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IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1932

VOLUME CXXIII

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

DURING THE PERIOD OF THESE REPORTS

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JAMES R. DEAN, Associate Justice
EDWARD E. GOOD, Associate Justice
GEORGE A. EBERLY, Associate Justice
L. B. DAY, Associate Justice
BAYARD H. PAINE, Associate Justice

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* Died May 1, 1932.
† Appointed Clerk May 14, 1932.

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IN MEMORIAM

CHARLES BLAIR LETTON

At the session of the Supreme Court of the State of Nebraska, September 19, 1932, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable James R. Dean, Honorable Edward E. Good, Honorable George A. Eberly, Honorable L. B. Day, and Honorable Bayard H. Paine, Associate Justices, the following proceedings were had:

May it Please the Court:

Your Committee beg to report the following:

In Memory of Judge Charles B. Letton

We pause to record the death of one who devoted his life to the study, improvement and administration of the law.

Charles Blair Letton was born in Edinburg, Scotland, October 25, 1853. His early education was acquired in the schools of Edinburg and Glasgow in his native land. In early manhood he came with his parents to Nebraska.

He was graduated from the State Normal School at Peru in this state in June, 1879.

The schools, however, only started his education. He was a student all his life. To him the profession of law was not a mere trade or calling, it was to him a learned profession. The philosophy of the law appealed to him. He possessed the true Scotish instinct for scholarship. And our system of jurisprudence was to him always a subject of profound study.

As a member of the bar, as a trial judge, and as a member of this court, he was always loyal to the great

principles of the law evolved from the experience of the ages. He realized that the law—the product of the wisdom of the ages—is wiser than any one lawyer or any one judge. He realized that, while justice must be administered, yet this must be done without overturning the fundamental principles of the law. He knew full well that our social structure rests upon the consistent and regular administration of the law.

While his vocation was the administration of the law, his avocation was its improvement and its constant adaptation to our ever changing civilization.

He was an enthusiastic charter member of the American Institute of Law, a society whose object it is to keep our jurisprudence in step with our ever changing circumstances. This study brought him great pleasure and made him a truly scholarly lawyer.

Judge Letton was an independent thinker and readily granted to others the same freedom of thought that he claimed for himself. While positive in his own views he was always tolerant of the views of others.

As a lawyer, as a judge, as friend, neighbor, father and husband he rose to the full measure of our ideal.

His voice is stilled, his work among us is finished, and yet he lives on in his influence on the culture, civilization and jurisprudence of the state of his adoption. For all time that culture, civilization and jurisprudence will not be the same that it would have been if he had not lived and wrought among us.

Thus, he leaves a living monument to his high ideals, his constant and persistent efforts for the amelioration of mankind.

On May 1, 1932, he reached the end of a life full of years and good works, leaving a record worthy of the emulation of those who follow.

In the death of Judge Letton our profession loses one of its most useful members, this Court one of its ornaments, and the State one of its distinguished citizens.

May this memorial be spread at large on the records of this Court and a copy thereof transmitted to his family.

A. M. MORRISSEY
B. S. BAKER
W. H. THOMPSON
H. H. WILSON
PAUL JESSEN

Committee

Judge William H. Thompson.

If the Court Please:

In joining with the members of this Honorable Court and the Bar of this state in paying tribute to our brother and former associate on the bench, the departed Charles B. Letton, I do so with a sense of utter inability to do him and his services adequate justice.

My first close acquaintance with him was as a practitioner many years ago, then a judge of the district court, next as a member of the court commission, and finally as an associate member of this Honorable Body, and as its clerk. I shall ever remember the occasion of his administering to me the oath of office which qualified me as one of your associates; and am not unmindful of the manifest sincerity and helpfulness he showed and extended to me in familiarizing me with the procedure and duties as an Associate Justice. I was then the junior member of this exalted body, and greatly appreciated his advice and kindness. Indeed would I be recreant to every instinct of human gratefulness, fellowship, and kindness, were I not at this time to acknowledge the unstinted help and counsel given me by the departed and each member of the bench then serving, at a time when most needed by me.

He was a native of Scotland, as has been said, and in his early youth became an adopted son of our country and state. While with characteristic Scotch tenacity he clung to the land of his nativity with its interesting and instructive history and its traditions, he was ever loyal to the land of his adoption, and its people, laws, institu-

tions and government occupied the first place in his warm heart.

Judge Letton was a man of strong likes and dislikes, and an untiring worker, ever watchful and painstaking on the bench, as well as in chambers. His scholarly attainments were not only applied to the particular cases assigned to him, but radiated beyond that and extended to all matters coming before the Court. Nothing was finished with him until he could with conscientious sincerity join in the conclusions reached. He was blessed in his life work with keen discrimination, profound judgment, and the courage of his convictions. When the occasion required it in his view, he dared stand alone. He was intrepid, and thus persistently clung to his convictions.

He was gifted with an analytical mind, was forceful and convincing in debate, remorseless in logic, and an outstanding personality in any assembly. While he had a heart as sympathetic as his ideal, Bobby Burns, and a linguistic ability enabling him to clothe his ideas in a pleasing and diplomatic manner, yet, when aroused by what he perceived to be a distortion or perversion of the true facts, his keen analysis enabled him to readily divine the true intentions and arrive at the naked truth with force and clarity. His was a lawyer's life. His duty to the Court as a practitioner, to his client and his profession was sacred and cherished by him. He was a just judge.

He played his part well, and without flinching; won and held the confidence and esteem of all with whom he touched elbows. He honored the bench, and it is fit we honor him. Shall we bid him farewell—a long farewell—or shall we join with the poet in saying:

"Life is a drop from the river
That rises in mist o'er the lea,
A moment in space to quiver
Then falls on the breast of the sea.
It was—it is—now gone forever,
Yet lives through eternity."

Judge Benjamin S. Baker.

May it Please the Court:

I feel it a high honor to be privileged to participate in these services. I feel my inability to properly speak of the high qualities in the life of our departed brother.

Having enjoyed a close and profitable relationship with Judge Letton, covering a period of over fifty years, I was familiar with his habits and manner of living. He was unassuming, courteous and approachable.

Judge Letton was endowed with a clear, strong and analytical mind; industrious, energetic, and free from the follies of life. He made the best of every opportunity to fit himself for his chosen profession.

He was a man of unimpeachable character, sympathetic, unselfish, and generous. He recognized, to the fullest extent, the rights of his fellow man, and was ever ready to see that justice was meted out. I knew him as a struggling young lawyer; I knew him as a successful advocate; I knew him as a learned, just and impartial nisi prius Judge; I knew him as a distinguished member of this Honorable Court, and the keeper of its records. In all these positions he did his part with marked fidelity, ability and distinction. His every thought was to be right and to do his whole duty.

Judge Letton was a devoted and model husband and fond and inspiring father, and an exemplary citizen.

In the passing of Judge Letton, the legal profession has lost one of its most distinguished members, and the state one of its most honored and valuable citizens. His life is a legacy and inspiration to future generations.

Judge Paul Jessen.

May it Please the Court:

I can add but little to the report of your committee. The members of this Court and others on your committee are in a position to speak on this occasion with more assurance than I. Few lawyers in Nebraska have served

their profession and their state with more distinction than Judge Letton. A bare recital of his professional life is sufficient proof of this.

As a young lawyer in a country town he served his clients in such a way that he was asked to take charge of the legal affairs of his County. His work as County Attorney was such that the District asked him to preside as one of its judges, and his work there was of such a character that it attracted attention outside of his district and he was advanced to associate membership in this Court, the highest honor that comes to a lawyer in our State.

Here for twenty years he discharged the duty of that high position in such a way as to reflect credit and honor on himself and on the position he occupied. His work as a judge was always marked by courage and faithfulness to duty. He was one of the few judges who did not allow his work on the bench to wean him from interest in men and affairs outside of his profession. His interest in life reached beyond the shelves of his library and formed a strong bond of friendship with his fellow men. His work is now finished and his most enduring monument was built by himself in the Judicial records of our State, and in the memory of his fellow lawyers.

His life was an inspiration, his work an honor to our profession. To his duty as a judge, to his obligation as a citizen, and to his friends, he gave his best endeavor; no man can do more, none should do less.

Honorable C. A. Sorensen.

The Attorney General's office joins in honoring the memory of the late Charles B. Letton. He stood for the finest traditions of the legal profession. He increased the respect of the people for the Bar and Bench in Nebraska.

Young lawyers liked him. Many young lawyers were kept from being humiliated by receiving from Judge Letton a friendly tip as to procedure.

Nebraska has lost one of its outstanding citizens.

Judge Bayard H. Paine.

The life of Judge Letton was ever one of self-restraint, self-mastery and poise, which qualities led to his effective accomplishment of many worthwhile tasks.

Some thirty years ago Judge Letton held an extended jury term of court at Ord in exchange with District Judge John R. Thompson, who tried the Miles will case for Judge Letton at Falls City. While serving as official court reporter that term at Ord, I had an excellent opportunity to study his work as an experienced district judge.

He opened court on the dot and closed as promptly. He kept things moving all the time. As each argument closed he at once read his instructions to the jury without a moment of delay, for they had been carefully prepared in advance. Then, instead of taking a recess until the next morning, he at once called the next case on for trial. He was vigilant, alert and strict in maintaining order in the crowded courtroom. Whenever any confusion occurred, the proceedings were instantly stopped and the sheriff instructed to perform his duty. Each evening we took a long walk, and it was a delight to listen to his review of trial then in progress, with his keen comments thereon.

As a stalwart Scotchman, he held his emotions in check by a strong will and a philosophical balance of mind. Nothing ever swept him off his feet, and he was ready to meet every emergency.

In addition to more than 600 opinions which he wrote as a justice of this court, he delivered many addresses upon legal subjects, which gave insight to his wide range of interest and study.

Upon January 5, 1905, he delivered a matchless address as president of the Nebraska State Bar Association at its fifth annual meeting. He took for his subject, "The Influence of James Wilson in the Making of the Constitution." In this oration he upheld the genius of Wilson, who was also a Scotchman. He endeavored to prove that the work of James Wilson in the building of our Consti-

tution was equal to that of James Madison, but that Benjamin Franklin, also a delegate from Pennsylvania, eclipsed Wilson in the public eye.

When George Washington appointed the six members of the first United States Supreme Court, James Wilson was one of them, and Judge Letton says was the only signer of the Declaration of Independence among the number, and being the most deeply learned in the civil and common law, as well as the law of nations and the governmental structure, he was able to clarify and strengthen every subject he touched.

In a paper upon the subject of Lynch Law, also written for the Nebraska State Bar Association, Judge Letton denounced in the strongest terms mob rule. He presented a quotation from the London Law Times, saying: "When Judge Lynch is called upon to execute mob law, there is an end of liberty, we cease to be a free people, we have no longer rights or liberties, for liberty can only exist when protected by law * * * when the law has lost its power, liberty dies." Then in the next paragraph Judge Letton said: "With these sentiments we must all agree. Of all despotisms, that of the mob is the most hideous. Let the legal profession do its part toward ending mob rule and making Lynch Law only a memory."

As senior Justice of this Court, Judge Letton took part in the memorial exercises held January 10, 1918, in memory of Chief Justice Reese. The closing words of the tribute given on that occasion by Judge Letton, we might now, in all sincerity, apply to Judge Letton himself. Listen to them.

"His pole star was right and justice. He would not knowingly wrong any man by word or deed. In every case brought to this court for review, he painstakingly sought to inform himself as to the facts and diligently sought to ascertain and apply the proper legal principles so as to reach a conclusion most in accordance with right."

May I say in closing that for his wise and conservative

advice as a counselor, for his admitted attainments as an attorney at this bar, for his prompt and vigorous dispatch of business as a trial judge, for his ripe and scholarly decisions as a Justice of this Court, for his old-fashioned virtues as a citizen, for his fine example as a husband and father, for the strength of his Christian life and character, we commend the example of Judge Charles B. Letton to the admiration and esteem of all.

Charles A. Goss, Chief Justice.

The memorial and the remarks made by members of the bar and court have my entire concurrence. Though Judge Letton was chosen as clerk and librarian just before I became a member of the court, his selection met my cordial approval. His fine experience at the bar, as a district judge, and as a judge of the supreme court, added to his personal character, his legal learning, his lifelong habit for accuracy, his love for books and his knowledge of them, made him an ideal clerk and librarian. He discharged his official duties with fidelity and with the zest of unquenchable youth.

As a member of this court Judge Letton wrote many opinions, which were so careful in their statements of fact, so cogent in their legal reasoning, and so clear in their language, that they are oft cited as authorities for the propositions of which they treat.

By reason of his work here and in national groups, like the American Bar Association, the American Law Institute, and the American Judicature Society, Judge Letton was well known to many judges and lawyers all over the country. They always greeted him with pleasure and, in his absence, inquired after him affectionately.

The memorial and remarks will be spread upon the records of the court and ordered printed in the current Nebraska Report.

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STATUTES AT LARGE

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1932.

STATE OF NEBRASKA, APPELLEE, V. CHEYENNE COUNTY: THEODORE M. POPPITZ ET AL., APPELLANTS.

FILED MARCH 31, 1932. No. 28165.

1. **Estoppel:** BURDEN OF PROOF. "Where a party pleads and relies on an estoppel, the burden of proof is upon him to establish the facts upon which the estoppel is based." *Parkins v. Missouri P. R. Co.*, 76 Neb. 242.
2. **Adverse Possession.** Land cannot be acquired by adverse possession while the title is in the state.
3. **Boundaries:** LOCATION: EVIDENCE. In surveying land to fix corners and lines these rules control: (a) Government corners fixed by the government survey at the time of the original survey furnish the best evidence of the true location of the corners; (b) in the absence of such corners, or of satisfactory proof of their location, the field notes of the government survey (including its plats, if any) furnish *prima facie* evidence from which the true corners and lines may be located.
4. **Appeal.** "On appeal in equity cases, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying." *Yardum v. Evans*, 120 Neb. 699.

