication at least, against plaintiffs' present contention, by sustaining the transfers of real estate and by setting aside the gifts of personal property. In the present case we are limited by the pleadings to the validity of the warranty deeds in suit. The source of the funds involved in these investments is not a matter of dispute. It is agreed that the father, from the beginning, appropriated and controlled all of the profits and proceeds of the 640-acre farm, a situation which was continued long after the sons had attained their respective majorities. It may be fairly deduced from the evidence that the fund was contributed to by Frank, George and John as late as the month of the father's death. The hope and inducement which from the commencement of the course of business was held out by the father to his sons was that the investments made by him were for their benefit, and in due time would become their own. The evidence of the banker from whom a large amount of the securities involved were purchased is, in substance, that the business was transacted by the father at his home. Personally he never went to the bank for that purpose, even in the earlier years. The members of the family, while quite often present during the negotiations, and to an extent participating therein, were his servants and messengers in the matters transacted, and simply carried out his decisions and directions with reference to the same. Joseph Blochowitz was always

the dominant controlling spirit in these matters, and, from all the evidence, it fairly appears that there was no change in the situation up to and including the last of these transactions, which took place a few days prior to his death. So, too, the transfer to, or placing of these securities in, the names of the several sons did not commence after the estrangement of Albert, but these promises made by the father to his sons, it is quite plain, were in the course of fulfilment long prior to 1917. Relating to this subject Albert testified in part: "A. He (Joseph Blochowitz) had been buying (securities) all the years I know before the war when I was home. I used to go with mother to the First Trust Company, and take the money for fat cattle, and take the money and put it in mortgages in John's or George's name, in mortgages for John and George. * * * Q. And sometimes in your name? A. Yes, sir; sometimes in mine."

It is also quite evident that as this division between the sons was carried out, both before and after the war, it was not made upon a per capita equality basis. It was a matter that rested wholly on the judgment of the father, who did not hesitate, by the exercise of parental authority, to change the situation at any time, even after legal title to the personal property involved had been fully vested in the donees.

It is quite obvious that, notwithstanding the advancing years and the delegation of certain matters to others, Joseph Blochowitz was, and ever continued, the master mind and the occupier of the relatively dominant position, and at no time, in comparison with his sons, could he be deemed the weaker party. The situation fully justifies the application of the rule that, "Even where the donor and donee stand in confidential relations, the presumption of undue influence arises only when the weaker party is the donor, being always against the party having the superior dominant position or control, though who was the dominant spirit is always a question of fact." 8 R. C. L. 1033, sec. 89.

Expressly negativing the intention to determine the validity of any of the transfers of personal property set forth in plaintiff's evidence, as between the respective parties thereto, we are still of the abiding opinion that, under all the circumstances disclosed by the record, they wholly fail to establish the exercise of undue influence over the father in the real estate transactions in suit.

Undue influence, whatever the technical definition thereof may be, must amount in effects accomplished to the destruction of the free agency of the grantor, and there must be proof that the deed was obtained thereby, and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which cannot be presumed, but must be proved, in connection with the conveyance in suit, and not with other things. *Latham v. Schall,* 25 Neb. 535; *Seebrock v. Fedawa,* 30 Neb. 424, 438; *Boggs v. Boggs,* 62 Neb. 274, 284; *Ward v. Ward,* 86 Neb. 744, 748; *In re Estate of Dovey,* 101 Neb. 11, 18; *Stull v. Stull,* 1 Neb. (Unof.) 389, 392.

It follows, therefore, that the validity of the warranty deeds in suit is fully sustained by the evidence, and the trial court erred in adjudging them void.

The judgment of the district court is, therefore, reversed and the cause remanded, with directions to enter judgment in favor of defendants and against plaintiffs in conformity with this opinion, thereby confirming the several deeds in suit and quieting the several titles vested thereby; provided, however, that the district court is authorized to permit an amendment to the pleadings by the plaintiff Albert J. Blochowitz, if so advised, setting forth the alleged alterations of the warranty deed of April 4, 1929, in which he is named as grantee, to the end that issues thereon may be formed and such matter determined.

REVERSED.

ROBERT F. CASSENS ET AL., APPELLANTS, V. DORA WISNER ET AL., APPELLEES.

FILED JANUARY 29, 1932. No. 28064.

1. **Adverse Possession**: OCCUPANCY OF TENANT. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
2. ———. In obtaining title to ranch or grazing land by adverse possession, the tilling of a small portion thereof, the cutting of the hay from another portion thereof, and the pasturing of the entire remainder thereof, continuously year after year, by a duly authorized tenant, who lived in the same section and, for and on behalf of his landlord, had open, notorious, exclusive, and adverse possession thereof for more than ten years, is a sufficient possession in such owner to establish his title thereto.

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

William E. Shuman and *R. H. Beatty,* for appellants.

Beeler, Crosby & Baskins, contra.

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

PAINE, J.

This is an ejectment action to recover the title and possession of 80 acres of land in McPherson county, Nebraska. At the close of the trial the jury brought in a verdict finding that the defendants were the owners of the east half of the southeast quarter of section 13, township 17 north, range 30 west of the sixth P. M., McPherson county, and were entitled to the possession of the same. The jury were duly polled, at the request of the plaintiffs, judgment entered on the verdict, and the motion for a new trial was overruled.

It may be stated that, while the bill of exceptions is quite long, there is practically no question of fact in dispute in the evidence in this case.

The 80 acres in controversy in McPherson county, together with 80 acres lying immediately east, across the line in Logan county, were taken as a homestead by William S. Rowsey, and after living upon the 80 acres in Logan county the required length of time, and making proof thereof at the United States land office at North Platte, a patent was issued to him, but never recorded. In the record there appears the photostatic copy of the duplicate patent retained in the general land office, showing that it was issued July 12, 1894. At about this date the said Rowsey left, never to return, and the first heard of him was when he gave a deed to the 80 acres in controversy to Silas E. Clothier, in Powder River county, Montana.

Robert H. Cassens, the father of the two plaintiffs, made a homestead entry upon the northeast quarter of this same section of land in 1900, and the land to which the title is in dispute is the east half of the southeast quarter in the same section. At the time Cassens made the entry and settlement, the county was still very sparsely settled. Boundary lines were uncertain, and were not fixed definitely until the government survey was made in later years. It was an open range country. At the time Cassens made his homestead entry, in 1900, Rowsey had been gone for six years, his improvements had disappeared, and the small amount of land that he had broken out had gone back to native grass and sod. Cassens by mistake broke out and cultivated 12 acres of land upon the 80 in controversy, and, as the land lay open and unused, he cut hay upon it and pastured it each year for 12 years, as a trespasser, but he never made any claim to the title.

Dewey Wisner, a ranchman, residing 40 miles away, purchased a tax sale certificate upon this 80 acres upon February 4, 1907, which tax sale included all taxes back to 1895, the year after it was patented, at which time it was first placed upon the tax lists, and Mr. Wisner paid the taxes for each year up to the time of his death in 1926. Neither Wisner nor Cassens personally knew the original entryman upon the land, William S. Rowsey. This land

was light grass land, and 40 acres in the same section has always remained government land.

Five years after purchasing the tax certificate upon the land, Dewey Wisner wrote a letter to Cassens, in which he said he was paying the taxes upon this land, and asked Mr. Cassens to send him $14.42 for the use of the land for the years 1912 and 1913, and the letter Robert H. Cassens wrote in reply, upon December 13, 1912, reads as follows: "Inclosed please find $14.42 which is for the two years' lease on the W. S. Rowsey 80 acres of land, the years 1912 and 1913. *What would you take for this land and turn it over to me?*" Every year thereafter Cassens leased the land from Wisner or his widow, paying as high as $30 a year rental thereon. Wisner never saw the land but once, so far as the evidence discloses, and only then at a distance. A few years after he had been receiving rent for it, he came to the door of the Cassens home, in the same section, one evening, and asked where that 80 was that he was paying taxes on. "Q. What occurred then? A. Mr. Cassens pointed to it down east, and he stood there on the doorstep and looked in that direction. Q. Then, what did he do? A. He went away." These parties never met, so far as the evidence discloses, but upon two other occasions. The first time was when the Cassens drove 40 miles to see if they could buy the land. This was in October, 1918, when they had Jim E. Main drive them down to Wisner's ranch on the Platte river valley; and Mr. Main testifies that Mr. Cassens wanted to buy the 80 acres, and question No. 626 is as follows: "Q. You may state what was said between them; what Mr. Wisner said and what Mr. Cassens said. A. Mr. Cassens spoke to him about wanting to buy it. He said, 'I don't have it so I can sell it, yet.' He said, he figured on getting a tax title."

The last time they met was in cattle-branding time of the spring of 1926. Their son took them down to Wisner's ranch again, and they found Mr. Wisner out by the windmill, and talked about buying the 80 acres, but "he said he didn't consider he had any title to it yet, so we let it go at that."