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

R. O. Canaday and *F. E. Williams*, for appellants.

C. A. Sorensen, Attorney General, George W. Ayres, Clifford L. Rein and *R. P. Kepler, contra.*

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

GOSS, C. J.

The state, as the owner of section 16, township 16 north, range 51, west of the 6th P. M., in Cheyenne county, brought this suit to have the disputed boundaries of the section adjudicated. The land is a school-land section. The proceeding is provided for by a special statute (Comp. St. 1929, sec. 34-301) authorizing the district court, as in equity, to ascertain and establish permanently corners or boundaries which are lost, destroyed or in dispute. The statute also provides: "Either the plaintiff or the defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years."

The state, in its petition, specifically described by metes and bounds the lands claimed by it as comprising its section 16 by reference to monuments established at the corners thereof by an official survey made in 1928 by E. C. Simmons, state surveyor. All adjacent owners in adjoining sections were purported to be named as defendants, as was also the county, because of roads established or likely to be established. Most of the defendants either filed disclaimers or defaulted, so that the only parties interested in the appeal are the state, as appellee, and Theodore M. Poppitz and Anna Poppitz, husband and wife, as appellants.

These appellants answered, admitting they own the northeast quarter of section 17 (which adjoins the northwest quarter of section 16). They specifically denied that the Simmons survey was an official survey of section 16, or correctly established the boundaries. They alleged that the original government survey, made in 1869, located the boundaries between the sections approximately 40 rods east of the line established by Simmons, that said government location has been used and recognized for 60 years, and that the public has used the said line as a public highway. The answer further alleged that plaintiff, for more than 20 years, has occupied and used a full section

east of said public highway, claiming the same to be section 16, has never claimed any land lying west of said highway, has always acquiesced in said highway as the boundary, that defendants have owned the northeast quarter of section 17 for 15 years, they and their predecessors in title have owned and occupied it for more than 40 years, that relying upon all these facts defendants expended large sums, constructing a dwelling-house, other buildings, and fences, and improving the land, of all of which they will be deprived if plaintiff have judgment; that by reason thereof plaintiff is estopped from asserting a boundary line between section 16 and the land of defendants according to the Simmons survey or at any other place than that at which it has been recognized and acquiesced in.

The reply was a general denial. The findings and judgment were for plaintiff. The decree gave appellants six months to remove their buildings.

Without in any way deciding or undertaking to pass upon the question of the power of the state to estop itself in such a matter as is here involved, it is sufficient to say there was no proof upon which a judgment of estoppel against the state could be based. "Where a party pleads and relies on an estoppel, the burden of proof is upon him to establish the facts upon which the estoppel is based." *Parkins v. Missouri P. R. Co.*, 76 Neb. 242. See 21 C. J. 1250. If the pleading of the appellants be considered as a plea for title by adverse possession, a sufficient answer to that theory is found in the elementary proposition that no title by adverse possession can be acquired against the state. *Topping v. Cohn*, 71 Neb. 559. "In the absence of a provision making the state subject to the statute of limitations, no title by adverse possession can be acquired against the state, no matter how long continued." 2 C. J. 213, 214, citing many cases from the supreme court of the United States and from thirty states.

As to the allegation of appellants that the state had used a full section of land east of the highway claimed by them as the boundary between sections 16 and 17, the

evidence of the state's lessee of the school section shows that he had leased this land for the past six years, that he had measured it, and that it was about 160 acres short of the usual 640 acres.

The court accepted as correct the survey of the state surveyor, E. C. Simmons, who is now dead, but an exemplified copy of the record of whose survey was received in evidence. This survey shows that Mr. Simmons, not finding any interior government monuments or corners in section 16, took as his starting points on the east and south boundaries of the township the outer township corners of sections 12 and 33, respectively, as established in a survey made by L. H. Bordwell, county surveyor of Cheyenne county, and examined and criticized in 1919 by B. W. Benson, deputy state surveyor. Without going into details, it may be said that the effect of the Simmons survey is substantially the same as that of Bordwell. By these surveys the real boundary line between sections 16 and 17 is 40 rods west of the line claimed by appellants. This takes in about 40 acres and most of their buildings.

L. H. Bordwell, 85, now of Spokane, testified by deposition. He went to Cheyenne county in the spring of 1874 and lived there until December, 1929. He was a surveyor and for several terms was county surveyor. Twice he surveyed township 16, once in 1912 and again in 1918. When he first knew the land it was prairie. It was burned over several times before it was settled. The fires burned up all the vegetation and all government stakes lying on the ground to mark the sections. When he made the 1918 survey he first went carefully over the whole township to discover marks of interior section lines or of any section lines, but, being unable to find evidence of the original survey, he took the government field notes as the next best evidence of the survey. He ran every section line in the township by orders of the county commissioners as they had declared these lines to be public roads. His survey of section 16 indicates that it has 637.9 acres. As we have heretofore indicated, the difference in the Bordwell and Simmons surveys are slight, so far as they affect

the line between the parties here. The differences are due to the fact that Simmons, as he states in his field notes, did not follow the Bordwell line on the north side of the sections involved but agreed with Benson's terminal points as shown in his survey of the parallel.

Charles H. Gardner, for the last nine years county surveyor, had made surveys in the township at different times but had never been able even with the government field notes to find any interior government corners. By the use of the government field notes he took the Simmons survey and methods and established the corners of section 16 at the same places.

Witnesses were produced by appellants who, 40 years earlier, as young boys, attended a school located a little east and north of the point appellants claim as the southwest corner of section 16. They were produced by appellants to furnish evidence of a government corner there. The best was probably William Gustafson, who testified there were at the time "one or two holes there, I couldn't say whether they were pits or not. * * * The rock was in one of the holes." There were fire guards there and the holes were about in the center of where the fire guards crossed. He also testified to fire guards and four pits and a mound with a stake located at the southwest corner of section 17; and that 40 years ago the stake had the numbers of the four sections on it, "20, 17 and 18 and 19." The stake was larger than the one the butt of which was dug up there last fall when Mr. Chaloupka was surveying and showed that it had rotted away. The fire guards were still visible last fall. He also remembers that a lime rock marked the northwest corner of the northeast quarter of section 17 when he was a boy and first came to the country in 1889. He last saw it about 20 years ago, but was present when Mr. Chaloupka dug up a lime rock at about the same location. He also testified there was a lime rock that marked the northeast corner of section 17 and fire guards there 40 years ago; that the north and south road between sections 17 and 16 has been used possibly 30 years, but he saw the

rock there about 20 years ago. He was corroborated by two brothers, Ed Sanders, 55, and Emmons Sanders, 55, who had lived in the neighborhood 45 years. W. F. Chaloupka, a surveyor of experience, surveyed certain features of the land and made a plat of section 17 for appellants, which is in evidence. He accepted the corners pointed out by the above witnesses and corroborated their testimony as to present conditions. He testified that they found a small piece of a rotted stake a little below the surface of the present ground. It was a sharpened stake. At the northwest corner of the northeast quarter of section 17, he "found evidence of three old rotted posts very close together and a small piece of stone * * * I should judge perhaps four inches square * * * located right in among the post butts * * * in the ground perhaps ten inches * * * on a line with the fence running north and south through section 17."

The situation as now disclosed by the record we have recited is quite conflicting. From the evidence of Simmons, Bordwell and Gardner, it seems almost incredible that there could have been established as government corners all the ones that were pointed out as such corners by the testimony on behalf of appellants, or that through all the years they could have existed as such established corners without discovery by surveyors and by county officials. Certainly they could never have been established at these points by use of the government field notes. These are the controlling rules: (a) Government corners fixed by the govenment surveyor at the time of the original survey furnish the best evidence of the true location of the corners; (b) in the absence of such corners, or of satisfactory proof of their location, the field notes of the government survey (including its plats, if any) furnish *prima facie* evidence from which the true corners and lines may be located. *Harris v. Harms,* 105 Neb. 375; *Halley v. Harriman,* 106 Neb. 377; *Littlejohn v. Fink,* 109 Neb. 282.

In this state of the proofs the trial judge found that many years ago L. H. Bordwell, county surveyor, had

surveyed (as shown by his field notes that had been received in evidence in rebuttal) for the location of a school site near the southeast corner of section 16. The field notes indicate that the survey was made in 1916 and prior to his 1918 survey, about which he testified in this case, and at a time when he did not know of any government corners or lines in the section; that he started farther south in the township, and then, in his survey, went to various points involved in the instant case. Twice in the course the field notes recite certain "supposed" corners. So the trial court found that Bordwell was not then sure he had found the southwest corner of section 16; found that the testimony of witnesses for defendants, who claimed to have seen and known the government corners at the southwest corners of sections 16 and 17 is unreliable; that the corner post found by Mr. Chaloupka at the southwest corner of section 17 was probably the corner post placed there by Mr. Bordwell, when making the schoolhouse survey. The court found that it would be unsafe to rely upon the testimony of witnesses for defendants that the post found by Chaloupka at the southwest corner of section 17 was an original government stake; and found that the stone discovered by Chaloupka "at the quarter section corner on the north line of section 17 could easily have been placed there by persons, who in the early days were attempting to mark their lands." The court therefore found from all the evidence that there were no interior government corners placed by the original government surveyors in township 16, that there were only three exterior government corners on the north boundary of the township, that they are in the northeast corner of the township, and that Simmons, Bordwell and Gardner used the proper methods of proportioning in determining the section lines.

"On appeal in equity cases, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying." *Yardum v. Evans*, 120 Neb. 699.

We reach the same conclusion as that reached by the

district court. In the decree below the appellants were allowed six months to remove from section 16 such of their buildings as are over the line of that section as fixed by the decree. In view of the justiciable merits of their appeal, we direct that the time for such removal be extended to six months after the issuance of mandate herein. The judgment of the district court is

AFFIRMED.

ANTHONY BLATCHFORD, APPELLANT, V. GILBERT A. PALMER: ESTATE OF JOHN O. YEISER, SR., INTERVENER, APPELLEE.

FILED MARCH 31, 1932. No. 28193.

1. **Executors and Administrators: PETITION: ALLEGATION OF CAPACITY OF PLAINTIFF.** A petition in intervention, in which it is alleged that intervener is administrator of the estate of a decedent and, as such, files the petition, is sufficient to show that intervener's claim is prosecuted in his capacity as personal representative of decedent, notwithstanding the estate of decedent is designated in the caption as intervener.
2. ———: ———: **REPRESENTATIVE CAPACITY OF PLAINTIFF: PRESUMPTION.** It is a general rule that where a personal representative of a decedent, as such, files a petition setting out a cause of action, and in the answer thereto a defense is made to the merits, without specially denying the representative capacity of the petitioner, his representative capacity will be presumed, and it is unnecessary to offer proof thereof.
3. **Attorney and Client: LIEN: RELEASE: FRAUD.** In a proceeding to enforce an attorney's lien, a purported release of the lien, which was obtained by fraud and without consideration, will not operate to defeat the lien.
4. ———: **ALLOWANCE OF FEES.** Evidence examined and *held* to sustain the amount of the award of the trial court.

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

John A. McKenzie, for appellant.

Battelle, Travis & Strehlow and *John O. Yeiser, Jr., contra.*

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

GOOD, J.

This is a proceeding in which the interveners, Carl T. Self, J. C. Travis, John O. Yeiser, Jr., for himself and as administrator of the estate of John O. Yeiser, Sr., deceased, seek to enforce liens for legal services performed by them for plaintiff in the main action. Plaintiff denied that he ever employed or promised to pay Travis or John O. Yeiser, Jr., and alleged that each of the interveners had, for a valuable consideration, released and discharged any demand for attorney's fees they might have had. The trial resulted in a finding adverse to Self, and that the estate of John O. Yeiser, Sr., was entitled to recover $880, which should be divided between Travis and the Yeiser estate. Plaintiff alone has appealed.

At the outset plaintiff raises the question that the petition in intervention on behalf of the Yeiser estate does not represent any person, either natural or artificial, and that there is no intervening plaintiff, so far as the estate of Yeiser is concerned.

It is true that in the caption the intervener is denominated as the estate of John O. Yeiser, Sr., deceased, but in the body of the petition in intervention it is alleged that John O. Yeiser, Jr., is the special administrator of the estate of John O. Yeiser, Sr., and, as such, files the petition. This petition is not a model of excellence, but it sufficiently appears that the action is being prosecuted in the name of the special administrator of the estate of Yeiser, Sr., and is not vulnerable to the objection made thereto by plaintiff. *Williams v. Eikenbary,* 36 Neb. 478.

The following pertinent facts appear: Plaintiff employed Self as an attorney to bring an action for damages for fraud alleged to have been practiced upon the plaintiff by the defendants in the main action. The action was begun and tried in the district court and resulted in a directed verdict for the defendants. Thereupon Blatchford discharged Self as an attorney and employed John O.

Yeiser, Sr., to represent him in the litigation. Yeiser, Sr., argued the motion for a new trial in the district court, and after it was overruled caused an appeal to be perfected to the supreme court and prepared and filed a brief for appellant. Thereafter and before the case was argued in the supreme court, John O. Yeiser, Sr., departed this life. Yeiser, Jr., was associated with his father, John O. Yeiser, Sr., in the practice of law, and it appears that he assumed, as the surviving member of the firm, that he had a right to continue as an attorney in the case. He testified that he wrote a letter to Mr. Blatchford, informing him of his father's death, and that Blatchford's interests would be looked after by himself, and, if necessary, he would procure other counsel to aid him in presenting the case in the supreme court. Blatchford denied that he received such a letter. Yeiser, Jr., then employed Travis and procured him to assist in preparing a reply brief and to argue the cause in the supreme court. It appears that, at the request of Travis, Yeiser, Jr., made two attempts to see Mr. Blatchford, but failed to find him at home, but did talk with Mrs. Blatchford. As to what occurred between them, the evidence is in conflict. Nowhere does it appear that Blatchford ever authorized Yeiser, Jr., to employ Travis to assist in the case, or that he ever authorized Yeiser, Jr., to act as an attorney therein. Blatchford testified that before the hearing of the cause in the supreme court he interviewed Carl Herring, a reputable member of the Omaha bar, to look after his interests in the case, but that Herring did not appear in and did not argue the case in the supreme court. Travis did appear and argued the cause in the supreme court. The judgment of the district court was reversed and the cause remanded for a new trial. Thereafter Blatchford for the first time saw Travis, and there is some controversy as to what took place between them. Suffice it to say that Blatchford told him he would be remunerated for his services, and Travis states that Blatchford promised to pay him for his services, but at

that time Blatchford informed Travis that another attorney would have charge of the case for plaintiff.

It appears that Blatchford employed Thomas Matters, an attorney, to procure releases of liens for attorney's fees, claimed by Self, the Yeisers and Travis. In this behalf Matters made certain representations to the Yeisers that a settlement was pending whereby Blatchford would receive from $1,500 to $2,000, but that, in order to perfect the settlement, it was necessary that all attorney's liens should be discharged, Matters stating that he had $500 at his command for the purpose of discharging all of those liens. In consideration of $100 he procured an absolute release from Mr. Self. He procured John O. Yeiser, Jr., and the widow of John O. Yeiser, Sr., the only heirs at law of John O. Yeiser, Sr., to execute releases, promising to pay an agreed sum therefor. These releases were turned over to Matters, with the agreement that they were not to be filed until the consideration agreed upon was paid. The agreed consideration was not paid, but the releases were filed. This appears to have ended the connection of Mr. Matters with the case. About this time, John A. McKenzie was employed as plaintiff's attorney in the cause.

A second trial in the district court resulted in a verdict for plaintiff in the sum of $10,000. This verdict was set aside, and a new trial granted. The third trial in the district court resulted in a verdict and judgment thereon for plaintiff in the amount of $21,598.11. This judgment was afterwards affirmed. *Blatchford v. Palmer,* 120 Neb. 847. Thereafter plaintiff realized upon said judgment the sum of about $20,000.

It is contended by the plaintiff that there is no proof in the record that John O. Yeiser, Jr., was the special administrator of the estate of John O. Yeiser, Sr., and that therefore no recovery could be had in behalf of Yeiser, Jr., as administrator.

We think the contention is unsound. An applicable rule is stated in 24 C. J. 833, in this language: "The

general rule is that, where a personal representative sues on a cause of action which he must sue on in his representative capacity, that is, a cause of action accruing to decedent in his lifetime, a plea of the general issue or other plea to the merits operates as an admission of his representative capacity and he need not prove it, for the reason that such plea does not question plaintiff's character, but only his right to recover on the merits. Many decisions lay down the rule broadly that, in an action by a personal representative in his capacity as such, a plea to the merits admits his representative capacity and obviates the necessity of proving it and the weight of authority sustains this view." The answer to the petition in intervention did not properly raise the question of the representative capacity of Yeiser, Jr.

Plaintiff further contends that, because of the releases executed by John O. Yeiser, Jr., and Hettie Yeiser, as the only heirs at law of John O. Yeiser, Sr., deceased, John O. Yeiser, Jr., as administrator is barred of any right of recovery in this proceeding. It appears without question that the releases were obtained by fraudulent representations made by Matters, and further that the agreed consideration was never paid. Under the circumstances, we think the trial court properly treated the releases as not affecting the right of intervener to recover.

It is further contended that the amount of recovery is excessive. It is a general rule that the death of an attorney who has been employed in a case terminates the contract of employment, but, where the termination is caused without fault of the attorney, he may recover on *quantum meruit* for the value of services rendered, but not to exceed the contract price. In the instant case, there is no question that Mr. Yeiser, Sr., performed valuable legal services for the plaintiff and was entitled to compensation therefor. The evidence offered on behalf of intervener tends to prove that the value of the service rendered was greatly in excess of that allowed by the court. There is no evidence tendered on behalf of plaintiff as to the value of such service. The evidence fully sustains and justifies

the finding of the trial court that John O. Yeiser, Jr., as special administrator of the estate of John O. Yeiser, Sr., was entitled to recover the sum of $880.

It is true that the trial court attempts to apportion the amount so awarded between the administrator of the estate of Yeiser, Sr., and Travis, probably on the theory that the administrator of the estate of Yeiser, Sr., procured Travis to render a valuable service, and that, as between the administrator of Yeiser's estate and Travis, the latter should recover a portion of the fee earned by John O. Yeiser, Sr.

Since there is no cross-appeal, we do not feel called upon to pass upon this question. It does appear, however, that the decree entered awards $880 to the estate of John O. Yeiser, Sr. The estate is neither an artificial nor a natural person. The decree should have awarded this sum to John O. Yeiser, Jr., as special administrator of the estate of John O. Yeiser, Sr., deceased.

We find no error in the record prejudicial to the plaintiff. The decree will be modified to award $880 to John O. Yeiser, Jr., as special administrator of the estate of John O. Yeiser, Sr., deceased, and the apportionment of this fee between Travis and the administrator of John O. Yeiser, Sr., deceased, will not be disturbed.

As thus modified the decree is affirmed.

AFFIRMED AS MODIFIED.

OTIS W. RADFORD, APPELLEE, V. SMITH BROTHERS, INC., ET AL., APPELLANTS.

FILED MARCH 31, 1931. No. 28235.

1. **Master and Servant**: COMPENSABLE INJURY: EVIDENCE. Evidence examined and *held* to establish that plaintiff received compensable injuries while working in Nebraska under a contract of employment entered into in this state.
2. ———: INJURY TO SERVANT: AMOUNT OF COMPENSATION. Under the provisions of section 48-121, Comp. St. 1929, a claimant for compensation who has sustained an injury to both legs

and both hands, resulting in a total loss of the use of one leg and a permanent partial loss of the use of the other leg and of both hands, is entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of the loss of the several members will bear to the total loss of two of such members.

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

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

Vasey & Mattoon, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

GOOD, J.

This action arises under the workmen's compensation law. Plaintiff, while employed by defendant Smith Brothers, Inc. (hereinafter called defendant), received injuries arising out of and in the course of his employment, for which he seeks compensation. He received his injuries in Gage county, Nebraska. The trial court found that plaintiff had a permanent partial disability, amounting to 85 per cent. of total disability, and awarded compensation on that basis. Defendants have appealed.

Defendants contend that the contract of employment was entered into in the state of Kansas; that the workmen's compensation law of that state, and not the law of Nebraska, governs, and for that reason the courts of Nebraska are without jurisdiction.

The evidence shows without substantial dispute that plaintiff entered into the employment of defendant in the state of Kansas and continued in such employment for some time, when he was discharged; that plaintiff then moved into the state of Nebraska and located at Steele City, in Jefferson county; that thereafter a new contract of employment was entered into between plaintiff and defendant, wherein plaintiff was to work as a night watchman in the laying of a pipe line by defendants, and that

at the time he took up his duties as night watchman under the second contract of employment he went to work in the state of Nebraska and continued to work in this state until he was injured. Under this state of facts, plaintiff selected the proper forum in which to bring his action. The workmen's compensation law of Nebraska governs. The trial court had jurisdiction of the parties and subject-matter.

It is next contended by defendants that the trial court erred in determining the degree of plaintiff's disability and the amount of compensation to which he was entitled. The evidence discloses that, as the result of an explosion while plaintiff was firing a large paint pot, he was severely burned on both legs and both hands, to such an extent that it is conceded he permanently lost the use of the left leg, and that the right leg is permanently injured to the extent of 25 per cent. of its function or use. It is conceded that there was a severe permanent injury to the left hand. Plaintiff's evidence tends to show that the percentage of loss of the left hand is 40 per cent., while some evidence on behalf of defendants places it at 25 per cent. Plaintiff's evidence tends to show that there is an impairment of the right hand to the extent of 5 or 10 per cent. and that it is a permanent disability, while the evidence of defendants is to the effect that the injury to the right hand is negligible. However, one of the physicians called by defendants, while saying that the injury was negligible, further stated on cross-examination that it was less than 10 per cent., and that where it was less than 10 per cent. it was considered negligible. The evidence sustains a finding that there is a permanent loss of use of the left leg; that there is a permanent loss of 25 per cent. of the function of the right leg; that there is a permanent loss of use of the left hand to the extent of 40 per cent. and of the right hand to the extent of 5 per cent.

It is contended by defendants that the proper method of estimating the loss under such circumstances should be to award compensation as for a permanent total disability of one leg, which would allow a recovery of $15

a week for only 225 weeks; that a 25 per cent. disability of the right leg would entitle plaintiff to $15 a week for 56 weeks, and that the same rule should be applied to the injury to the hand. Defendants contend that the amount of compensation should be determined by subdivision 3, sec. 48-121, Comp. St. 1929. They concede, however, that a different rule has heretofore been applied by this court, but insist that the rule which we have heretofore adopted is not the correct one.

In *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, this court held: "Under the provisions of section 3044, Comp. St. 1922 (now section 48-121, Comp. St. 1929), *held*, that a claimant for compensation, who had sustained an injury to both legs, resulting in a total loss of the use of them for a period of two years, followed by a permanent partial loss of the use of them, was entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of his loss would bear to the total loss of such members."

The rule above announced has been adhered to and followed in the cases of *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332, and *Ashton v. Blue River Power Co.*, 117 Neb. 661. In each of these cases the same contention was made that is now presented by defendants. In the *Ashton* case it was said (p. 670): "We have carefully reexamined this statute. Giving due consideration to the public policy involved, according to the language of the enactment, and to the full and complete meaning expressed by the terms employed, we are unable to accept the able and ingenious arguments of counsel for appellants or agree with the conclusion for which they contend. We are impressed with the thought that the doctrine announced in *Frost v. United States Fidelity & Guaranty Co., supra,* is not only in accord with the literal terms employed by the legislators, but fairly expressive of the true legislative intent evidenced by this act. This case has been followed by this court in *Johnson v. David Cole Creamery Co.*, 109 Neb. 707; *Schlesselman v.*

Travelers Ins. Co., 112 Neb. 332; *Davis v. Lincoln County*, 117 Neb. 148. Three legislatures have convened and adjourned since the announcement of this rule without the adoption of any amendment to the controlling statute in this case." Since that opinion was adopted there have been two other sessions of the legislature, and, had not the interpretation placed upon the statute by this court represented the legislative intent, no doubt the statute would have been amended. We are content with the ruling formerly made and adhere thereto.

No error prejudicial to the defendants has been found. The judgment is

AFFIRMED.

CHARLES I. SMITH V. STATE OF NEBRASKA.

FILED MARCH 31, 1932. No. 28177.

1. **Criminal Law**: TRIAL. Accused and his attorney are entitled to reasonable time to prepare for trial.
2. ———: ———. What is a reasonable time for the accused to prepare for trial must be determined by the court from the facts and circumstances presented by the record.
3. ———: CONTINUANCE. Order overruling continuance will not constitute reversible error unless trial court abused its discretion.
4. ———: ———. There is no abuse of discretion in denying a continuance, unless it appears from the record that the defendant was prejudiced thereby.
5. **Receiving Stolen Goods**: PROOF. Suspicion is not sufficient to establish knowledge that property was stolen in a prosecution for receiving and concealing stolen property knowing it to have been stolen.
6. ———: ———. Testimony examined and *held* sufficient to establish knowledge of defendant that property received and concealed by him with intent to defraud the owners was stolen.

ERROR to the district court for Nance county: LOUIS LIGHTNER, JUDGE. *Affirmed; sentence reduced.*

G. F. Rose, Claude A. Davis and *J. R. Shields*, 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.

DAY, J.

The plaintiff in error was convicted of the offense of receiving stolen property. The numerous assignments of error may be, for the purpose of our discussion, reduced to three: (1) The trial court erred in refusing to grant a continuance; (2) there is not sufficient competent evidence to support a conviction; and (3) erroneous instructions.

An application for a continuance is addressed to the sound discretion of the court. One accused of crime is entitled to a reasonable time to prepare for trial after the prosecution is commenced. What is a reasonable time must be determined in every case from the facts and circumstances presented therein. In the instant case the original complaint was filed April 11, 1931. Upon May 2 the state filed an amended complaint and a preliminary hearing was held May 5. The information was filed in the district court on May 28. The defendant filed four motions for a continuance over the term as follows: May 28, June 1, June 3, and June 15, all of which were overruled and the defendant forced to trial June 15. The reasons for a continuance were that the defendant was ill and unable to prepare for trial; and that his wife was a material witness and that she was unable to attend his trial. The record shows that the defendant was ill from May 28, the date of the first application for a continuance, up to and including the day he was forced to trial. The case was originally set for trial on June 3. The defendant did not then appear, and upon application of the state the court ordered the sheriff to bring the defendant in for the trial. The court appointed a medical commission to accompany the sheriff and examine the physical condition of the defendant. The report of this commission, the original of which is not in the files, was that it was inadvisable for

the defendant to attend court as he was suffering from acute exacerbation of a chronic appendicitis, accompanied by severe vomiting. Upon the report of this commission, the defendant filed his third motion for a continuance, supported also by three doctors who were attending the defendant. Upon this showing the court overruled the defendant's motion for a continuance over the term and set the case for June 15. Upon June 15 the defendant made his fourth application for a continuance supported by medical testimony as to his physical condition. While the showing indicates that upon June 15 the health of the defendant was somewhat better, there is evidence that the defendant has been sick for a long time prior to said date with a serious ailment. In *Elliott v. State,* 34 Neb. 48, the court said:

"It is not the policy of the law * * * to compel the party to go to trial until a reasonable opportunity has been given to procure the attendance of witnesses."