Robert F. Cassens and Lloyd E. Cassens, the plaintiffs, are the sons of Robert H. Cassens, who rented this land from the year 1912 until March 1, 1929, there being correspondence and other exhibits in the bill of exceptions relating to this period of uninterrupted tenancy of 17 years. Silas E. Clothier, who had received a deed of the land from Rowsey, dated February 11, 1927, deeded the 80 acres in question to the two plaintiffs upon March 23, 1929, and their ejectment action is based solely upon their ownership under said deed. The petition was in the ordinary form used in ejectment. The answer pleaded, first, a general denial, and then set up that the defendants inherited the land from Dewey Wisner, who, it is alleged therein, entered into possession of this land on or about February 4, 1907, and continued in the open, notorious, exclusive, continuous, and adverse possession, claiming title thereto until his death, September 27, 1926. The verdict of the jury being for the defendants, the journal entry based upon said verdict found that the defendants were the owners and entitled to the immediate possession thereof.

Among the 12 assignments of errors, we find the appellants complain particularly of the giving of instruction No. 7, which reads as follows: "The jury are further instructed that, in order for a person to establish title to real property in this state by adverse possession, there must have been maintained, by the party asserting it, an actual, exclusive, continued, notorious and adverse possession of the premises under claim of ownership for the period of ten years by the person asserting it, or his tenant for him." Appellants claim that, by the addition of these last five words, the instruction became ambiguous, uncertain, and an incorrect statement of the law. The appellees insist that, what a man may do by himself in the matter of taking and holding real estate, he may do by another, and cite 2 C. J. 73. In *Lantry v. Parker,* 37 Neb. 353, being a quiet title case upon adverse possession, this court laid down the rule: "The possession of one's agents is, for the

purpose of the statute of limitations, the possession of the principal."

In the case of *Strom v. Hancock Land Co.*, 70 Or. 101, the first paragraph of the syllabus reads: "Possession by an agent is the possession of the principal, for the purpose of acquiring title by adverse possession, though the principal never personally occupied the land." This case seems never to have been cited in Shepard's Citations, although it is directly in point. The appellants, in their reply brief in discussing this case, call attention to the fact that Mrs. E. Ryan, the adverse claimant, caused her tenant to erect a fence inclosing the land, and there was no such inclosure in the case at bar. Appellants also cite the case of the *Omaha & Florence L. & T. Co. v. Parker*, 33 Neb. 775, which holds: "To entitle a party to claim by adverse possession, he must have made an actual entry upon the land and occupied the same as owner. This occupancy, however, may be continued by his agents." The evidence discloses that in that case the parties claiming the land actually took possession of the land themselves and then placed tenants in possession, and we do not understand that the supreme court held in that case that it would be impossible to take possession of the land in the first place by and through a tenant.

Possession of a tract of land by an agent or tenant under adverse holding inures to the benefit of the adverse holder. Personal occupation in such a case is unnecessary. *Lantry v. Parker*, 37 Neb. 353; *McComb v. Saxe*, 92 Ark. 321; *Strom v. Hancock Land Co.*, 70 Or. 101; *Abel v. Love*, 81 Ind. App. 328. And it is held in *Pearce v. Wright*, 284 Ill. 221, that on the issue of adverse possession through a tenant it is immaterial whether the leases were written or verbal. "Possession through a tenant or agent is of course sufficient actual possession to support the claim of adverse possession." Tiedeman, Real Property (3d ed.) sec. 493.

We hold that the weight of authority supports the doctrine that the possession of a tenant, who entered by ex-

press right of a person who claimed to be the owner of the land, is the entry and possession of such owner. Under this view, the instruction complained of properly states the law of the case.

It is contended that in this case the possession was not notorious, nor was the boundary sufficiently defined. In closely settled communities it has been held that a substantial inclosure of the land is necessary, and that disseisin only extends to land so inclosed, and a right of ingress thereto. However, the rule cited does not apply to the open ranch or grazing land of the short-grass country. A clandestine use of land, of so secret a character that the owner would not notice it if he investigated, would not be sufficient. But, if the making of turpentine amounts to a sufficient possession of pine land (*Royall v. The Lessee of Lisle*, 15 Ga. 545) certainly the putting up of hay in the hay flats, and the pasturing of the shorter grass, and the plowing and tilling of a portion thereof, even if it was not all inclosed, would put an ordinarily prudent owner on notice that an enemy had taken over possession of his land, especially if the man claiming to be in possession by his tenant had paid the taxes thereon continuously for a period of approximately 30 years. *Holtzman v. Douglas*, 168 U. S. 278; *Stetson v. Youngquist*, 76 Mont. 600; *DeWulf v. DeWulf*, 104 Neb. 105; *Twohig v. Leamer*, 48 Neb. 247; *Lewon v. Heath*, 53 Neb. 707; *Kuh v. Flynn*, 108 Neb. 798; *Lantry v. Parker*, 37 Neb. 353.

The continuous, open, notorious, exclusive, and adverse possession of an 80-acre tract of land by pasturing the lighter portion thereof, and by mowing the grass long enough to make hay, and the tilling of a small portion thereof each year for more than 10 years, by and through a tenant, is sufficient to constitute adverse possession thereof.

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

AFFIRMED.

FIRST NATIONAL BANK OF ALLIANCE, APPELLEE, V. PRUDE BROYLES: WILL HOLLSTEIN, APPELLANT.

FILED JANUARY 29, 1932. No. 28102.

Judgment: CONTROL OVER DURING TERM. During the same term of court at which a cause is tried, the district court, on its own motion, may set aside the verdict of the jury, and enter judgment for the adverse party, when the pleadings and the evidence will sustain no other judgment.

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

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

R. O. Reddish, contra.

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

PAINE, J.

This is an action in conversion. On August 18, 1930, plaintiff, First National Bank of Alliance, filed its petition in the district court for Sheridan county against one Prude Broyles and Will Hollstein for the conversion of 77 head of hogs of the then market value of $1,354.90. The petition sets out a chattel mortgage, in the principal sum of $1,898.21, executed by defendant Broyles to said plaintiff, and dated April 27, 1929. Said mortgage was not filed with the county clerk of Dawes county until June 22, 1929.

Conversion is alleged to have taken place at the town of Hay Springs, Sheridan county, on September 20, 1929; the mortgage, by its terms, matured September 1, 1929, and covered 270 head of animals, and small grain. The following payments were admitted: June 20, 1929, $276.89; October 2, 1929, $300; November 30, 1929, $436.65; February 21, 1930, $125; total, $1,138.54; and the petition claims damages resulting from said alleged conversion in the sum of $831.75.

The appellant, Will Hollstein, alone answered. He admitted the purchase of 77 hogs from Broyles at Hay Springs, and the payment of their full value of $1,354.90;

denied that he had any knowledge of the existence of a chattel mortgage on the hogs; alleged that Broyles paid appellee $600 of the proceeds of said sale upon October 2, 1929, and that at that time appellee knew of the sale and ratified and confirmed the same. The jury rendered a verdict February 12, 1931, against Broyles for the full amount, as he had made no defense, but found for the appellant, Hollstein, no cause of action.

Without ruling upon the motion for a new trial filed by the appellee, the court, upon its own motion, at the same term of court, upon May 28, 1931, set aside the verdict of the jury, and entered a judgment against appellant, Hollstein, for $831.75, who thereupon filed a motion for a new trial, and the court then decided that appellee should file a remittitur of $225.75, which was done. The appellant's motion for a new trial was thereupon overruled, and a judgment entered against him for $607.

The appellee was paid $600 of the proceeds from the sale of the hogs, but applied a portion thereof upon another note than the one secured by the hogs, and the court rightly decided that the appellant was entitled to have the entire amount credited on the note of $1,898.21, which left a balance due thereon of $607, so the court required the remittitur to be filed.

The principal contention is that the trial court erred in setting aside the verdict for appellant, and upon its own motion entering a judgment, notwithstanding the verdict.

District courts have ample power, even upon the court's own motion, if satisfied that an error has been made, to set aside a verdict of a jury in favor of one party and enter a judgment in favor of another party, during the same term of court when the pleadings and the evidence will sustain no other judgment. Such absolute control may be exercised, within the sphere of sound discretion, as an inherent right, independent of every statute, derived from the common law. *Netusil v. Novak,* 120 Neb. 751; *Colby v. Maw,* 1 Neb. (Unof.) 478. This has also been done where the motion for a new trial had not been filed

in time, and the court acted, as it had a right to do, upon its own motion. *Young v. Estate of Young*, 103 Neb. 418; *Bradley v. Slater*, 58 Neb. 554; *Kirshenbaum v. Massachusetts Bonding & Ins. Co.*, 107 Neb. 494.

The appellant made no effort to ascertain whether the hogs were mortgaged, he did not even inquire of the seller, or inspect the records. The testimony of Frank Abegg, president of appellant bank, is clear and positive, and, with the other evidence, establishes the fact that the sale was made without the knowledge or consent of appellee. We find no error in the record, and the judgment of the trial court is

AFFIRMED.

CLERMONT CRAVAT COMPANY, APPELLEE, V. HERSCHEL A. ECKHARD ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27878.

Fraudulent Conveyances: APPEAL: AFFIRMANCE. The case is ruled by well-settled principles of law and, upon an examination of the record, the findings of fact and judgment of the trial court are approved.

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

Burkett, Wilson, Brown, Wilson & Van Kirk, for appellants.

F. L. Bollen, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and BLACKLEDGE and MESSMORE, District Judges.

BLACKLEDGE, District Judge.