In this case, the defendant being ill most of the time from the commencement of the prosecution, and all of the time from the filing of the information, and in addition having a disturbed mental condition on account of the condition of his wife, did not have an opportunity to prepare for trial. This is especially true, since the prosecuting attorney changed the complaint by amendment against the defendant three times from the time the prosecution was commenced, indicating an uncertainty on his part as to what charge he could lodge against the defendant. The information upon which the case was tried in the trial court was filed May 28, and afterwards amended on June 15. This information charged the defendant with receiving and concealing 9 sets of harness, the property of 11 different persons, with the intent to defraud and knowing said property to be stolen. The state indorsed upon this information the names of 51 witnesses. It seems obvious to us that, under the circumstances as here related, the trial court should have granted a longer time to the defendant in making preparation for trial.

On the other hand, the only testimony which the defendant set out in his application for a continuance over the term on June 15, that he had been unable to secure, was that relating to one set of harness, and this the trial court required the state to strike out of the information as a condition to proceeding with the trial of the defendant and no evidence was thereafter introduced relative to this harness. This eliminated from consideration the only reason existing which would require a continuance on June 15.

There are certain other things to be considered in determining whether or not the denial of a continuance is reversible error. The trial occurred on June 15, at which time the defendant and his wife testified. The defendant was found guilty by the jury of receiving and concealing four sets of harness, the property of four different persons, with the intent to defraud the owners and knowing said property to be stolen. A motion for a new trial was filed in the case, which was overruled on October 5, 1931, more than three months after the trial. The defendant makes no showing at that time of newly discovered evidence, and we fail to see wherein the defendant was prejudiced by a denial of a continuance. It would seem that due diligence would require that he should secure any evidence that might be available to him within the period which elapsed after the trial. Where there is no showing of newly discovered evidence which he was not able to obtain at the time of the trial, we are unable to say that he was prejudiced by reason of the denial of the continuance. It would be a futile gesture, inconsistent with the present trend of judicial opinion, to reverse a judgment and remand a case because a continuance for preparation was denied by the trial court, where, so far as the record shows, it would be tried again on the same evidence. Taking into account all the facts and circumstances presented by the record, the denial of the defendant's motion for a continuance was not an abuse of discretion.

Is there sufficient competent evidence to support the

conviction of the defendant? The defendant contends that there is a total lack of evidence as to his knowledge that the property which was found in his possession was known by him to be stolen and that it was received and concealed with the intent to defraud. The possession of property recently stolen is a suspicious circumstance to be considered, which may be explained, and is not conclusive. *St. Clair v. State,* 103 Neb. 125. In this case the stolen property was found in the possession of the defendant, or had recently been in the possession of the defendant, but this fact alone would not be sufficient to sustain a conviction. The harness had been stolen and taken to the premises of the defendant, where it had been oiled and "scrambled" by putting various parts of different harnesses together, the hames painted a different color, and then turned over to the defendant for disposal. He then sold some of the harness. In order to complete the proof of the state, the witness, Otto E. Dudschus, a deputy state sheriff, was recalled, who testified that he drove from Osceola to Genoa with the defendant alone, and "He said he had got all of these harnesses from Rodd; and I asked him if he ever felt suspicious about the harnesses having been stolen, and he said after he received six or seven sets he felt suspicious about it." Incredible as this testimony is, even if believed, it would not be sufficient to impute knowledge to the defendant. Both the Oxford dictionary and Webster's International dictionary define knowledge as acquaintance with facts; a clear perception of fact or truth. The same authorities define suspicious as the imagination or apprehension of something, especially of something wrong or without proof or on slight evidence, also as "mental uneasiness" aroused in one who suspects. Therefore, this admission against interest, even if made, and it was denied by the defendant, is not sufficient to establish knowledge on the part of the defendant that the property in question had been stolen.

Rodd, who stole the harness, an ex-convict, which was unknown to defendant during the time he stayed at de-

fendant's house and brought the harness to him at his place, testified in this connection that the defendant helped change the parts of the harness and was present and watched him working on the harness, and that defendant furnished the paint which was used in painting the hames. He also testified that he had a conversation with Smith about the harness and, "if I remembered right, he said if any one claimed one he said he would say that he got it from a trader." Most of this stolen property was brought to defendant's place very early in the morning after Rodd, the thief, had been away all night. This latter fact is not disputed, although all the others are. We are of the opinion that all these facts and circumstances related above, together with the finding of the property recently stolen in the possession of the defendant, if believed by the jury, are sufficient to sustain the conviction. The fact that the witness Rodd was a convict affects his credibility as a witness, which credibility was a question for the jury to determine. The evidence was sufficient, if believed, from which an inference of guilt may be drawn.

We have examined the instructions complained of by the defendant as confusing and prejudicing the jury against the defendant. The defendant has not pointed out wherein the instructions are prejudicially erroneous, and we are likewise unable to demonstrate that the portions of sentences quoted by defendant in his briefs from the instructions constituted reversible error. An examination of the instructions as a whole does not reveal any reversible error.

Considering all the circumstances in the case, a majority of the court are of the opinion that the sentence of three years is excessive. It is our judgment that the ends of the law and the good of society will be served by reducing the sentence to one year, which is hereby done under the authority of section 29-2308, Comp. St. 1929. As thus modified, the judgment of the district court is

AFFIRMED: SENTENCE REDUCED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FIRST STATE BANK OF ALLIANCE: E. H. LUIKART, RECEIVER, APPELLEE: ALFRED H. SMITH, INTERVENER, APPELLANT.

FILED MARCH 31, 1932. No. 28172.

Banks and Banking: INSOLVENCY: CLASSIFICATION OF CLAIMS. The payee of a draft drawn by a bank which becomes insolvent before the draft is paid is a holder of exchange within the meaning of section 8-1,102, Comp. St. 1929, and entitled to payment as a depositor.

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

R. O. Canaday and *F. E. Williams,* for appellant.

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

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

PAINE, J.

This is an appeal from a judgment of the district court for Box Butte county, classifying the holder of a draft, sold by the First State Bank of Alliance, among depositors as a holder of exchange of that bank. Appellant seeks to set aside this classification and to obtain the position of the beneficiary of a trust, entitled to payment in full out of the assets of the failed bank before claims of depositors are considered.

Upon December 26, 1929, Alfred H. Smith, who had a substantial deposit in the First State Bank of Alliance, cashed a check on that bank for $1,500, taking $500 of the proceeds in cash, and taking its draft on the Omaha National Bank for the balance of $1,000, and having the same made payable to Ada Melvin. This draft was transmitted by Lizzie Smith, the wife of Alfred H. Smith, to Ada Melvin, at Modesto, California, to pay an obligation due her from Mrs. Smith. The draft was cashed at the Security-First National Bank of Los Angeles, California, upon January 3, 1930, but before it reached the Omaha

National Bank, upon which it had been drawn, the First State Bank of Alliance had been closed, and payment was refused, thereupon Mrs. Smith paid to Ada Melvin the $1,000 she owed her with other funds, and took an assignment of the draft, and, under the name of Lizzie Smith, she filed a claim in the receivership proceedings of the First State Bank of Alliance. After the hearing the receiver classified this $1,000 draft as a deposit. Shortly thereafter Mrs. Smith died, and Alfred H. Smith, the appellant, was appointed administrator of her estate, and filed a petition of intervention in this case. There was no intent on the part of Alfred H. Smith to obtain an illegal preference in this matter, and he had no intimation or knowledge, at the time he purchased the draft, that the First State Bank of Alliance was in failing circumstances. This claim was tried by the district court upon the same basis in every way as though the claim had been filed by Ada Melvin. The district court denied the prayer of the petition of intervention, asking that it be paid in full as a trust fund, and approved the action of the receiver allowing it only as a deposit.

A single question is presented for determination to this court in this case: Is the payee, or assignee of the payee, of such a draft, drawn by a bank which is closed before the draft is cashed by the bank on which it is drawn, entitled to claim a trust fund under section 62-1812, Comp. St. 1929, or is such assignee simply a holder of exchange under section 8-1,102?

It is insisted in the briefs filed in this case that this court has never passed upon this question, nor has the appellant been able to find any case from any other jurisdiction passing upon a similar statute. The appellee, in his brief, cites in support of his contention the following authorities: *Grammel v. Carmer,* 55 Mich. 201, 54 Am. Rep. 363; 3 Michie, Banks and Banking (Perm. ed. 1931) 315, sec. 207; *State v. Farmers State Bank,* 111 Neb. 117; *Leach v. Battle Creek Savings Bank,* 202 Ia. 875; *Leach v. Exchange State Bank of Stuart,* 203 Ia. 790; *Standard Oil Co. v. Veigel,* 174 Minn. 500; *Legniti*

v. Mechanics & Metals Nat. Bank, 230 N. Y. 415, 16 A. L. R. 185. However, since this case was submitted, a decision has been handed down in *State v. State Bank of Belvidere,* 122 Neb. 797, in which the full court had this identical question before it and passed squarely upon it, as follows: "The purchaser of a bank draft is a purchaser of a bank's credit and a holder of exchange, and, as such, is entitled to share *pro rata* with depositors and other holders of exchange in the assets of a failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, is not entitled to have his claim allowed as a trust fund."

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

AFFIRMED.

HOME SAVINGS & LOAN ASSOCIATION, APPELLANT, V. FRED L. CARRICO, APPELLEE.

FILED MARCH 31, 1932. No. 28223.

1. **Master and Servant:** "EMPLOYEE." An employee is one bound, in some degree, to the duty of service, and who is subject to the master's command as to how to do the work. The word "employ" carries with it the idea of a contract, and employee includes only such persons engaged in the service of another as are under contract of hire, express or implied, oral or written.
2. ———: ———. An employee is one who works for an employer for a salary or wage, and usually applies to clerks, workmen, and sometimes laborers, but very rarely applies to the officers of an employer.
3. **Officers.** A public officer is an incumbent of a public office, which is the right, duty and authority conferred by law, by which for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public.
4. **Garnishment.** Under the facts in this case, an attorney, assigned by the court to defend an indigent defendant, is not an employee or officer of the county in which such service is being performed, but such services are paid for by the county as one of the necessary expenses and costs of a felony trial.

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

Perry W. Morton, George E. Hager and *James E. Addie,* for appellant.

Stiner & Boslaugh, Carrico & Carrico and *Herman G. Schroeder, contra.*

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

PAINE, J.

This is an action at law, in which the appellant seeks to reach by garnishment process the sum of approximately $1,000, allowed the appellee, Fred L. Carrico, as attorney's fee for defending Sidney A. Trobough, an indigent defendant, in a homicide case, the same to be credited upon a deficiency judgment secured against said Carrico in a foreclosure action. The district court dismissed and dissolved the garnishment.

On October 26, 1929, the appellant secured a deficiency judgment for $2,931.15, with 10 per cent. interest, against Jennie L. Carrico and Fred L. Carrico, growing out of the foreclosure of a mortgage upon certain residence property in Adams county. Upon June 9, 1931, an execution was issued thereon, and returned by the sheriff *nulla bona,* and thereafter, upon the same day, a garnishee summons was issued against Adams county and placed in the hands of the sheriff, and served upon the chairman of the county board. Upon July 13, 1931, Adams county appeared by Herman G. Schroeder, its county attorney, and the appellant by James E. Addie, and in open court, before Judge J. W. James, it was stipulated as follows: "The county of Adams, Nebraska, garnishee in the above entitled cause, should not be required to answer until the final disposition of the appeal of Fred L. Carrico from allowance of his claim against Adams county in the sum of $1,000, for fees and services rendered by said Carrico as the attorney for the defendant in the case of State of Nebraska v. Sidney A. Trobough."

Upon October 17, 1931, Judge Lewis H. Blackledge entered an order, which in effect set aside the stipulation, and gave the garnishee until October 23, 1931, to file its answer, and ordered the same set down for hearing the next day, on which day the garnishee filed its answer, admitting that it was indebted to appellee, Carrico, in the sum of $1,000, less certain taxes owed by him to Adams county. The county attorney on the same day filed a motion to dismiss and dissolve the garnishment, for the reason that said Carrico was not an officer or employee of Adams county, and the said Carrico filed a motion to quash the garnishment. On the same day, Judge Blackledge entered the final order, in which he sustained the motion of the garnishee, Adams county, and also the motion of the judgment debtor, and directed that the garnishee be discharged from said garnishment. Within three days the appellant filed its motion for a new trial, which was overruled, and the case was appealed to this court.

At common law, salaries, fees, or other compensation due public officers and employees cannot be reached by garnishment. *Owen v. Terrell,* 22 N. M. 373. And in many states the compensation of public officers is not subject to garnishment, the subjection thereof to garnishment being contrary to public policy. *Jaffe v. McAdory,* 202 Ala. 53. But, in other states, a county is subject to garnishment if made so by express statutory provisions. *State v. Tyler,* 14 Wash. 495, 37 L. R. A. 207. See 60 A. L. R. 823, note.

In 1925 our legislature passed chapter 58, the title to which reads as follows: "An act to provide for garnishment of officers and employees of the state of Nebraska or any county, township, municipal corporation, municipally owned corporation, or school district." This act consisted of two sections, and appears as sections 20-1012 and 20-1013, Comp. St. 1929, and the first section provides, among other things, as follows: "This section shall apply only in case it is sought to hold and apply the earnings of such officers and employees which earnings have

been earned by personal services rendered to the state or to any county, township, municipal corporations, municipally owned corporation, or school district."