This action was instituted in the district court for Saline county by the plaintiff, appellee, for the purpose of setting aside a conveyance of a business lot and property situated in Friend, Nebraska, made by Conrad C. Eckhard to his three children, Herschel A. Eckhard et al., defendants herein, upon the ground that such conveyance was made in fraud of creditors, including the plaintiff.

The case is ruled by well-settled principles of law and the matters for determination are questions of fact. For an understanding of the situation as it is disclosed by the record, a brief résumé must be given of the material facts, and this will be done without extensive quotation of particular testimony, but by giving in condensed form the salient features of it sufficiently to illustrate the conclusion necessarily reached.

Conrad C. Eckhard had been a merchant engaged principally in the men's clothing business operating a number of different stores and during a portion of the period as many as three stores at the same time. These stores were located at Lexington, Geneva, and McCook, Nebraska, Atwood, Kansas, and Holyoke, Colorado. Also during a part of the time he undertook to develop at Friend, Nebraska, a plant for the manufacture and promotion of an automatic egg turner for an incubator company, in which he lost some $16,000; also during the time he made investments in a tract of 160 acres of land in Brown county, South Dakota, and an interest in a tract of some 400 acres near Holyoke, Colorado. He also owned a residence property and a store building in Friend, Nebraska, which is the property in controversy herein, and was engaged there in the general mercantile business. His wife, Cora Isabelle Eckhard, mother of the children, died at Friend in 1920. He continued to reside at Friend until shortly before November, 1924, at which time he remarried, and thereupon took up his residence in Denver, Colorado, where he continued to reside until the time of trial. The children did not go with him to Denver, but remained at Friend, Nebraska, in care of an aunt, Amelia Bulwan, occupying the residence property, of the value of approximately $5,000, at Friend, which property was before his second marriage deeded by him to Mrs. Bulwan and the two younger children; also about the time of his second marriage he sold his business at Lexington and at Friend, liquidating most of his indebtedness of $16,000 to the First National Bank, the balance being liquidated from the sale of his business

at Geneva. This left him operating a store at Atwood, Kansas, and at Holyoke, Colorado, and he was engaged in a sort of jobbing business in neckwear, operated from his residence in Denver, in which he had a small amount, two or three hundred dollars, invested; he also yet retained his South Dakota land which, however, was mortgaged for $3,500 to the Merchants & Farmers Bank at Friend, and an interest with four others in the land near Holyoke in which he states he had invested about $4,000. These investments had been made during the war period, about 1917 and 1918.

The foregoing, with the additional fact that, during the summer and fall of 1926, domestic trouble developed between Conrad C. Eckhard and his then wife, which reached its climax about the following February, and in which some sort of a separate maintenance decree, which is referred to but not clearly disclosed by the evidence, was rendered in the Colorado court, fairly shows the debtor's situation, as disclosed by the record at the time of the transactions immediately involved.

The deed of conveyance which is in controversy here was prepared at Friend, Nebraska, and bears date June 16, 1926. It is not witnessed and was acknowledged in Yuma county, Colorado, July 1, 1926, at about which time it was transmitted by mail by Conrad C. Eckhard to the Merchants & Farmers Bank at Friend apparently without any letter of instructions, received at the bank, placed in its file for safe-keeping, and there remained until about February 17, 1927, when, pursuant to a telegram from Conrad C. Eckhard to Mr. Nunemaker of the bank, the deed was forwarded to the recorder's office for record, was there recorded February 21, 1927, and returned to the bank. There is no direct evidence as to how or when the deed later got out of the possession of the bank. It was produced on behalf of defendants at the taking of the deposition of Conrad C. Eckhard in Denver on October 26, 1929. The only additional information as to the subsequent handling of the deed is what may be inferentially drawn

from the statements of Mr. Nunemaker in his testimony, that it was returned to them after recording, that he had no recollection how long they kept it after that, and "Q. What did you do with it finally? A. I don't remember whether—I think I delivered it to you, didn't I, Herschel?" Herschel, the son, later testified in the case, but neither he nor any one else makes any explanation of the actual disposition of the deed.

The indebtedness for which plaintiff's judgment was recovered was incurred for the purchase of merchandise by Conrad C. Eckhard in early October, 1926.

The defense raises two propositions: First, that there was a delivery of the deed at the time it was acknowledged and sent to the bank at Friend; second, that there was a trust created as between Conrad C. Eckhard, his former wife, and the children in fulfilment of which this conveyance was made.

The trust is claimed to arise from the fact that the first Mrs. Eckhard received from her father's estate, which was closed in Saline county in June, 1919, an inheritance of approximately $4,000, and that this money or part of it was invested in the property in controversy. She was afflicted with cancer and knew that she was soon to die. Upon an occasion at the table at meal time, about two weeks before her death, at which her husband, Amelia Bulwan, and the son, Herschel, were present, there was a conversation which is related by Mrs. Bulwan as follows: "A. Well, she wanted—she told him she would let him have that money, but she always wanted to have her children benefit from it. Q. Was anything said with reference to the store building in Friend in particular? A. Yes; she wanted the children to have that and the home so that they would always have something to live on. Q. What did he say? A. Well, he said he would fulfil her wishes."

The son, Herschel, in reference to the same matter, says: "Mother was greatly worried that at any time if Dad should remarry that things wouldn't go so well, and she asked that all her property, or all the money should be

turned into an investment that would protect the two children; she figured at that time that I was out of school that I should have my share, but I didn't need the protection that the other two did, and they should have income property that would protect them, and also that the house should be left to the children."

Conrad C. Eckhard tells it as follows: "A. She asked me to deed this building and also the home at that time to the children for what I owed her, and she deeded this bank stock to me at that time also; and I was to reimburse the children. She said she would feel a great deal better if I would deed the home and the building to the children. Q. Did you deed the home and the store building? A. I did not at that time because I felt I was fairly well heeled and secure, and did not think it was particularly necessary at that time to do it. * * * Q. And you were to deed this property for the money? A. For what I had gotten from her. She said I had enough anyway and she would feel a great deal better inasmuch as it was her estate if I would do that, and I agreed to do it." He also testified, in reference to this money, that she loaned it to him and he used it. He could not say positively whether this money was actually put into the building, but at her death the question came up. "She had also some bank stock in the Dorchester bank, and she signed this over to me to take care of the children, to afterwards give the children, and she also asked me for the money that I owed her or to deed the children the building for their protection." He did not do so at that time and did not think it necessary because at that time he had plenty of property and was not married. She did not have any property in her name except the stock of the Dorchester bank. They did not keep separate accounts. He did not give her any note. She just simply gave it to him and he deposited it to his own credit. She loaned it to him. She said she wanted it understood that it was hers and that she could have it whenever she wanted it.

The foregoing references fairly reflect the whole testi-

mony upon that proposition of the only persons, three in number, who claim to know anything with reference to the alleged trust agreement. They were all members of the same family, and when it is recalled that this conversation is claimed to have taken place early in 1920 and that nothing was done toward carrying out the claimed oral agreement as to this particular property until some six years later, it is clear that the evidence produced falls far short of that necessary under such conditions to establish any such trust.

It is further to be observed, in reference to the deed and the circumstances surrounding it, that it is neither attested by a witness nor joined in by the wife of the grantor; that the Dorchester bank stock which is the only property shown to have ever been in the name of the first wife had been prior to her death transferred to Conrad C. Eckhard and at this time, in June, 1926, he sold the bank stock and testifies that he took the money to Wray, Colorado, and there with it took up a note that he had at a bank, and acknowledged the deed and sent it back to Friend. He testifies he does not know why he did not acknowledge the deed sooner, or why it was not recorded sooner, and that he did not have any reason at the time for not recording it and does not know why it was not recorded promptly. The son, Herschel, testifies that this was shortly after they had disposed of the business in McCook and that he had trouble there with the father's second wife because of her interference with that business. He also states that he and the father talked over the matter of recording the deed, and that the father said that it would just cause a fight for him and that he would prefer that it be not recorded. When asked further as to why the deed was later recorded in February, 1927, he stated that the second wife had sued his father for separate support and maintenance in Denver in a case which she won and he was to make certain provisions for her support and pay an amount for her separate maintenance. It is further made clear from the evidence that business affairs for

Conrad C. Eckhard which had been going badly were not going better, and that about this same time he was closing out and did close out his store business at Holyoke by auction and from the whole thing netted some fifty or sixty dollars. His business at Atwood after having suffered the levy of attachments, and in reference to which he made an assignment, was closed out and he realized nothing. The land near Holyoke never had produced any income and from its closing out he realized $200, which he was glad to get. The land in South Dakota was foreclosed and he realized nothing from it. He had just before his second marriage conveyed the home property in Friend for the use and benefit of his minor children, which so far as is disclosed they still have and which amounted in value to more than the money received from his dead wife's estate. Thereafter so long as he was able he caused to be contributed from his stores at Geneva, Atwood, and Holyoke an amount for the support of his children, who were in the care of Mrs. Bulwan. The record presents a perfect picture of a failing and insolvent debtor trying to save something from the wreck, but it wholly fails to support the theory either that there was a trust established in the property sought to be conveyed or that there was a delivery of the deed prior to its recording in February, 1927. The trial court found that the deed was not delivered until on or about February 21, 1927, and after the indebtedness, which is the foundation of plaintiff's judgment, was incurred, that the plaintiff was an existing creditor, that the deed was without any consideration moving from the grantees and was in fraud of the plaintiff's rights as a creditor and should be canceled and set aside. The evidence amply sustains the findings of the trial court, which are approved and adopted by this court, and the judgment of the trial court is

AFFIRMED.

THOMAS J. MCQUIN, ADMINISTRATOR, APPELLEE, V. MISSOURI PACIFIC RAILROAD CORPORATION ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27833.

1. **Railroads**: AUTOMOBILE DRIVER: DUTY AT CROSSING. "It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence." *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273.
2. ———: ACCIDENT AT CROSSING: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* not to warrant us in holding, as a matter of law, that plaintiff's intestate was guilty of such contributory negligence as would bar a recovery.
3. ———: ———: WARNING SIGNALS: ROADS NOT DEDICATED AS HIGHWAYS. Section 74-562, Comp. St. 1929, requiring that a bell shall be rung or a whistle blown by locomotives at a distance of at least eighty rods from the place where the railroad shall cross any road or street and be kept ringing or whistling until it shall cross such road or street, applies as well to roads in fact used by the public though not dedicated as public highways as to those so dedicated. Under the facts stated in the opinion, *held* that the road crossed by the railroad at the place where the collision occurred was a road in fact used by the public, and that it was the duty of the defendant railroad company as its train approached the crossing to have rung the bell or sounded the whistle as required by said statute.
4. **Negligence and Contributory Negligence**: QUESTIONS FOR JURY. On the question of negligence and contributory negligence, the facts in this case are such that different minds may reasonably draw different conclusions therefrom and were for the jury and not for the court to determine.
5. **Railroads**: ACCIDENT AT CROSSING: DUTY TO PROVIDE FLAGMAN. In the absence of statutory regulation requiring it, the failure of a railroad company to have a flagman or watchman at a crossing will not warrant a jury in finding negligence on the part of the railroad company, unless there is evidence that such crossing is rendered more than ordinarily hazardous and dangerous by the conditions surrounding the same, and that the ordinary signals may be ineffective to warn travelers of the approach of a train. *Held*, under the rule stated, the evidence was insufficient to warrant a finding by the jury of negligence

for the failure of the defendant railroad company to have a flagman or watchman at the crossing where the accident occurred, and the giving of an instruction submitting such issue to the jury was error.

6. Trial: INSTRUCTIONS. Where the court by an instruction submits an issue to the jury and later by another instruction given at the request of the defendants withdraws such issue, this court will not reverse the case on account thereof, where it appears the jury were not misled thereby to the prejudice of the defendants.

7. Courts: CASE REMANDED TO STATE COURT FROM FEDERAL COURT. Where a federal district court has remanded to the state court a cause theretofore removed therefrom, no state court has power on appeal or otherwise to review such order of the federal court. By such an order of remand the state court is reinvested with jurisdiction and may rightfully proceed as if no removal had ever been attempted.

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

Kennedy, Holland & DeLacy and *W. G. Kieck*, for appellants.

C. A. Rawls and *Brogan, Ellick & Van Dusen, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This action is brought by Thomas J. McQuin, as administrator of the estate of Clifford J. McQuin, against the Missouri Pacific Railroad Corporation and H. F. Kilmer, as defendants, to recover damages growing out of the death of Clifford J. McQuin, due to a collision between the automobile he was driving and a freight train of defendant railroad company which was being backed over a railroad crossing. The defendant Kilmer was a brakeman taking part in the operation of the train. From a judgment for $6,000 on a verdict of the jury the defendants have appealed.

The acts of negligence alleged by plaintiff and submitted to the jury were: That the train of the defendant rail-

road was being operated without any headlight or other light on any part of the train that was visible from the direction toward which such train was moving at the time; without any person on said crossing to warn travelers upon said highway of the approach of said train to the crossing; without giving any warning by light, bell or whistle or otherwise of the approach of said train to said crossing; and without keeping and maintaining a lookout for travelers approaching or about to pass over said crossing.

Defendants alleged contributory negligence on the part of plaintiff's intestate, in that he failed to look and listen for the approaching train at a point where looking and listening would have been effective, and that in the exercise of reasonable care ought to have known that a train was approaching and that he would be struck if attempting to cross in front of the same.

The collision occurred about 1 o'clock in the morning of March 21, 1930, about one-half mile south of the Village of Union, in Cass county, on a crossing of the defendant railroad.

It appears from the evidence that a main traveled highway parallels the railroad tracks for about a half mile south of Union, where the main highway turns to the east and away from the railroad tracks. From that place, there is a road leading from the main highway west, which crosses the railroad track about fifty feet west from where the main highway turns to the east. Where the road going west crosses the railroad track, the defendant company maintained the usual public crossing with the usual crossing sign and cattle guards at the south end. This road is entirely unobstructed until about fifty feet west of the railroad tracks where there is a large iron gate in the right of way fence. The road extends from that point west about one-eighth of a mile and then about one-eighth of a mile south to the home of one Wencel, where it terminates.

The crossing was constructed by the defendant railroad more than twelve years prior to the accident. The road

in question, although it was not a regularly laid out highway, had been in use for many years prior thereto, and at least from the time the crossing was established had been open for public travel and accommodated a portion of the traveling public.

At the point where the road crosses there are two tracks, the east track, being the main line track, and the west track, referred to in the evidence as the passing track. The tracks run southeasterly. Fifteen hundred fifty-four feet southeasterly of the crossing is a switch which connects the passing track with the main track. The distance between the west rail of the main track and the west rail of the passing track is thirteen feet and ten inches. It was the custom of the defendant company to leave cars on the passing track between the crossing and the switch that were to be taken up later by trains going south on the main line.

On the night of the accident, the decedent, Clifford J. McQuin, in company with George Kennison, Wymore Fletcher, and Donald McQuin, had gone from Union in a five passenger sedan to the home of Mr. Wencel, where they stayed until nearly 1 o'clock. When they left for home the decedent was driving the car, with George Kennison seated at his right in the front seat, and with Wymore Fletcher and Donald McQuin riding in the back seat; Fletcher riding on the right side and McQuin on the left side. The night was partly cloudy and dark; the headlights of the car were lighted. From the Wencel place they drove north and then east. In driving along the east road, they saw no lights and heard no noise that might indicate the presence of a train, but from the reflection of the automobile lights saw some box cars on the passing track. They continued on east and drove through the gate at a point about twenty-five or thirty feet west of the west rail of the passing track and about half of the distance between the gate and said track, where the car was stopped. Kennison got out, leaving the right door open, and went back to close the gate, which they had left open

when they went over to Wencel's place earlier in the evening. After Kennison closed the gate decedent asked him if he saw or heard any train. He looked and listened and stated that he could neither hear nor see any train south of the crossing; that all he could see was a part of a string of box cars, but it was so dark that he could not see how far they extended south and east; that he thought he heard a train coming into Union from the north, but could not see it. Fletcher and Donald McQuin both testified that they looked and all that they could see was a part of the string of box cars, and they could not tell how far they extended south, but estimated that the north end of the cars was within fifteen or twenty feet of the crossing, and, although they looked and listened, there was nothing to indicate the presence of a train south of the crossing. Kennison, Fletcher and Donald McQuin all stated positively that they heard no sound of a whistle or of a bell ringing or of the movement of a train south of the crossing, and that, had the bell been ringing or the whistle sounded, they would have heard it. Kennison got into the car and the decedent drove the car from there on to the point of the collision at about four or five miles an hour. When the front of the automobile was just over the west rail of the main track, Fletcher and Donald McQuin saw the north end of a box car within five or six feet of them; there was no light upon the box car that they could see and all that they could see was a dark object coming toward them. When they saw the box car within that distance it was too late to avoid the accident. Donald McQuin and Fletcher further testified that during the time they were proceeding from the place where they had stopped to the point of the collision the decedent was facing towards the east, and that they did not notice him turn his head either to the right or to the left. All of the occupants of the automobile were familiar with the crossing.

The train involved in the collision arrived from Lincoln in Union at about 12:45 a. m. The caboose was left at Union and the conductor and a brakeman remained there,

leaving the engineer, fireman and the head brakeman on the train. The defendant Kilmer, as head brakeman, was controlling the movements of the train. The train, consisting of the engine and twenty-nine box cars of the standard length of about forty-two feet each, proceeded south on the passing track, across the crossing, and left twenty-seven of the box cars on the passing track between the crossing and the switch. The train, then consisting of two box cars and the engine, started back toward Union on the main track with the box cars in the lead.