We are cited to numerous authorities holding that garnishment is a remedial process and is controlled wholly by statute, and that such statutes should be liberally construed. 12 R. C. L. 776, sec. 3; Drake on Attachment (7th ed.) sec. 451a; *Rogers v. Omaha Hotel Co.*, 4 Neb. 54. It is contended that the sections of the statute herein cited, with reference to garnishment process, were enacted for the purpose of abolishing all privilege in that respect and making them subject to execution and garnishment in all respects, the same as a natural person would be, and to the end that the funds earned by all such officers and employees could be speedily reached to compel payments of their honest debts.

In considering the question of garnishment of the county to reach the earnings of its employees and officers, as provided in the section quoted, the court must examine the statute under which this appointment took place, to throw light on the relation Mr. Carrico bore to Adams county while defending Mr. Trobough.

Section 29-1803, Comp. St. 1929, provides that, in counties having a population of over 100,000, a public defender shall be elected for four years, who shall defend all indigent persons in suits brought against them, and perform other duties, and be paid a salary of $3,600 a year, and it is argued that said Carrico, by his appointment by the district judge in Adams county, which has less than 100,000 population, for the purpose of defending a certain indigent criminal, is an employee of the county, the same as a duly elected public defender would be in Douglas county, and the real question at issue is this: Was Carrico an officer or employee of Adams county?

Under the same section 29-1803, Comp. St. 1929, it is provided: "The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceed-

ing two, * * * and it shall not be lawful for the county clerk or county board of any county in this state to audit or allow an account, bill or claim hereafter presented by an attorney or counselor at law for services performed under the provisions of this section, until said account, bill or claim shall have been examined and allowed by the court before whom said trial is had, and the amount so allowed for such services certified by said court."

In many western counties the only lawyer resident in the county is the county attorney, and the attorney assigned to defend the criminal is, therefore, not a resident of the county. Would it be contended in such a case that he was an officer of a county in which he was not a resident?

It is also clear, from a careful reading of this section, that the assignment by the district judge of a certain attorney might be opposed by every member of the county board, and perhaps by many taxpayers, yet, according to this law passed by our legislature, the appointment would be good.

In *Kraus v. State,* 102 Neb. 690, where the court was about to assign counsel, and an attorney present announced that his firm would appear for the indigent defendant, as a friend of the court, even if other counsel were assigned, the court refused to appoint any one, and, in this court, such firm so acting were denied even the cost of printing their brief, on the ground that one who volunteers his services as a friend of the court should accept neither fee nor reward. In *Moran v. Otoe County,* 95 Neb. 658, it was held that the district judge had the power under such appointment to certify to a claim for services in the supreme court as well.

Before provision was made by law for allowing a fee to the counsel thus appointed, they were not at liberty to reject the cause of the defenseless because no provision was made by law for their compensation. *Rowe v. Yuba County,* 17 Cal. 61. There is no contract whatever between the county and the attorney appearing for a pauper. The court assigns counsel, not employs one. *Case*

v. Board of County Commissioners, 4 Kan. 511, 96 Am. Dec. 190.

Having the duty under the law to assign counsel to the defense of an indigent defendant in felony cases, it results necessarily that such courts may impose upon the proper county the obligation to pay for such services, and the legislature has not left this to inference, but has clearly provided for the payment thereof.

Is such an attorney, compelled by his oath of admission to the bar to perform his duty under such assignment as an officer of the court, either an officer or an employee of the county in which he happens to be so appointed? It is clear that the county did not employ him and could not discharge him.

Let us examine with some care what the terms "employee" and "officer" mean in law. An employee is one bound, in some degree, to the duty of service, and who is subject to the master's command as to how to do the work. The word "employ" carries with it the idea of a contract of employment. Therefore, strictly speaking, an employee includes only such persons, engaged in the service of another, as are under contract of hire, express or implied, oral or written. The term "employee," as usually understood, means one who works for an employer for a salary or wage, and usually applies to clerks, workmen, and sometimes laborers, and but very rarely applies to the officers of an employer. And, on the other hand, a public officer is an incumbent of a public office, which is the right, duty and authority conferred by law, by which, for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public.

This court would find the greatest difficulty in declaring that this attorney, assigned by the district court to defend an indigent defendant accused of a felony, was, during the time of such service, an employee of Adams county, and much less could it find him at such time to be one of the officers of Adams county.

A county is primarily liable for all of the expenses of the arrest, imprisonment, and trial of accused persons, and this appointment, and the fee paid therefor, is one of the incidents of a legal trial of a felony, under which every such defendant has the right to have an attorney appear in his behalf.

This court holds that the said Fred L. Carrico, in performing his task of defending Trobough in a homicide case, under assignment of the district judge, was not an officer or employee of Adams county, and that the garnishment was properly dissolved and dismissed by the district judge.

AFFIRMED.

EDWARD E. BENNETT, APPELLEE, V. TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, APPELLANT.

FILED MARCH 31, 1932. No. 28237.

1. Insurance: INJURY: ACCIDENTAL MEANS. Term "accidental means," as used in accident insurance certificates, should be interpreted according to the usage of the ordinary man.
2. ———: ———: ———. An injury which is tragically out of proportion to its trivial cause, if it is something unforeseen, unexpected, extraordinary, and unlooked-for, would, in the common speech of men, be caused by "accidental means," and the same test ought, in common sense, to be applied by the courts.
3. ———: ———: ———. The mere fact that an injury occurred is not sufficient to support a verdict in such cases, but the jury must in addition find, from competent evidence, that in the occurrence which happened to the insured something unforeseen and unexpected occurred which caused the injury.
4. ———: ———: ———. Accident insurance is not designed to furnish indemnity only to those who conduct themselves at all times with grave circumspection and a provident foresight of all consequences, but rather to indemnify, strictly according to the terms of the contract of insurance which he has purchased, the ordinary and average man when unexpected and unforeseen injury follows a voluntary, but not reckless, act, and which injury is not the probable or anticipated result of such act.

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

Hall, Cline & Williams, for appellant.

J. W. Kinsinger, H. C. Henderson and *Lincoln Frost, Jr., contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS, District Judge.

PAINE, J.

This is a suit brought on an accident insurance contract issued by the Travelers Protective Association of America, a fraternal benefit society, commonly known as the T. P. A., with headquarters at St. Louis, Missouri. The appellee recovered a verdict of $2,687.12 for the loss of his left eye through accidental means. The motion for a new trial was overruled, and an attorney's fee of $270 was taxed as part of the costs.

The evidence discloses that on May 23, 1930, appellee employed a carpenter to raise, remove, repair, and replace a set of five steps, weighing probably 400 pounds, in front of his residence at 1524 Washington street, Lincoln, and, in assisting the carpenter to lift up this heavy flight of five steps, and endeavoring to reach a 2 by 4 to place under them as a brace, Mr. Bennett strained himself quite severely. He does not recall whether he read the evening paper that night or not, but in the morning he found the sight in his left eye blurred, and, upon examination by an oculist, he was told to go home and go to bed for three weeks. His difficulty was diagnosed as a detachment of the retina, which caused the entire loss of the sight in his eye, and three months later he was compelled to have the eye removed. The certificate of insurance in the appellant organization provided for a payment of $2,500 for the loss of one eye by accident. The judgment is attacked on the ground that under these facts such eye was not destroyed by "accidental means," as the decisions exclude results which follow acts intentionally

done. *Caldwell v. Travelers Ins. Co.*, 305 Mo. 619, 39 A. L. R. 56.

The appellee testified that, at one particular time, when the old steps were tilted up on edge at a 45-degree angle, and as he was reaching for the brace, he made a superhuman effort to keep the steps from slipping, and that that was the time the strain occurred, and the medical testimony indicates that when there is an extra strain the eyeball often contracts in such a way that the fluid in the eyeball is forced under the retina, and in such area of the retina as is detached there is no sight. There are two causes which bring about this result, disease and a physical strain, and the medical testimony of the appellee indicated that the strain caused by lifting and reaching might have caused this loss of the sight of the eye. Upon June 6 following the accident, Mrs. Bennett wrote to the appellant association, advising it that Mr. Bennett was in bed and having trouble with his eye, and "that the retina had become almost entirely detached. * * * Mr. Bennett does not know whether he is entitled to anything under his policy or not. He is perfectly well, so apparently disease was not the cause of this trouble and yet he cannot point out a specific accident. I am writing you simply to place the matter before you just as it is." In this letter she gave the association the name of the oculist who was treating him. Ten days later she described the work that Mr. Bennett had done with the carpenter, and stated: "The doctors believe that his trouble started the afternoon before, while working with the carpenter."

1. It is sometimes a disputed question whether an "accident" has occurred, for it is not every trivial mishap or occurrence that the insured must, under such a policy, regard as an accident. *George v. Aetna Casualty & Surety Co.*, 121 Neb. 647.

In discussing the term "accidental means," as used in policies of insurance, we must interpret such term according to the usage of the ordinary man, and to eliminate all of those cases where the injury happened as a foreseeable result of an event voluntarily set in motion is

contrary to the common understanding of such terms, and tends unfairly to limit such policies to cases where the insured is guilty of no negligence. *Wiger v. Mutual Life Ins. Co.*, 205 Wis. 95.

2. In the case of *Lewis v. Ocean Accident & Guarantee Corporation*, 224 N. Y. 18, 7 A. L. R. 1129, we find a very interesting opinion by Judge Cardozo. In this case the insured had a pimple on his lip, which, when pricked, carried a germ known as staphylococcus aureus into the underlying tissues of his face, and, in spite of remedies applied by the physician, it spread toward the eye, and 12 days later his death ensued. The question arose whether the infection was the result of an accident, making the insurance company liable. Judge Cardozo says: "Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. To the scientist who traces the origin of disease there may seem to be no accident in all this. * * * But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. * * * Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts." *United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100; *Lewis v. Iowa State Traveling Men's Ass'n*, 248 Fed. 602; *Western Commercial Travelers Ass'n v. Smith*, 85 Fed. 401, 40 L. R. A. 653; *Brintons v. Turvey* (1905) App. Cas. 230, 2 Ann. Cas. 137; *Ismay, Imrie & Co. v. Williamson* (1908) App. Cas. 437, 99 L. T. n. s. 595; *Hood & Sons v. Maryland Casualty Co.*, 206 Mass. 223, 30 L. R. A. n. s. 1192, 138 Am. St. Rep. 379; *Aetna Life Ins. Co. v. Portland Gas & Coke Co.*, 229 Fed. 552, L. R. A. 1916D, 1027.

3. It is but natural to find, in such a closely contested

point of law, that many authorities can be cited upon the other side, and in the extensive notes which follow Judge Cardozo's opinion in *Lewis v. Ocean Accident & Guarantee Corporation,* 224 N. Y. 18, as reported in 7 A. L. R. 1129, we find discussed opinions from the courts of England and Scotland, as set out in the brief of appellant, and many others. In some, a very close line is drawn, as in *United States Mutual Accident Ass'n v. Barry,* 131 U. S. 100, in which a judgment was affirmed where death was due to an injury to the duodenum as a result of jumping from a low platform. The charge which the court approved made the right of the jury to find "accidental means" dependent, not upon the mere fact of an injury, but upon the occurrence of something unforeseen or unexpected, as an involuntary strain of the body, which brought about the alleged injury. But the jury were told that if he jumped from the platform and alighted upon the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, then any resulting injury was not effected through any "accidental means."

4. Accidental means include those which produce effects which are not their natural, probable, or expected consequences, and this court has passed upon a somewhat similar case, where a plaintiff picked up a dumb-bell, said to weigh 450 pounds, which got out of balance by his failure to hold it in the center of gravity, and, in a great exertion to get it balanced, one of the ligaments of his back gave way, and Judge Sullivan, in deciding the case, held in *Rustin v. Standard Life & Accident Ins. Co.,* 58 Neb. 792: "The contract right to indemnity was not lost because the injury resulted from overexertion, unless the overexertion was conscious and intentional. *Manufacturers Accident Indemnity Co. v. Dorgan,* 58 Fed. 945, 952; *Johnson v. London Guarantee & Accident Co.,* 115 Mich. 86. Surely, it cannot be said as a matter of law that the plaintiff was aware of the probable result of his act, or that he acted with a reckless disregard of consequences likely to ensue. That he failed to accurately

gauge his own strength, or else to correctly estimate the weight of the dumb-bell, is evident; but accident insurance is not designed to furnish indemnity only in cases where the policy-holder orders his conduct with grave circumspection and a provident foresight of consequences." See *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 63 L. R. A. 425, 98 Am. St. Rep. 846; *Atlanta Accident Ass'n v. Alexander* (1898) 104 Ga. 709, 42 L. R. A. 188, 4 Am. Neg. Rep. 616, in which a blacksmith was ruptured while using a heavy hammer; *Young v. Railway Mail Ass'n* (1907) 126 Mo. App. 325, in which a railway mail clerk, in lifting a heavy sack of mail, ruptured a blood vessel in his lung.

Appellant insists that instruction No. 4 eliminated the question whether the injury was caused by accidental means, and told the jury that there was an accident as a matter of law, and that for such error this case should be reversed. Yet the first sentence of this instruction reads as follows: "You will therefore immediately turn your attention to the question of whether or not the plaintiff suffered an accident in moving the steps or stairs described in the petition and if so whether said accident was the sole and independent cause of the loss of his left eye, and whether it occurred by external and violent means." We find no error in this instruction or any of the others.

The insured was in good health; the evidence discloses no disease which could cause the injury to the retina. The medical testimony shows that a strain of the nature which occurred in this case may cause the exact displacement of the retina which occurred in this case. Many authorities cited hold that this would be an accident. The jury were justified, under the evidence and the instructions, in finding a verdict for the appellee. There being no error in the record, the judgment of the district court is affirmed, and an additional attorney's fee of $100 is taxed in this court.

AFFIRMED.

JOHN H. FOWLER, APPELLEE, V. TODD A. DORAN ET AL., APPELLEES: NATIONAL SURETY COMPANY, APPELLANT.