The brakeman, the engineer and the fireman testified that when they started backing toward Union the headlight was lighted and there was also a headlight on the back of the engine; there was no light on the north end of the lead car. The brakeman was sitting in about the middle of the lead car with a lantern that he used for signaling. It is the testimony of the trainmen that when they started back the engineer blew the whistle and started the automatic bell, and that the bell was ringing from that time on until the time of the collision. The brakeman and the engineer testified that as they were backing up they noticed a light at the crossing but assumed that it was from a fire lighted by hobos. The brakeman then claims that he gave the engineer the signal to slow down, that the engineer responded by slowing the train, and that very shortly thereafter they both observed that the lights were from an automobile which appeared to be standing a short distance to the west of the tracks at the crossing. The engineer, assuming that the person or persons at the automobile had either seen or heard the train and were waiting for it to pass the crossing, increased the speed of the train to about ten miles an hour. Both testified that at the time they first saw the light, which they supposed to be from a fire started by hobos, they were to the east of the string of box cars, and that when they observed that the light was from an automobile they were at or a little past the north end of the string of box cars on the passing track. They testified that when within about three cars length of the cross-

ing the automobile suddenly started up and proceeded to cross the crossing; that the brakeman immediately gave the "washout" or stop signal, the engineer applied the brakes and attempted to stop the train, but it was too late and the lead box car collided with the automobile driven by decedent. The engineer also testified that after the collision he stepped the distance between the crossing and the north end of the string of box cars and found the distance to be one hundred fifty feet. The foregoing is a substantial summary of the evidence adduced by the parties relating to the facts and circumstances surrounding the collision.

On the facts stated, it is contended by counsel for the appellants that, had the decedent looked and listened at the time and at the place where looking and listening would have been effective, he could have seen or heard the approach of the train, and that failing to do so he was guilty of more than slight contributory negligence in comparison with the negligence of the defendants, and that this cause should be reversed and dismissed. It is the settled law of this state that:

"It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence." *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273. See *Rickert v. Union P. R. Co.*, 100 Neb. 304; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Seiffert v. Hines*, 108 Neb. 62; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Stanley v. Chicago, R. I. & P. R. Co.*, 113 Neb. 280; *Tyson v. Missouri P. R. Corporation*, 113 Neb. 504; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221; *Moreland v. Chicago & N. W. R. Co.*, 117 Neb. 456; *Lewis v. Union P. R. Co.*, 118 Neb. 705; *Eggeling v. Chicago, R. I. & P. R. Co.*, 119 Neb. 229; *Belz v. Chicago & N. W. R. Co.*, 119 Neb. 312.

In the cases cited it appears that the accidents occurred in daylight and, had the drivers of the cars or vehicles looked and listened effectively, they could have prevented the collisions.

In the instant case a different situation is presented. The accident happened on a dark night, the decedent stopped his car within forty feet of the main track and seemingly exercised caution, in that he was not trusting alone to his own observation and hearing, but requested the person out of the car to look and listen. The door of the car was open and the other occupants of the car looked and listened and saw or heard nothing to indicate the presence of a train southeast of the crossing. It will not be presumed that the decedent could have or did see or hear more than the others. In driving from that point to the place of the collision the track to the southeast would be under decedent's observation as much as under the observation of the other occupants of the car, and they saw or heard nothing to indicate the presence of the train as they moved eastward, although they were looking and listening. At the time that they stopped and looked and listened the train must have been a short distance southeast of the cars upon the passing track.

It is insisted by counsel for the appellants that they should have heard the rumble of the train had they been listening attentively. It is quite evident that the engine and two cars traveling at a speed of about ten miles an hour would, ordinarily, not make any appreciable noise. The movement of the train was toward them, with no light on the rear end of the lead car. It might well be that they would be unable, on account of that fact, to see any part of the light from the headlight of the engine or the light on the tender thereof. The brakeman was sitting in such a position on the car that under the situation existing the light from his lantern might not have been visible to them.

As heretofore pointed out, the distance from the west rail of the passing track to the west rail of the main track

was thirteen feet and ten inches and the distance between the two rails of the passing track was about four feet and eight inches, which would leave a space between the west rail of the passing track and the east rail of the main track of about nine feet, approximately the length of the automobile. Furthermore, the cars on the passing track would extend out over the rail about eighteen inches, while those on the main track would extend out the same distance, leaving about six feet clearance between the cars on the passing track and the cars on the main line, so that no one, no matter how attentively he was looking, might be able to distinguish the cars on the main line track from the box cars on the passing track. After the train had passed the cars on the passing track, the distance would only be about seven and a half feet between the cars on the main line and the east rail of the passing track. The train moving toward the crossing past the cars on the passing track might, under such circumstances, look like a continuation of the cars on the passing track. The distance between the north end of the cars on the passing track and the crossing is shown to have been one hundred fifty feet by the testimony of the only person who measured the distance. The cars on the passing track being that distance from the crossing, it appears that the place where the decedent stopped his car was as advantageous a place to look and listen effectively for the approach of a train from the southeast as any point between there and the main line track. From where he did stop, look and listen he could be as sure whether a train was dangerously near as at any other place between there and the place where the collision occurred.

Counsel for appellants contends that under the evidence it was the duty of the decedent to have got out of his automobile and gone to a point where the train on the main line track could be seen or that he have some one of the other occupants of the car do so, and not having taken such precaution he went upon the crossing at his own risk. In support of that contention counsel insists

that the facts in this case bring it within the rule announced in the case of *Baltimore & Ohio R. Co. v. Goodman*, 275 U. S. 66, wherein it is held (48 Sup. Ct. Rep. 24):

"Where, because his view of railroad tracks is obscured, a driver of an automobile cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, in addition to merely stopping and looking, and if he relies on not hearing train or signal, and takes no further precaution, he goes on crossing at his own risk."

In those jurisdictions where the rule contended for prevails it has its limitations and the courts in such jurisdictions have refused to apply the same in many instances on facts which were not as favorable to the party against whom they were invoked as they are in this case. Illustrations are given in a note on that subject in 56 A. L. R. 652, 653. Obviously, for the reasons heretofore stated, the rule contended for does not apply to the facts in this case.

The facts disclosed by the evidence are not such as warrant us in holding, as a matter of law, that decedent was guilty of such contributory negligence as would bar a recovery. It was for the jury to determine, from the evidence, whether the decedent exercised that reasonable care for his own safety that an ordinarily prudent man would have exercised under the existing circumstances and conditions.

Appellants assign as error that the evidence is insufficient to show that they were guilty of any negligence. The principal contention in that regard being that the accident did not happen at a public highway crossing; that the road was a private road, in that it was a *cul-de-sac* and traveled by only a limited number of persons, and that not being a public highway no duty was imposed upon the defendant railroad company by section 74-562, Comp. St. 1929, to have rung a bell or blown a whistle continuously in approaching said crossing with its train. That statute provides:

"A bell of at least thirty pounds weight, or a whistle shall be placed on each locomotive engine, and shall be

rung or whistled at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and be kept ringing or whistling until it shall have crossed such road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning or operating the railroad, and also be liable for all damages which shall be sustained by any person by reason of such neglect."

We construed that statute in the case of the *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, wherein we held that the statute "requiring that a bell shall be rung or a steam whistle sounded by locomotives at a distance of at least eighty rods from the place where a railroad shall cross any other road, etc., applies as well to roads in fact used by the public though not dedicated as public highways as to those so dedicated."

In that case as in this it was contended that the statute was limited in its application to a crossing over a public highway, and in answer to such contention, in the opinion by Judge Irvine, it is said:

"We do not think the statute should be given so narrow an application. Some courts have held that such a statute is in derogation of the common law, and therefore the subject of strict construction, but we think in most of the cases where such statutes have been confined in their application to public highways, the language of the statute was such as evidently to call for such restrictions. The object of the law was plainly to afford ample warning to persons near the railroad at points where they were probably about to cross as trains approached."

That case was decided before the day of automobiles and we see no reason now, when travel upon all highways and roads has increased many fold, owing to the extensive use of automobiles, to narrow and restrict the application of the statute.

There is no evidence showing that the road was a regularly laid out or dedicated public highway. The question is: Was it a road in fact used by the public? That the

road was traveled by only a limited number of persons is not important in determining the question involved. The important question is: Was it open to all who desired to use it? If so, it was a road in fact although it might accommodate only a limited portion of the public, or though it might accommodate some individuals more than others. 13 R. C. L. 16, sec. 4. While a public highway *prima facie* imports the way from one public place to another it may nevertheless be a *cul-de-sac*. *Warner v. Cavey*, 94 Neb. 778; 13 R. C. L. 14, sec. 2. The evidence shows that the crossing over the road was constructed in the same manner as other public crossings over country highways.

Applying the rule announced in *Chicago, B. & Q. R. Co. v. Metcalf, supra,* we hold that the evidence establishes that the road in question was a road in fact used by the public, although not laid out and dedicated to the public use, and that the place where the movement of the train started toward the crossing being eighty rods or less from the crossing, it was the duty of the defendant railroad company to ring the bell or blow the whistle continuously as it approached the crossing.

A finding that the statutory signal was not given as the train approached the crossing would warrant a finding that the failure to give said signal was the proximate cause of the collision and death of plaintiff's intestate.

In this connection counsel for appellants urge that the evidence shows that the bell was rung as required by the statute. Upon this question the evidence is conflicting and presented a question for the jury to determine. *Campbell v. Union P. R. Co.*, 100 Neb. 375.

There is also evidence that there was no conspicuous light on the end of the lead car that could be seen from the direction in which it was moving to warn persons of the approach of the train. Ordinarily it would be the duty of the railroad company, after dark, to have such a light so placed on the end of the lead car that it would warn persons of the approach of the train. See note, 15 A. L. R. 1527, 1528.

The questions whether, under the circumstances disclosed by the evidence, there should have been a light on the end of the lead car so that it could be seen from the direction in which the train was moving, and whether the lantern held by the brakeman at the place on the lead car shown by the evidence was a sufficient light for that purpose, were properly questions for the jury to determine, in determining whether defendants were guilty of actionable negligence in that regard.

We hold that on the questions of negligence and contributory negligence the facts in this case are such that different minds may reasonably draw different conclusions therefrom and were for the jury and not for the court to determine. *Hair v. Chicago, B. & Q. R. Co.*, 84 Neb. 398; *Lieb v. Omaha & C. B. Street R. Co.*, 119 Neb. 222; *Wortman v. Zimmerman*, 119 Neb. 682.

The appellants assign as error the giving of instruction No. 2 by the court, and the refusal to give instruction No. 4, requested by the defendants. One of the acts of negligence alleged was that there was no "person * * * on the crossing, to warn travelers upon said highway of the approach of said train to said crossing." By instruction No. 2 the court submitted that act of alleged negligence to the jury as one on which they might find a verdict against the defendants. On behalf of appellants it is contended there is no evidence that warranted the submission of that issue to the jury and that instruction No. 4, requested, withdrawing such issue should have been given.

We have no statute that requires the placing of a flagman or watchman at railroad crossings. The law seems to be well established that, in the absence of statutory regulation requiring it, the failure of a railroad company to have a flagman or watchman at a crossing will not warrant a jury in finding negligence on the part of the railroad company, unless there is evidence that such crossing is rendered more than ordinarily hazardous and dangerous by the conditions surrounding the same, and that the ordinary signals may be ineffective to warn travelers of the

approach of a train. *Grand Trunk R. Co. v. Ives,* 144 U. S. 408; *Glanville v. Chicago, R. I. & P. R. Co.,* 190 Ia. 174; *Hubbard v. Boston & A. R. Co.,* 162 Mass. 132; 52 C. J. 202; 22 R. C. L. 1008, sec. 238.

The defendant railroad company had no person at the crossing to warn travelers of the approaching train. There is nothing in the evidence to indicate that the crossing was more than ordinarily hazardous and dangerous, nor anything in the conditions surrounding the same that might render the giving of the ordinary signals ineffective to warn travelers of the approach of a train. The crossing was not much used by travelers, in fact it appears that the trainmen, in the years that they had been over the crossing at night, had never seen an automobile approaching the same until they saw decedent's car.

In the case of *Glanville v. Chicago, R. I. & P. R. Co., supra.,* in which one of the grounds of negligence was the failure of a railroad company to have a flagman or watchman at a crossing over a public highway, that court held, under a state of facts much stronger than are shown here, that the evidence was insufficient to carry that issue to the jury.

The evidence was insufficient to warrant the submission of that ground of negligence to the jury. It is manifest the submission of such issue to the jury was error prejudicial to the defendants, and calls for a reversal.

Error is assigned in the giving of instructions No. 1 and No. 2, in which the court, on its own motion, submitted to the jury the issues as to whether the train was moving at a high and dangerous rate of speed, and whether there was any one on the lead car. Both of those acts of negligence were withdrawn from the jury by instructions No. 4 and No. 5, given at the request of the defendants. While the instructions are conflicting, yet it does not seem probable that the jury were misled thereby to the prejudice of the defendants. While the practice is not to be commended of submitting an issue in one instruction and then withdrawing it in another, yet where we are satisfied that

the jury were not misled thereby, a reversal will not be predicated thereon. As this is not likely to occur on a retrial we give the question no further consideration.

On the petition of the defendant railroad company, this case was removed from the district court for Cass county to the district court of the United States for the District of Nebraska, Lincoln Division. The petition for removal alleged, as grounds therefor, diversity of citizenship, separable controversy, and the fraudulent joinder of the defendant railroad company with the defendant H. F. Kilmer. On a motion to remand evidence was taken, the motion sustained and the case remanded. The federal district court sustained the motion on the ground that there was a joint liability alleged, and that the joinder of the defendant Kilmer with the defendant railroad company was not fraudulent. It is contended that the federal court erred in remanding the case to the district court and that said court was without jurisdiction to hear and determine the case. Under the federal practice an order of a federal district court remanding a case removed thereto from the state courts is not subject to review either directly or indirectly, but is final and conclusive. *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440; 23 R. C. L. 831, sec. 200. The rule is that, where a federal court has remanded to the state court a cause theretofore removed therefrom, no state court has power on appeal or otherwise to review such an order of the federal court. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463; 54 C. J. 375. "By an order of remand the state court is reinvested with jurisdiction and may rightfully proceed as though no removal had ever been attempted." 23 R. C. L. 832, sec. 201. The order of remand of the federal district court to the district court for Cass county is final and conclusive and is not subject to review by this court, and such order reinvested that court with jurisdiction and with the right to proceed as though no removal had ever been attempted.

For the error heretofore pointed out, the judgment is reversed and cause remanded for a new trial.

REVERSED.

IN RE ESTATE OF E. F. SKINNER.
EDGAR SKINNER, EXECUTOR, APPELLEE, V. BERTHA DEVALL ET AL., APPELLANTS.

FILED JANUARY 29, 1932. No. 27927.

1. **Wills:** CONSTRUCTION. When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the lawful intention of the testator can be ascertained, such decree will be entered as best gives effect to the intention therein expressed.
2. ———: ———: IRRECONCILABLE PROVISIONS. Where two provisions of a will are irreconcilable, the later will prevail over the earlier.

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

Maher & Carrigan, for appellants.

O'Hanlon & O'Hanlon, contra.

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

RYAN, District Judge.

On the 4th of October, 1927, E. F. Skinner, a resident of Washington county, Nebraska, executed his last will and testament. The provisions, so far as material to this case, are as follows:

"Second. I hereby give and bequeath unto my beloved daughter, Mrs. Bertha Devall, the sum of One Thousand Dollars ($1,000) to be paid to her within six months from the date of my death by my son, Edgar Skinner, and if not so paid the same shall bear interest at 4 per cent. from the date of my death.

"Third. I hereby give and bequeath unto my beloved daughter, Mrs. Ella Raver, the sum of One Thousand Dollars ($1,000) to be paid to her within six months from the date of my death by my son, Edgar Skinner, and if not so paid then the same shall bear 4 per cent. interest per annum from the date of my death.

"Fourth. In consideration of my beloved son, Edgar

Skinner, providing me with a good comfortable home the rest of my life together with the necessary food, clothing and care to sustain me in comfort and of his surrendering to me my note executed to his wife and also of his paying a note that I executed to the Plateau State Bank of Herman, Nebraska, I hereby give, devise and bequeath unto him my said son all the rest, residue and remainder of my estate, both real and personal wheresoever situated; but upon this further consideration that he pay to each of my said daughters named in the second and third paragraphs of this will the legacies therein set forth to each of them within six months from the date of my death and should he fail to do so then and in that event I do now provide that said legacies shall bear 4 per cent. interest from the date of my death, the said legacies shall be and remain a charge and lien against my real estate until fully paid. It is my intention that my said son shall keep my farm charged only with the payments of the above legacies.

"Fifth. I hereby nominate and appoint my beloved son, Edgar Skinner, executor of this my last will and testament without bond.

"In witness whereof, I have hereby declared the above to be my last will and testament this 4th day of October, 1927.

"E. F. Skinner."

Then follow the usual attestation clause and the signatures of two witnesses.

On September 27, 1929, E. F. Skinner died, and on November 2, 1929, Edgar Skinner, the executor named in the will, petitioned the county court of Washington county for the probate of the will, and on December 11, 1929, the will was duly admitted to probate and Edgar Skinner was appointed executor. He qualified and since that time has been acting as such executor. The usual statutory proceedings in probate followed, and on May 8, 1930, the executor filed his petition for final settlement, alleging, among other things, that he, as residuary legatee, had complied with all the specific conditions contained in the fourth

paragraph of said last will and testament. On May 16, 1930, Bertha Devall and Ella Raver, daughters of E. F. Skinner, deceased, filed objections and an answer to the petition for final settlement, and alleged that the devise in the fourth paragraph of the will failed because of noncompliance with the conditions therein, and asking that proof of heirship be taken and the property described in the fourth paragraph descend according to the intestate laws of the state of Nebraska. Hearing was had and a decree entered in favor of the devisee, Edgar Skinner. The appellants herein appealed from said order and decree to the district court for Washington county, Nebraska. Trial was had and on January 2, 1931, decree was entered, finding that the devisee, Edgar Skinner, had complied with all of the conditions in the fourth paragraph of said last will and testament, and that he was the absolute owner in fee simple, by reason of said devise, of all the property belonging to said estate. From these findings and decree the appellants bring the case to this court for review.

The appellee, Edgar Skinner, is the only son, and the appellants, Bertha Devall and Ella Raver, are the only daughters of the deceased. Appellee had lived at home with his parents until he was thirty-five years old before marrying. In 1913 he married and in 1929, when his father died, he was forty-nine years of age. The mother of the parties died in 1919. After appellee's marriage, his parents lived in one house on the farm and the appellee and his family lived in another on the farm until the death of the mother, when the father moved in with the appellee and his family and lived with them until his death. E. F. Skinner, the father, was past eighty-one years of age at the time of his death. He had purchased the land involved in this action about twenty-five years prior to his death. The appellee, Edgar Skinner, lived at home and after 1919 farmed this land. He paid all taxes, repairs, interest and other bills, but paid no other rent.