FILED MARCH 31, 1932. No. 28143.

1. Contracts: ACTION: PARTIES. The beneficiaries of a contract may recover thereon though not named as parties, when it appears by express stipulation, or by reasonable intendment, that the rights and interests of such beneficiaries were contemplated and being provided for therein.
2. Mechanics' Liens: CONTRACTOR'S BOND: ACTION BY MATERIALMAN. A materialman may sue directly on the bond of a building contractor conditioned "that the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, * * * and shall pay all persons who have contracts directly with the principal for labor or materials," when the contract, which is incorporated as a part of the bond by reference, provides that "the contractor shall furnish and pay for all the materials and perform and pay for all the erection" of the building.
3. ———: ———: ———. Under the terms of the bond and contract set out in the opinion, the bonding company is liable to a materialman for the full price of millwork manufactured for a particular building, and of little value for any other use, although not delivered, where the contract between the owner and contractor had been rescinded by the contractor without notice to the materialman until after the millwork had been manufactured and ready for delivery.

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

C. Frank Reavis, for appellant.

Albert S. Johnston, Fred C. Foster and *Frederick J. Patz, contra.*

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

CARTER, District Judge.

This is an action brought by the plaintiff, John H. Fowler, against Todd A. Doran and others, alleging the existence of a mechanic's lien and praying for the foreclosure of the same. The defendant Conservative Mortgage Company by cross-petition alleged that it was the

holder of a mortgage upon the premises involved upon which was due the sum of $4,792.65 and prayed that said mortgage be declared a first lien on the premises. The defendant Clarence F. Young by cross-petition on behalf of himself and the North Side Planing Mill alleged that the defendant Doran and one Ernest L. Lowell entered into a contract for the construction of a dwelling-house on said premises, and that the faithful performance of said contract by Lowell in the furnishing of materials and the payment of the same was secured by a bond executed by the defendant National Surety Company; that said Young and the North Side Planing Mill upon the order of Lowell, the contractor, and in reliance upon the bond, manufactured certain millwork of the value of $1,695. On September 2, 1930, the contractor, Lowell, notified the owner, Doran, of his intention to rescind said contract. At the date of the rescission, millwork of the value of $346 had been delivered by the North Side Planing Mill, which, however, contended that the millwork was a special order, made especially for this job, and claimed that it was entitled to the full purchase price from the contractor and the National Surety Company, his bondsman. On the 19th day of August, 1930, the defendant Conservative Mortgage Company accepted in writing the order for the millwork and agreed to pay the sum of $1,695 on delivery. The trial court found generally for the North Side Planing Mill, and rendered a decree against the National Surety Company for $1,695, with interest, and an attorney's fee of $250; and a decree in the same amount in favor of the North Side Planing Mill against the Conservative Mortgage Company. The court further found that the Conservative Mortgage Company accepted the order and agreed to pay the North Side Planing Mill said sum. The court further decreed that upon the payment of said sum by the Conservative Mortgage Company to the North Side Planing Mill the Conservative Mortgage Company was entitled to enforce the payment of said amount against the National Surety Company to recoup itself. A foreclosure of the mechanic's lien held

by the North Side Planing Mill and of the mortgage of the Conservative Mortgage Company was decreed. All other parties holding claims or liens were paid off prior to the trial and their actions were dismissed. From the above decree, the National Surety Company prosecutes this appeal.

The evidence discloses that on January 9, 1930, one Lowell, a contractor, entered into an agreement with Todd A. Doran for the erection of a house to be built on the property involved herein. At or about the same time Lowell delivered to Doran a builder's bond, executed by the National Surety Company, the appellant herein, which provided, among other things: "The condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all costs and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect." The bond further provides that the contract with the owner is to be considered as a part of the bond, it being set out in the bond as follows: "Which agreement is by reference made a part hereof." The building contract referred to in the bond contains, among other things, the following provisions: "The contractor shall furnish and pay for all the materials and perform and pay for all the work for the erection of three (3) residences and three (3) garages as shown on the drawings and described in the specifications," one of the residences referred to therein being the one involved in this action. Some time prior to July 30, 1930, Lowell contracted with the North Side Planing Mill, which was owned by the defendant Clarence F. Young, for the millwork under the contract. Millwork of the value of $346 was manu-

factured and delivered prior to July 30, 1930, at which time Lowell signed a written contract for all the millwork for the agreed price of $1,695. On August 19, 1930, Maude Young, the representative of the North Side Planing Mill, demanded assurance that the millwork would be paid for upon delivery, and as a result thereof the Conservative Mortgage Company, which had taken a mortgage on the premises in the sum of $9,000, which said $9,000 was payable to the owner in instalments as the construction progressed, accepted the order by indorsing thereon the following: "Pay $1,695 whenever all millwork has been delivered. Cons. Mtg. Co. By S. J. Fieselman, V. Pres." The testimony discloses that immediately after the acceptance of the order by the Conservative Mortgage Company, the manufacture of the millwork was commenced, and that the same was completed on September 12, 1930. It also appears from the record that on September 2, 1930, Lowell, the contractor, notified Doran, the owner, that he had rescinded the contract and that he would not complete the same. Clarence F. Young and Maude Young both testified that they or the North Side Planing Mill had no notice of the rescission until after the millwork was manufactured and ready for delivery. The National Surety Company contends that on or prior to August 14, 1930, it, through Lowell, demanded and received a sworn statement of the value of the millwork delivered at that time and that this amounted to notice of the rescission. An examination of the evidence discloses that a request was made of the North Side Planing Mill for the amount then due, but that there was nothing said that could be construed as a notice of a rescission. The testimony furnished by the National Surety Company was to the effect that Lowell did not leave the work until about August 25, 1930, and that notice thereof was not given to Doran, the owner, until September 2, 1930. It cannot therefore be said that the North Side Planing Mill had or could have had notice by virtue of any transactions prior to August 25, 1930. After the millwork was completed, attempts were made

by the North Side Planing Mill to deliver it, but because of the fact that there was no suitable place on the premises to protect it from the weather, and damage from other causes, it was held by the North Side Planing Mill subject to order. On October 17, 1930, Albert S. Johnston, the attorney for the North Side Planing Mill, interviewed John H. Fowler, president of the Conservative Mortgage Company and informed him that the millwork was ready for delivery. The result of this conversation was that it was mutually agreed that the millwork should be retained at the mill, rather than have it delivered at the premises, and that the rights of the parties should not be affected thereby. The evidence further discloses that on October 17, 1930, Albert S. Johnston informed C. F. Reavis, attorney for the National Surety Company, that the millwork was completed and was ready for delivery. The National Surety Company thereupon denied all liability as to all materials and millwork not theretofore delivered, and tendered the sum of $346, the agreed value of the millwork actually delivered and used in the construction of the building. The remainder of the millwork was delivered just before the trial was commenced in the district court on April 27, 1931.

The testimony shows conclusively that the millwork to be furnished by the North Side Planing Mill was of a special character, manufactured and designed for this particular building, and would have no value for any other purpose. Under such circumstances, the North Side Planing Mill could maintain an action against the buyer for the full price. Comp. St. 1929, sec. 69-463. The millwork was manufactured at the shop of the North Side Planing Mill. All parties concerned knew that it was to be manufactured at that place. It could hardly be material that the work of construction should proceed at the shop of the North Side Planing Mill, instead of on the premises in question. The planing mill completed the work and attempted to make delivery, but, because of the fact that the contractor had rescinded his contract, delivery was held up. This work was made up

for this particular job in the mill just as it could have been done on the premises. In these days a large proportion of the material furnished for the construction of buildings, such as cut stone, inside furnishings, etc., is prepared at the yard or shop of the contractor or manufacturer, in accordance with plans and specifications for particular buildings, with the implied consent of the owner, and which in many cases would be of comparatively little value for use elsewhere. Such work and materials should be deemed a part of the labor and materials "furnished" under the builder's contract in evidence in this case.

The appellant contends that the price of the millwork was not a lienable claim, and that the bond protects only those materialmen who furnished and delivered material for use in the premises. We are of the opinion that this position is not tenable. Had the bond in question only provided for security of payment of claims secured by liens upon the building, then perhaps there would have been some merit in this contention, for it seems to be conceded that, under the law, no lien could attach upon the building as security for the payment of the purchase price of material, labor, or otherwise; but this is not the case. The bond in question has a provision clearly contemplating security for the payment of claims such as that sued on in this action. The appellant in this case is a paid surety, and placing the construction on the bond that is usually applied in such cases, it appears clear to us that the words "pay all persons who have contracts directly with the principal for labor or materials" cover the claim of the North Side Planing Mill, whether or not it be lienable. The provision of the bond above referred to provides that, in addition to saving the owner harmless, the surety shall pay all persons who have contracts directly with the principal for labor and materials. This language shows that it was the intent of the parties to make the bond for the benefit of laborers and materialmen, as well as for the protection of the owner. The contract also provides that "the contractor shall furnish

and pay for all the materials," and the bond contains the provision that, "if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, * * * and shall pay all persons who have contracts directly with the principal for labor or materials." It is clearly the law that, under these provisions of the bond and contract, a materialman may maintain an action directly against the surety. In the case of *Knight & Jillson Co. v. Castle,* 172 Ind. 97, the court said:

"The contract under consideration contains the express promise 'to pay for all labor and materials used in said work when due,' and the provisions of the bond are that the contractors shall 'faithfully perform said contract on their part, according to the terms, covenants, and conditions thereof,' clearly bringing the case within the rule of the adjudicated cases in this state, and in many other states, that such contract and bond, taken together, constitute a contract primarily for the benefit of third persons, and that on default such third persons may maintain actions for its breach, and the rule will be found to be one inferable from the contract or bond, or both considered together. * * *

"Some of the cases put the proposition argumentatively, on the ground that, in that class of cases where liens cannot be acquired, it cannot be inferred as a matter of law that the contract is for the benefit of the obligee, for the reason that it is a matter of indifference to him whether the labor or material obligations are paid; others, that the obligation must be regarded as one inuring solely to the benefit of an obligee, and for his protection as owner. Neither of these propositions is put upon the correct basis. In the former class of cases there is a moral obligation to pay, and every man would prefer that the just claims for labor and material used in the construction of his building should be paid for, and that is a sufficient consideration to support the promise; but the obligation to pay the debt of another must arise from a written agreement, or not at all. Even in case of an in-

tention that the promise shall be for the benefit of a third person, it must still be in writing. In the second example put, it is quite manifest that, where the express promise in contract or bond, or both, is to pay for labor or material, it is not an obligation to pay the owner of the property, for nothing is owing to him, unless he has been compelled to pay to protect his property, and it must follow that the primary obligation to pay runs to those who furnish material or perform labor, and thus it will be seen that the matter resolves itself into the question of construction of the written contract. This being true, if the obligee in the bond is compelled to pay, he has his remedy on the bond; but if the materialman or laborer elects to proceed upon the bond, instead of availing himself of the lien, if he can take a lien, the guarantor is not injured, or, in cases where a lien cannot be taken, and the laborer or materialman has but the one remedy, the guarantor is not injured, so that in either event the surety is not required to do any more than he has undertaken to do, nor to do it upon any other or different condition than the one he has undertaken, so that the matter resolves itself in each case into the question of the intention of the parties, as expressed by stipulations of the written agreement, and does not arise upon any implied agreement or equitable considerations. * * * This being true, there is no good reason why, in the avoidance of circuity of action, the third person, when he falls within the class for whose benefit, by express promise, or by the intention of the parties, an agreement is made, as disclosed by the agreement, though the direct obligee be another, may not bring and maintain an action for his own benefit, under the provisions of our Code authorizing suit by the real party in interest, who is construed to mean the person entitled to receive the benefits of the suit."

It is the contention of the appellant that the above rules apply only to public bonds, and not to private ones. The same rule is applied, however, in the case of *Orinoco Supply Co. v. Shaw Bros. Lumber Co.*, 160 N. Car. 428,

on a private bond. The court in its opinion saying: "There have been several later decisions of the court applying the principle that under certain circumstances the beneficiaries of a contract could recover thereon, though not named as parties, a principle that usually prevails when it appears by express stipulation or by reasonable intendment that the rights and interests of such beneficiaries were contemplated and being provided for. * * * In the case before us it appears that the contractor had agreed to pay 'for all labor and material supplied for the erection of the building, and to save the trustees of the church harmless from any and all claims and liens which might arise out of contracts made by him with material furnishers and laborers,' etc., and the bond sued on, signed by the surety company, contains express stipulation 'that said contractor shall faithfully perform and carry out said contract according to the true intent and meaning thereof.' These provisions, in our opinion, clearly contemplate that the contractor shall pay the materialmen and laborers, and constitute such claimants the beneficiaries of the contract and bond, within the principle of the authorities cited."

In the case of *Kaufmann v. Cooper,* 46 Neb. 644, this court has said: "It is also urged that the plaintiff was not a party to the bond, and that no action could accrue or be based thereon in its behalf. A precisely similar question to this one has been heretofore discussed in and by this court, and it was then held that the promise set forth in the condition of the bond under consideration was for the benefit and an action arose thereon in favor of the laborer to whom wages remained due or to the furnisher of material whose account or any portion thereof was unpaid. *Doll v. Crume,* 41 Neb. 655; *Lyman v. City of Lincoln,* 38 Neb. 794; *Korsmeyer Plumbing & Heating Co. v. McClay,* 43 Neb. 649; *Sample v. Hale,* 34 Neb. 220."

Under the above holdings, this court is of the opinion that the North Side Planing Mill could maintain this

action directly upon the bond, and that the judgment of the trial court in this respect was a correct one.

The appellant complains that the cross-petitions filed asking for money judgments against the National Surety Company are not germane to plaintiff's action. In view of the fact that this objection was not raised during the trial in the lower court, it cannot be assigned as error for the first time on appeal in this court. *Prudential Ins. Co. v. Qualset,* 116 Neb. 706.