At the time the will was made, October 4, 1927, the deceased was indebted to Nettie E. Skinner, the wife of the appellee Edgar Skinner, for money borrowed, in a sum

not definitely disclosed by the evidence, which was evidenced by a note. The amount due on this note at the time of the death of E. F. Skinner appears to have been about $2,200. This is the note referred to in the fourth paragraph of the will. This note was surrendered by Nettie E. Skinner to the executor on December 12, 1929, about three months after the death of the testator. The entire estate of the deceased consisted of the eighty-two acres of land involved in this action and $3.65 in cash. The claims allowed against the estate, including the note to the Plateau State Bank and the expenses of administration, amounted to $852.25. This amount was paid by the executor, Edgar Skinner, as residuary legatee.

The deceased was indebted to the Plateau State Bank of Herman, Nebraska, on a note in the sum of $250, which is the other note referred to in the fourth paragraph of the will. The Plateau State Bank filed a claim for the amount of this note with the county judge of Washington county and it was allowed as a claim against the estate. It was paid by the executor out of his own personal funds on March 1, 1930.

The residuary legatee, Edgar Skinner, also tendered to Bertha Devall and Ella Raver the sum of $1,000 each, within six months from the date of the death of the testator, as provided in the second and third paragraphs of the will, but they refused to accept the same. He thereupon tendered the amount of these two legacies into court and the tender has been there continued.

It is contended by the appellants that the provisions of the fourth paragraph of the will are conditions precedent, and that, since compliance with these provisions was not made during the lifetime of the testator, the conditions were not complied with, and accordingly the devise in the fourth paragraph failed. The sole question necessary for the decision of this case is therefore whether or not the provisions of the fourth paragraph of the will are conditions precedent.

It is well settled that there are no set rules which always determine whether a devise be on a condition pre-

cedent. In different cases the same words have been interpreted differently. It is always a question of intention. The general rule is that, in interpreting or in construing a will, it is the duty of the court to ascertain, if possible, the testator's meaning and intention, and to give effect to it, unless it be prohibited by law. In determining the intention of the testator, the court must take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will, as well as the provisions of the will itself. *Fisher v. Fisher,* 80 Neb. 145; *Gotchall v. Gotchall,* 98 Neb. 730; *In re Estate of Vandeveer,* 110 Neb. 651; *In re Estate of Smith,* 117 Neb. 776. Upon looking at the will, it will be seen that in the second and third paragraphs of the same the testator bequeathed legacies of $1,000 to each of his two daughters and in the fourth paragraph bequeathed the remainder of his estate to his son, Edgar Skinner, and made the legacies to the daughters a lien upon the real estate. He closed the paragraph with this statement: "It is my intention that my said son shall keep my farm charged only with the payments of the above legacies." Following the rule laid down by this court in *Martley v. Martley,* 77 Neb. 163, that the last provision in a will controls, where there are inconsistencies in the instrument, we think the language just quoted clearly indicates the intention of the testator and is controlling in this case.

Furthermore, the will made no provision for a forfeiture of the title, nor was a devise over made, in case of default on the part of the residuary devisee. We think it is clear that the testator did not intend the provisions set forth in the beginning of the fourth paragraph as conditions precedent, but merely stated the motives or reasons for the residuary devise.

We have carefully considered the evidence as to the care and support of the testator and find that the son substantially complied with the provisions of the will in that regard.

The decree of the district court is correct and is

AFFIRMED.

ALLEN DUDLEY & COMPANY V. FIRST NATIONAL BANK OF OMAHA: FIRST STATE BANK OF LARAMIE, APPELLANT: RALPH BROKAW ET AL., APPELLEES.

FILED JANUARY 29, 1932. No. 27931.

Banks and Banking: MISAPPLICATION OF DEPOSITS: RELIEF IN EQUITY. Where a bank has innocently taken drafts from a depositor who was not the true owner thereof, and applied the same upon a debt due it from such depositor, but has not changed its position in any way on account of the taking of such drafts, equity and good conscience require that the bank should account to the true owner for the proceeds of such drafts.

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

Finlayson, Burke & McKie, for appellant.

Kennedy, Holland & DeLacy and *McConnell & Pence, contra.*

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

RYAN, District Judge.

This was an action instituted by Allen Dudley & Company, a live stock commission firm of Omaha, to enjoin the First National Bank of Omaha from paying to the appellant, First State Bank of Laramie, Wyoming, the proceeds of a draft made payable to the latter bank and collected from the plaintiff, Allen Dudley & Company, through the First National Bank of Omaha, upon the ground that others claim an interest in the proceeds of the draft. The appellant, appellees and others were made parties defendant. The appellees, Ralph Brokaw, Edith Brokaw and Rosenlieb & LeBeau, filed a petition of intervention, in which they claimed the proceeds of the draft in the amount of $1,970, as proceeds of cattle which they had sold to the defendant Dwight O. Herrick. The contest was solely between the interveners, who for convenience will be referred to as the appellees, and the appellant, First State

Bank of Laramie, Wyoming, as to who was entitled to the $1,970.

There is practically no dispute in the evidence as to the facts in the case, except as to the knowledge of the appellant's officers as to the source of the money in question. The appellant is a banking institution, organized and existing under the laws of the state of Wyoming, with its banking house at Laramie, Wyoming. The appellees in this case, Ralph Brokaw, Edith Brokaw and Rosenlieb & LeBeau, are ranchmen and cattle raisers, living approximately fifty miles northwest of Laramie, Wyoming. Dwight O. Herrick is, and was for many years prior to November 16, 1929, a cattle buyer and ranchman, living in Laramie, Wyoming, and the owner of a ranch upon which he ran cattle, located twenty-four miles west of Laramie, Wyoming, and it also appears quite clearly from the evidence that he was on November 16, 1929, and had been for some years insolvent.

The record discloses that the defendant, Dwight O. Herrick, had been indebted to the appellant in approximately the sum of $26,600 for several years, which indebtedness had been renewed from time to time and on which very little had been paid in the fourteen years it had been running. This indebtedness was evidenced by notes and a chattel mortgage on certain cattle belonging to Dwight O. Herrick.

It is further shown by the record that on or about the 18th day of November, 1929, Dwight O. Herrick had a balance in his checking account with appellant of approximately $2,779.56; that, on the 15th day of November, 1929, Herrick purchased some cattle from one Ole Ericksen, a resident of Albany county, Wyoming, and gave as a down payment therefor a check in the sum of $500. This check was presented to the appellant and paid on November 16, 1929. On this same day Herrick purchased some cattle from the appellees for the sum of $2,170.29, which sum was to be paid to the appellees at Rock River, Wyoming, upon delivery of the cattle. The cattle were delivered

with a bill of sale therefor, and Herrick delivered to Ralph Brokaw a check in the sum of $1,439.49, drawn upon the appellant bank, and gave Archie H. LeBeau for Rosenlieb & LeBeau a check in the sum of $730.80, in payment for the cattle purchased from them. This check was also drawn upon the appellant bank. This transaction took place about noon on November 16, 1929, at the town of Rock River, approximately forty miles north of Laramie. The appellant bank closed its place of business on Saturday, at the hour of 1 o'clock p. m., and said checks could not be presented for payment on that day.

The record further disclosed that all of the cattle purchased by Herrick were consigned to the plaintiff, Allen Dudley & Company, at South Omaha. After purchasing the cattle, Herrick returned to Laramie and drew two sight drafts upon the plaintiff, Allen Dudley & Company, which were made payable to the appellant bank, one for the sum of $9,347, which was drawn against the cattle purchased from Ole Ericksen, and the other in the sum of $1,970, which was drawn against the cattle purchased from the appellees. These drafts were mailed to the appellant bank, with instructions to deposit the same in his checking account.

The record goes on to show that on November 17, 1929, which was Sunday, Charles W. DeKay, cashier of the appellant bank, received the letter inclosing the drafts and took the same to the bank and mailed them to the appellant's correspondent, the First National Bank of Omaha, for collection.

The further facts are revealed that, on Monday, November 18, 1929, the appellant bank applied the balance in Herrick's account, including the credit given for the two drafts received by it on Sunday, totaling the sum of $14,096.56, upon the past due indebtedness of said Herrick, which amounted to $26,600. After this amount had been applied upon his indebtedness, there was nothing left in Herrick's account out of which any outstanding checks might be paid.

On Sunday, November 17, 1929, the appellees mailed the checks received by them from Herrick in payment for cattle to the First National Bank of Laramie, Wyoming, with which they did business, which, on the 18th of November, 1929, presented the checks to the appellant bank for payment and payment was refused. The First National Bank of Laramie notified the appellees to this effect, and on the following day, Tuesday, November 19, 1929, Ralph Brokaw and Archie H. LeBeau came to Laramie and the Brokaw check was again presented to the appellant bank for payment and payment was again refused.