Appellant also complains of the action of the trial court in giving the Conservative Mortgage Company a judgment against the National Surety Company for the $1,695 it agreed to pay in accepting the order of the North Side Planing Mill. In view of the fact that the money judgment obtained by the North Side Planing Mill against the National Surety Company is affirmed by this opinion, and as payment of it by the appellant will also satisfy the judgment complained of, we fail to see any prejudicial error in the action of the trial court. The Conservative Mortgage Company is in the position of a guarantor. In other words, the appellant can be subjected to only one liability, and it having been determined herein that it is liable directly on the bond to the North Side Planing Mill for the same amount, the proposition raised becomes a moot question, a determination of which is not necessary to a decision in this case.

Relative to the motion of the appellee Young, the owner of the North Side Planing Mill, for the allowance of an additional attorney's fee, the record disclosing that the sum of $250 has already been allowed by the trial court, we are of the opinion that an additional fee of $200 is ample and the same is hereby allowed.

Having found no prejudicial error in the record, the judgment of the trial court is in all respects

AFFIRMED.

KATE MORGAN, APPELLEE, V. UNITED BENEFIT LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 31, 1932. No. 28067.

1. **Insurance: DEFAULT.** A provision in a life insurance policy, providing that it shall become null and void upon failure to pay premiums when due, is not illegal, and where there is default in payment of premiums and no act or circumstance constituting a waiver or estoppel on the part of the company, preventing it from insisting upon a forfeiture, the contract will be enforced as it was made. *Novak v. LaFayette Life Ins. Co.*, 106 Neb. 417.
2. **Trial: DIRECTION OF VERDICT.** Where only one conclusion can be reasonably reached from the evidence, the question becomes one of law, and it is the duty of the trial court, upon request to that effect, to direct a verdict accordingly.
3. **Insurance: FORFEITURE: WAIVER.** Evidence examined and found insufficient to support a claim of waiver or estoppel on the part of a life insurance company of its right to declare a forfeiture by reason of failure to pay a premium due under the terms of the policy.

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

Cleary, Horan & Skutt and *W. G. Kieck*, for appellant.

D. O. Dwyer and *W. L. Dwyer, contra.*

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

WRIGHT, District Judge.

This action was brought by Kate Morgan, plaintiff, against United Benefit Life Insurance Company, defendant, for the amount claimed to be due on a life insurance policy issued by defendant to Gertrude Morgan, in which the plaintiff was named as beneficiary. The allegations of the petition as to the issuance of the policy, death of the assured on August 10, 1930, and refusal by defendant to pay, were admitted, but the defendant alleged that the policy had lapsed because of nonpayment of the premium due June 5, 1930, and was therefore null and void at the time of the assured's death. The plaintiff, by way of reply alleged that at the time of taking out the policy

in suit the insured, Gertrude Morgan, was acting as agent for the defendant in Plattsmouth, Nebraska, and vicinity; that, as an inducement to her to take out the policy, the defendant's representative, F. T. Bochemuehl, agreed with the insured that the commissions earned on policies that she and said Bochemuehl sold together at Plattsmouth and vicinity would be hers and would be applied to the payment of the premium on her policy; that during the first two years of the policy said commissions were credited on the premium of the same, and whenever the insured was behind in her premiums, she was permitted to make up, either by payment or by application of commissions; and that the defendant waived the strict performance of the conditions in said policy regarding the payment of premiums in advance, and by so doing is now estopped to deny that said policy was in full force and effect at the time of the death of the insured on account of her failure to pay said premiums at the expiration of the 31 days' grace. Plaintiff further alleged that at the time of the death of the insured there were some commissions due to the insured, the exact amount of which she was unable to state, but that it was the duty of the defendant to notify the insured of any balance due on the premium so that she could pay such difference in accordance with the previous method of handling the premiums between the parties.

The jury returned a verdict for the plaintiff assessing the amount of her recovery at the face of the policy, together with interest. Judgment was entered upon this verdict, from which defendant has appealed.

The defendant, at the close of all the testimony, orally and later by written request duly filed, moved for an instructed verdict in its favor. The overruling of this motion and the refusal of the requested instruction are each assigned as error. Each assignment presents for consideration the sufficiency of the evidence to sustain the verdict.

The evidence establishes that on June 5, 1928, the insured was acting as agent for the defendant, on which

date the policy in suit was issued to her. The consideration for the policy, so far as is necessary to consider in this case, was the payment in advance of an annual premium of $115.20 for one year's time ending on the 5th day of June, 1929, and the further payment of a like amount on the 5th day of June, 1929, and annually thereafter, during the continuance of the contract. The policy, which was introduced in evidence, contained a provision for a grace of thirty-one days for the payment of every premium or instalment thereof, after the first, during which time the policy would remain in force, and a provision that after the first policy year premiums could be paid in advance in semiannual or quarterly instalments; also, the further provision that "upon default in payment of any premium this policy shall be null and void and all premiums forfeited to the company," with certain exceptions which could not be invoked in this case since they applied only after premiums had been paid for three full years and were provisions for extended insurance according to reserves earned on the policy and held by the company.

It is admitted that the first premium and the second premium due June 5, 1929, were paid. The premium or any instalment of the premium due June 5, 1930, was not paid. The reply concedes a failure to pay this premium and asserts a waiver on the part of the defendant of its right to insist upon the prompt payment according to the terms of the policy.

It is, we believe, a general rule, at least it is the accepted rule of this court, that a provision in a life insurance policy providing that it should be null and void upon failure to pay premiums when due, is not illegal, and where there is default in payment of premiums and no act or circumstance constituting a waiver or estoppel on the part of the company preventing it from insisting upon a forfeiture the contract will be enforced as made. *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. 669; *Novak v. LaFayette Life Ins. Co.*, 106 Neb. 417; *Bogue v. New York Life Ins. Co.*, 103 Neb. 568.

In *Dressler v. Commonwealth Life Ins. Co., supra,* this court said: "While it is undoubtedly the rule in this state that forfeitures are looked upon with ill favor by the court, and that when an insurance contract is susceptible of two constructions, one of which will work a forfeiture and the other will not, the court will incline to adopt the construction which will prevent a forfeiture. Still, it is equally well established that, when there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, and when there is no situation presented which would create a waiver of its terms or work an estoppel, it will be enforced as made. * * * By plain and unmistakable terms the policy provided that the failure to pay the premium on the day appointed should work a forfeiture. The parties had the right to make such a contract; it is not illegal or against public policy; there is no situation suggested which could be regarded as a waiver of its time or to create an estoppel. Under such circumstances it is the plain duty of the courts to enforce the contract as made." And in support of its holding, the court cited *Rye v. New York Life Ins. Co.,* 88 Neb. 707, where it was said: "When there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made."

This brings us to a consideration of the plaintiff's claim that the defendant had waived its right to enforce the plain provisions of the contract as to payment of premiums. The plaintiff insists that the defendant had waived the forfeiture clause in the policy at its inception and could not therefore insist upon a strict performance as to the payment of the premium; and further insists that the plaintiff, in dealing with the insured, had led her to honestly believe that the forfeiture clause would not be strictly enforced, and that by reason of its conduct the defendant had estopped itself from declaring a forfeiture in this case. As to the contention that it was the agreement of the parties upon the issuance of the policy that the defendant should accept in payment of

the premiums the renewals due the insured on such business as she should write, we feel that the evidence is insufficient to support the claim. The written contract itself recites the unqualified agreement that payments should be made promptly at the company's office or to an authorized collecting agent.

It is hardly conceivable that an insurance company would undertake to issue its policy of insurance under an agreement on its part to look to future commissions which the insured might be able to earn, for the payment of premiums to be paid as a consideration for the risk taken; in other words, fasten upon itself and upon its policyholders a liability in return only for the prospect of premiums to be earned in the future. Such a practice would undermine the safety of the company and from a standpoint of public interest would hardly be countenanced by the authorities exercising control over life insurance business. Promptness of payment of premiums is essential to insurance companies and upon this is based all the calculations of such institutions. Unless such a rule is enforced the business would be thrown into utter confusion and the door to fraud on the other policyholders thrown open.

A careful reading of the entire record fails to disclose any evidence which would reasonably justify the conclusion that at the inception of the contract the defendant waived or intended to waive prompt payment of the premiums as they fell due under the terms of the contract or that the subsequent acts of the defendant were such as led the insured to believe that the provisions as to payment would be waived or that she was justified in so believing. The whole course of dealings between the parties as disclosed by the letters put in evidence which passed between them is conclusive proof that such was not the case. These letters established beyond a doubt that it was the intention of the insured that commissions to which she claimed to be entitled should be paid direct to her as they fell due, and not held by the company against premiums on her own policy as they accrued.

And further, that she knew and recognized that a failure on her part to pay would work a forfeiture of the policy in suit. At the time this policy was issued, the insured, Gertrude Morgan, was acting as agent for the defendant company. She, with the agent Bochemuehl, wrote four other policies in and around Plattsmouth, upon which she made a claim for a portion of the renewal premiums, which claims were by the defendant company conceded, except a matter of $8.68, which was still left indefinite as to whether it belonged to her or to Bochemuehl. The whole amount of these premiums claimed by her was insufficient to meet the amount of the premiums on her policy; and the record discloses that each of these policies upon which she claimed commissions on renewal premiums had lapsed before the time the defaulted payment due June 5, 1930, on her own policy had matured. The insured paid the first premium on her policy in 1928. Before the premium which fell due June 5, 1929, had matured, she made claim to certain commissions due her from renewals on these four policies, and finally she received credits amounting in all to $37.50, and by arrangement with the company she was also to receive a credit on the premium of her own policy amounting to $7.11.

On May 27, 1929, the defendant wrote the insured regarding her claims for commissions due, telling her that they then had on hand belonging to her $25; and on June 10 she replied to this letter stating that this amount was right, and making a claim of $8.68 as her portion due on the premium of one Warner, and claiming also a credit of $7.11 commission on her own premium which fell due June 5 and upon which she had 31 days' grace. She also asked as to allowance for commissions to fall due in the future, and estimated that the payment of $75 more, with the credits, would be sufficient to pay the premium on her own policy, falling due on the 5th of the following month, adding: "Want my policy continued." On June 15 the defendant replied to her letter of the 10th, telling her that she was not entitled to commissions in advance and it would be impossible to allow

her any commissions until the premiums were actually paid; also informing her that one more premium had been paid, upon which she had an allowance which would make it necessary for her to pay $100 and apply the premiums due in order to meet her premium on which the days of grace would expire July 5, 1929. On January 23, 1929, she had written regarding commissions, asking that the company let her know the amount, if any, she had due and that they remit to her as soon as possible. At that time she seemed to have no thought that the commissions were to be held against her premium. In a letter of May 20, 1929, regarding her premium, she wrote: "As to my policy, have 31 days' grace, so will await a settlement from him (Bochemuehl) before deciding whether to drop it completely or renew another year." On February 16 she wrote regarding her commissions, stating: "As to my check for commissions, am still looking for it—have not received any from Mr. Bochemuehl either. Send it, and any further commissions or communications to 2039—29th St., San Diego, Cal. * * * Should appreciate the check very much." On July 1, 1929, she forwarded $100 to apply on her premium, the days of grace on which expired July 5. In this letter she states: "Am inclosing my check for $100 because I do not want the policy to lapse, but want credits due me sent as they come in henceforth, please."

The defendant, after applying credits due her for commissions and the $100 forwarded, still had in its hands $5.04 due on commissions to the insured, for which it sent its check, which was put in evidence. It seems clear that at the time of the payment due in 1929 neither party had any thought of waiving payment of the premium within the time provided for in the policy; and it is likewise clear that insured had no intention to permit any commissions due her to remain in the defendant's hands against accruing premiums on her policy. The premium for 1930 fell due June 5. September 28, 1929, she wrote: "Believe there must be some money due me. * * * Would appreciate getting my commissions at this time as I need

the money." Apparently at that time she had no thought of leaving the commissions there to apply on the next premium on her policy. June 3, 1930, two days before the premium for that year fell due, she wrote saying: "Am sorry to report to you that I am unable to carry my insurance policy C-9011 (the policy in suit) this year." And on the 26th day of the same month, during the period of grace, the defendant wrote her: "Just a word to remind you, Miss Morgan, the days of grace for payment of your life insurance premium on your policy No. C-9011 will be up July 5th and your remittance on either the quarterly or annual basis should be forwarded by that date for the protection of your interests. * * * We don't want you to lapse any more than you want to lose your insurance and to do anything within reason to assist you over your temporary period of financial difficulty is our sincere desire." She wrote her reply on the back of this letter and mailed it to the defendant, in which she said: "In reply to letter on reverse side of this page, wish to state that I am still out of work, and cannot even meet the quarterly payment at this time. The employment situation is no better, so there is no definite solution that I can see. Might suggest that you consult Bochemuehl to see if he has any suggestion to offer, if he is still working for you people." This seems to be the last correspondence between the parties relating to the matter. The premium was not paid and the policy was permitted to lapse. At that time the insured made no claim for any commissions due her, nor is there any evidence that the defendant owed her anything on that account.

The only attempt to show any amount due the insured from the company on commissions was the testimony of the plaintiff herself, wherein she testified that she called on the defendant "to see what commissions were due and to get them; to see what commissions were coming to Gertrude on her writing policies for them." She states that Mr. Adams, the official of the company with whom she dealt, sent for some files and said that he would look

the matter up and let her know later. The question was asked: "Did he mention any amount there that he thought might be due? A. There was something about a little over twenty-four dollars that he would let me know about;" and then she adds that she heard nothing further from Mr. Adams after that in regard to the matter. This evidence falls short of proof that there was any amount due, and, further, it was insufficient to meet the payment due on the policy, in any event.