Tuesday morning, November 19, 1929, the defendant Herrick went to the appellant bank and there talked with Charles W. DeKay, the cashier, concerning the drafts. At that time DeKay did not advise Herrick of the action taken the day before, in crediting his balance, together with the amount of these drafts, upon his indebtedness, but told him he had wired Omaha, inquiring about the payment of the drafts, and that the checks could not be paid until he was sure the drafts would be paid, and added: "We have all day in which to pay them." It appears that the defendant Herrick also wired the plaintiff commission firm regarding payment of the drafts.

There is also disclosed in the record that the appellees and the First National Bank of Laramie also wired the plaintiff concerning the sight drafts and instructed them to institute this suit to enjoin the First National Bank of Omaha from paying over the proceeds derived from the sale of the cattle to the appellant bank. Charles W. DeKay, cashier of the appellant bank, testifies that he did not know, at the time he received the two drafts, that they were drawn against cattle which had been purchased by Herrick from the appellees; that he did not know they were so drawn, at the time he applied the balance, including the credit given for these drafts, upon Mr. Herrick's indebtedness; that the first information he had in that regard was when the checks to Brokaw and LeBeau were presented for payment. The appellees, however, take the position

that the appellant bank knew the nature of Mr. Herrick's business, and that, if it did not know the real source of the drafts deposited on November 17, 1929, its knowledge of Mr. Herrick's business and his manner of doing business was such as to put the bank upon inquiry as to the nature of the transaction.

The defendant Dwight O. Herrick filed an answer, in which he admitted that the matters and things set forth in plaintiff's petition and the appellees' petition of intervention were true; that he gave the checks to the appellees, as claimed by them; and that said checks had not been paid; and that the money, which is the subject-matter of this suit, is the money received from the sale of the cattle belonging to the appellees and that they should recover the amount claimed in their petition. The answer of the appellant was a general denial.

Herrick was a witness for the appellees and testified in detail concerning the transaction with the appellees and his business dealings with the appellant bank, and claimed that he had an arrangement with the appellant that he would buy cattle and issue checks in payment for them, which checks were to be paid out of the proceeds of sight drafts which he would draw upon the plaintiff commission company and deposit with the appellant bank. The only officer of the bank who testified was the cashier, Charles W. DeKay. He denies any knowledge of any such agreement with Herrick, and also testifies that no one else had the authority to make such an agreement, regardless of the facts shown in the record. The record discloses a long course of dealings between Herrick and the appellant bank, which, if they do not substantiate Herrick's testimony as to the arrangement claimed by him, at least unquestionably show that such a procedure was followed, and that, during the months of September and October, 1929, Herrick made purchases of cattle totaling more than $25,000, drew sight drafts upon Allen Dudley & Company, and issued checks against the proceeds of these sight drafts, and that all of the checks were paid by the appellant bank.

Herrick further testifies that in 1928 he did business in exactly the same way, except that he shipped the cattle to a commission firm in Denver instead of to the plaintiff. In the light of this testimony, it cannot be said that the appellant bank did not have knowledge of Herrick's manner of doing business, and when the two sight drafts were received on Sunday, November 17, 1929, it knew or should have known that these sight drafts were drawn on Allen Dudley & Company against shipments of cattle which Herrick had made, and that Herrick had bought these cattle from various parties, as the record shows he had been in the habit of doing for a year or more, and that undoubtedly there were checks outstanding, representing the purchase price of these cattle, which were to be paid out of the proceeds of these drafts.

There is another circumstance that appears in the testimony of the witnesses that throws some light upon the action of the bank in crediting Herrick's account with the amount of these drafts and charging off the entire amount and crediting it upon his past due obligations. According to the testimony of Archie H. LeBeau, when he and Ralph Brokaw learned that the checks had been dishonored, they came to Laramie, and Brokaw got his check and went down to the appellant bank and again presented it for payment. Payment was again refused, and Mr. DeKay said: "He was sorry that there was no funds to take it up, but that he thought in the course of a few days Mr. Herrick's brother would come to his rescue and we would get our money through Mr. Herrick's brother; that Mr. Herrick's brother would come to D. O. Herrick's rescue with additional funds to cover up his indebtedness." Ralph Brokaw, in his testimony, quotes Mr. DeKay as follows: "'I am very sorry for the embarrassing situation that has arisen over this deal.' He said, 'Had I known what it would cause I would not have done it.' He said, 'It was necessary to put Herrick in this embarrassing situation to force him to give the First State Bank more security upon an obligation that Mr. Herrick had with the First State

Bank.'" Charles W. DeKay in his testimony does not deny these statements, but merely states that he does not remember making them, and does say: "I says, I am in hopes if Herrick's brother comes out, and comes to his rescue, that this thing will be fixed up."

The trial court found that the appellees were entitled to the proceeds of the sale of the cattle shipped by Dwight O. Herrick to the plaintiff November 16, 1929; that the proceeds of the sale of said cattle amounted to the sum of $1,970, which the plaintiff paid to the Packers National Bank of Omaha, who, in turn, paid this amount to the First National Bank of Omaha for the appellant bank, and rendered judgment against the appellant, First State Bank of Laramie, Wyoming, in the sum of $1,970 and for costs.

The appellant claims to be a holder in due course of the draft made by Dwight O. Herrick to its order and drawn upon the plaintiff, Allen Dudley & Company, and that, when this draft was credited to the account of the defendant Dwight O. Herrick, it had the right to apply the balance in Herrick's account to his past due note in the bank.

It is conceded that a bank has a lien upon deposits and other property coming into its hands, to secure overdrafts and debts owing from the depositors. It is also clear that in the case of money neither a bank nor an individual should be required to accept it at the same risk and peril that they would other personal property, that money has no ear marks, and there is nothing about it that will give notice of the source from which it is derived. The proposition is also clear, and needs no citation of authority to sustain it, that where a bank, in the regular course of business, takes drafts or checks from one who is the apparent but not the true owner thereof, and, by reason of the apparent ownership of such drafts or checks, places itself in a position where it would be inequitable to require it to account to the true owner of the fund represented by such drafts or checks, the bank should not be held to account to the true owner of such fund. In the instant case, however, it is not contended by the appellant

that there was any change of position on account of the deposit of the drafts by Herrick. It advanced him no money or credit upon them. The First State Bank of Laramie was in exactly the same position after the deposit of such drafts as it was before. It did not change its position in any particular. Before the receipt of the drafts on November 17, 1929, Herrick owed the appellant bank approximately $26,600. He still owes that amount and obtained no credit by reason of the deposit of the drafts. His testimony shows that he deposited these drafts for the purpose of securing a credit with which to meet the checks he had issued in payment of the appellees' cattle. As was said by the court in *Shotwell v. Sioux Falls Savings Bank,* 34 S. Dak. 109: "We deny that there is any recognized principle of law, or even any reason founded upon that necessity which is said to know no law, that will sustain either the justice or necessity of holding that, when a fund, even though it consists of money, can be fully and clearly traced into the hands of one who has neither paid a valuable consideration therefor nor changed his relation to the person from whom the fund was received so as to give rise to any equitable defense against the claims of the true owner of such fund—when one man has money which in equity and good conscience belongs to another—such fund should not be recovered by the equitable owner thereof." The same principle was recognized in *Thex v. Shreve,* 38 Wyo. 285, in which it was held that the rule which gives a bank the right to set off the money or deposit to the credit of a depositor to the discharge of an indebtedness of the depositor to the bank was never intended to be extended to enable a bank to apply the funds which happened to be to the credit of an indebted depositor, and which in equity and good conscience belonged to another, to the discharge of such an indebtedness.

In principle this case is quite similar to *Cady v. South Omaha Nat. Bank,* 46 Neb. 756. In that case it was held that, where a commission merchant deposited in a bank money realized from the sale of live stock consigned to him

by a shipper and his account with the bank was overdrawn, regardless of the question of notice, the bank was accountable to the shipper, and that the bank could not apply the money deposited by the commission merchant to the satisfaction of such overdraft.

This is a case in which the cattle of the appellees were sold to Herrick for cash. Herrick executed and delivered to the appellees checks upon the appellant bank. The law is well settled that in such a case title did not pass, in the absence of payment of the checks. A check is not payment, but is only so when the cash is received upon it. *Lewis v. McMahon & Co.*, 307 Mo. 552; *Nelson v. Conroy Savings Bank*, 196 Ia. 391; *South San Francisco Packing & Provision Co. v. Jacobsen*, 183 Cal. 131; *Clark v. Hamilton Diamond Co.*, 209 Cal. 1. As was said in *First Nat. Bank of Byars v. Griffin & Griffin*, 31 Okla. 382: "Where goods are sold for cash and delivered, the vendor taking the vendee's check for the price, which on presentment within due time is dishonored, title to the goods does not pass, and the vendor may recover the value thereof from the vendee and from any party who has no greater equities."

The appellant bank cannot be permitted to recoup its losses of fourteen years ago at the expense of innocent parties. At the time the appellees learned that Herrick's checks would not be honored their cattle were gone. They had no remedy except to claim the proceeds of the sale. Unquestionably, as between these appellees and the appellant, the equities are all in favor of the appellees.

As we view the facts in this case and the law applicable to them, it is unnecessary to decide the other questions raised; however, if the question of notice were material, the evidence is ample to sustain a finding in favor of the appellees on that issue.

The decree and judgment of the district court was correct and is

AFFIRMED.