The rule that, where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside has been so long recognized and is so well established in this state that it needs no citation of authorities to sustain it; and on the trial of the cause in the district court, where only one conclusion can be drawn from the evidence, the question becomes one of law, and the court should direct a verdict. *Brown v. Swift & Co.*, 91 Neb. 532; *Baker v. Swift & Co.*, 77 Neb. 749; *Kelly v. Wehn*, 111 Neb. 446; *Sindelar v. Hord Grain Co.*, 116 Neb. 776.

The premium due June 5, 1930, on the policy in suit was not paid, and at the time of the death of the insured had been in default for more than 31 days. There is no evidence from which the jury could fairly conclude that the defendant had waived its right to declare a forfeiture for nonpayment of this premium. The defendant's motion for an instructed verdict in its favor should have been sustained and the jury instructed accordingly. The verdict of the jury and the judgment entered thereon, being unsupported by the evidence, should be set aside and the cause dismissed. In view of the conclusions reached as to the insufficiency of the evidence to sustain the judgment, it becomes unnecessary to consider other errors assigned in the brief of appellant.

For the reasons herein given, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LEE SHOWERS, APPELLANT, V. ALVIN C. LUND, APPELLEE.

FILED APRIL 8, 1932. No. 28287.

1. **Master and Servant: EMPLOYEE: INDEPENDENT CONTRACTOR.** There is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that relation must be determined from all the facts in each particular case.
2. ———: ———. One (1) who is engaged in hauling gravel from the employer's pit to a county highway project, where the employer is required to deliver it under his contract with the county; (2) who uses his own truck, furnishes it with gas and oil and keeps it in repair; (3) who is paid seven cents a cubic yard a mile for gravel hauled from pit to project; (4) who has no specific term of employment, no specific quantity of gravel to haul and whose engagement can be terminated without liability by either party at will; (5) whose loading of gravel is supervised and controlled by the employer's foreman at the pit and whose unloading is checked at the place of delivery and whose work generally is under the control of the employer; (6) whose earnings are computed by the employer and credited weekly; (7) who works continually at the employment from its beginning until his injury arising out of and in the course of his employment, is *held* to be an employee within the meaning of the workmen's compensation law.

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

Miller & Blackledge, for appellant.

Dryden & Dryden, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

GOSS, C. J.

The compensation commissioner and the district court in turn denied compensation on the ground that plaintiff was not an employee but was an independent contractor. That is the only ground of this appeal.

Whether one is an employee or an independent contractor must be determined from the circumstances of each particular case. *Potter v. Scotts Bluff County,* 112 Neb. 318. "There is no hard and fast rule by which to determine whether one sustains the relation of employee

or that of an independent contractor. It has frequently been held by this and other courts that the relation must be determined by the facts in the particular case." *Claus v. DeVere,* 120 Neb. 812, 816. The nature of the relation must be determined from all the evidence. *Barrett v. Selden-Breck Construction Co.,* 103 Neb. 850. On the issue as to whether a workman is an employee as distinguished from an independent contractor, his relation to his employer should be determined from all the facts rather than from any particular feature of the employment or service. *Knuffke v. Bartholomew,* 106 Neb. 763.

Alvin C. Lund was engaged in furnishing gravel from his pit to a county highway construction project. He employed Lee Showers, together with others, to haul this gravel from the pit from which it was pumped to the highway where it was to be used. Some of these drivers used Lund's trucks and others used their own. Showers used his own truck, furnished its gas and oil and kept the truck in repair. His truck held two cubic yards of gravel. He received seven cents per cubic yard per mile for the gravel hauled from the pump to where it was dumped on the highway. Showers had previously hauled gravel for Lund and knew the work. There was no specific term of employment nor specific amount of gravel agreed to be hauled, and no definite hours of labor were prescribed. The contract of employment was oral. Either party could terminate the relationship at will. Showers began hauling gravel on April 28, 1931. The length of haul was then about eleven miles. He continued until his injury on June 23, when the haul had been gradually shortened to about eight miles. While hauling a load from the pit to the highway under construction, appellant was injured in a collision with an automobile. There is no doubt that he was injured in the course of his employment. The only question is as to whether he was an independent contractor, as the district court held, or an employee, as he claims.

The pleadings and evidence on this point are meager, but they permit the inference that the contract of Lund

was with Adams county to deliver the gravel on a road project in that county at places specified by the overseer of the project. Lund had a foreman at the pit to see that the haulers loaded their trucks properly and the county had checkers to see that proper loads were delivered on the project. It appears from the testimony of Lund that Showers worked continually except when prevented by rain and by a breakdown of the pump. He drove his own truck all the time. Lund received reports, kept books and checked the accounts every week. He computed the amount due on the loads and miles and gave Showers credit each week.

A case very similar in its facts was recently decided by this court but not on this precise point. There the appellee used some of its own trucks and also hired a considerable number of others, among them that of the appellant, to haul paving material at 20 cents a ton mile from appellee's yard to the place of paving several miles away. But there it was held that the appellant's injury did not arise out of and in the course of his employment. This conclusion rendered unnecessary the discussion and decision of other questions; so the question, as to whether the appellant was an independent contractor or an employee covered by the act, was not decided. *Pappas v. Yant Construction Co.*, 121 Neb. 766.

Much learning has been written into the decisions of the courts on the distinctions between an employee and an independent contractor. The result is confusing. It is difficult to reconcile the diverse results derived from quite similar facts. Some apparent inconsistencies are traceable to local statutes. In writing of the diversity and confusion of opinion in the precedents in different jurisdictions, the Iowa supreme court said: "In this state of the precedents we can only hope to maintain, if we may, consistency in our own decisions." *Burns v. Eno*, 240 N. W. (Ia.) 209.

Section 48-115, Comp. St. 1929, of our workmen's compensation law defines an "employee" as including "every person in the service of an employer who is engaged in

any trade, occupation, business or profession as described in section 48-106 of this chapter, under any contract of hire, expressed or implied, oral or written." The section then excludes casual employment, defining the term. Section 48-106, Comp. St. 1929, makes the act applicable "to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer."

In *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850, it was held: "The right to supervise, control, and direct the work is one of the tests for determining whether a person is an independent contractor or an employee, but it is not the sole and only test." In *Bodwell v. Webster*, 98 Neb. 664, it was held: "While the existence or the absence of the right of the employer to control the work is a usual test to determine whether the workman is a servant or an independent contractor, the right of the employer to discharge him, the absence of an independent occupation, and the mode of compensating him and his subordinates, may be factors indicating the true relation."

"It is not always easy to determine when one performing labor for another is a servant and when a contractor. Each case must be decided upon its own facts and where these are in dispute the finding of the commission is final. Among the factors more or less controlling are: Does the workman give all or only a part of his time to the work; does the contract contemplate labor on the job, or the completion of it, or some portion of it; has the laborer or the employee control of the details; which may employ, control and discharge assistants; which furnishes the necessary tools and equipment; may either terminate the employment without liability to the others; is compensation measured by time, or by the piece, or by lump sum for the entire task? Of these the most important, in determining the main question, is the right of either to terminate the relation without liability. Where such right exists the workman is usually a servant. Where it does not exist he is usually a contractor. The measure of

compensation is also important for where it is based upon time or piece the workman is usually a servant and where it is based upon a lump sum for the task he is usually a contractor." *Industrial Commission v. Hammond,* 77 Colo. 414.

In *Industrial Commission v. Bonfils,* 78 Colo. 306, the facts as to one who is accidentally killed and the applicable principles granting compensation are stated as follows: "Was Sprigg in the service of the Continental Investment Company under a contract of hire? We think he was. He was engaged to haul coal with his own truck to customers of the company at a fixed price per ton; he was allowed to haul it himself or employ others; he was allowed to come and go as he pleased; need not report for work at any time nor at all unless he chose; could work for others if he desired. He called at the yard when he pleased, and was given coal to haul if there was any to be hauled when he called. The company was under no obligation to give him work, and he was under no obligation to work for the company, therefore he could quit when he chose and the company could discharge him when it chose. This was service for hire.

"A servant is one whose employer has the order and control of work done by him and who directs or may direct the means as well as the end. *Arnold v. Lawrence,* 72 Colo. 528, 530, 213 Pac. 129. By virtue of its power to discharge, the company could at any moment direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. *Franklin Coal & Coke Co. v. Ind. Com.,* 296 Ill. 329, 129 N. E. 811. The most important point 'in determining the main question (contractor or employee) is the right of either to terminate the relation without liability.' *Industrial Com. v. Hammond,* 77 Colo. 414, 236 Pac. 1006. This is a confirmation by this court of the rule above stated as to control, because the right immediately to discharge

involves the right of control." The deceased was held to be an employee and not an independent contractor.

A very illuminating case, from which we refrain from quoting at great length, quotes from the last named case and holds that an independent contractor is one who is doing his own work in his own way, and that a construction company, under the facts, is held to have such control over a hired truck as to make the company responsible for negligent operation of the truck. *Bowen v. Gradison Construction Co.*, 236 Ky. 270.

In 14 R. C. L. 72, sec. 9, it is said: "The power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered as a strong circumstance tending to show the subserviency of the employee. Indeed, it has been said that no single fact is more conclusive, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself. On the other hand, the fact that the employer cannot terminate the employment strongly tends to show that the contractor is independent." Valuable annotations and discussions of the subject may be found in 42 A. L. R. 607, and 43 A. L. R. 1312.

Merely because an employee furnishes his own tools and equipment does not convert him from an employee into an independent contractor. *Claus v. DeVere*, 120 Neb. 812.

Taking into consideration all the facts and applying the legal principles thereto, we are of the opinion that Showers was not an independent contractor, but was an employee of Lund in carrying out the latter's business of furnishing gravel in fulfilment of his contract with the county. It follows that the district court erred in finding that the appellant was not an employee but an independent contractor. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

ALBERT STRYKER, APPELLEE, V. JOSEPH R. WILSON, APPELLANT.

FILED APRIL 8, 1932. No. 28187.

Guardian and Ward: ACCOUNTING. A guardian may be charged in his final account with funds of his ward, which he negligently kept on deposit in a state bank knowing that it was insolvent.

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

Cook & Cook, for appellant.

Ellis York, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

ROSE, J.

This is a controversy between Albert Stryker, a ward, and Joseph R. Wilson, guardian, over $144.69 of the ward's money which, as charged, the guardian negligently kept on deposit in the Farmers State Bank of Overton with knowledge of its insolvency. The liability of the guardian to account for this item was put in issue by the pleadings. Upon a trial of the cause the district court entered judgment against him for $144.69 and he appealed.

Negligence creating the liability with which the trial court charged the guardian in his final account was clearly shown by the evidence. Consequently the judgment below is

AFFIRMED.

CLARENCE GRAHAM ET AL. V. STATE OF NEBRASKA.

FILED APRIL 8, 1932. No. 28174.

Larceny: INFORMATION. In a prosecution for hog stealing, under section 28-523, Comp. St. 1929, it is not necessary to set out in the information the value of the stolen hog.

ERROR to the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

E. D. Clarke and *J. Jay Marx,* for plaintiffs in error.

C. A. Sorensen, Attorney General, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

DEAN, J.

Clarence Graham, Franklin Graham, and Frank Williams were informed against in the district court for Keya Paha county and there jointly charged with having unlawfully stolen one barrow hog. The defendants each pleaded guilty and the court thereupon sentenced them to the reformatory for men for not less than one nor more than five years. The defendants prosecute error.

The assignment complained of is that the information does not "charge a crime against the statutes of Nebraska," and is defective in that the value of the stolen hog was not set out therein.

The defendants were prosecuted under section 28-523, Comp. St. 1929, which contains the following provision:

"Whoever steals any sow, barrow, boar or pig of any value, or receives or buys any sow, barrow, boar, stag or pig that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or buying to defraud the owner, or conceals any such thief, knowing him to be such, or conceals any sow, barrow, boar or pig, knowing the same to have been stolen, shall be imprisoned in the penitentiary not more than five nor less than one year and shall pay the costs of prosecution."

It should be noted that the statute makes the stealing of a hog "of any value" unlawful, while the information in the present case contains no allegation that the hog was of any value.

In *Halbert v. State,* 116 Neb. 1, in a prosecution for chicken stealing, we held that it was not necessary to allege in the information that the stolen chickens received by the defendants had value. And in *Mares v. State,* 112 Neb. 619, where the defendant was charged with buying and receiving a stolen automobile, we held that it was neither necessary to allege in the information nor to find in the verdict the value of the automobile there involved. And a general rule has been stated in this language by a recognized authority, namely: "Where by statute an aggravated form of larceny is punishable without reference to the value of the goods stolen, the value need not be stated." 36 C. J. 826.

The stolen hog that is the subject of this opinion is presumed to have been of some value and we conclude that, in a prosecution for hog stealing, under section 28-523, Comp. St. 1929, it is not necessary to set out in the information the value of the stolen animal. Reversible error is not disclosed in the record.

The judgment is

AFFIRMED.

STATE OF NEBRASKA V. ALOIS KACIN.

FILED APRIL 8, 1932. No. 28214.

Criminal Law: TRIAL BY JURY. It is within the power of the legislature to enact a law declaring the sale of intoxicating liquor to be a misdemeanor, for a first offense, and to provide that "violators of the law may be tried before magistrates and police courts without a jury, where the penalty does not exceed a fine of $100 or imprisonment for three months." *Bell v. State,* 104 Neb. 203.

ERROR to the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Exceptions sustained.*

C. A. Sorensen, Attorney General, Clifford L. Rein and *L. F. Otradovsky,* for plaintiff in error.

Frank C. Charvat, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

DEAN, J.

A complaint was filed against Alois Kacin in the county court for Colfax county wherein he was charged with having unlawfully sold, on or about May 17, 1931, a quantity of intoxicating liquor. The defendant moved for a jury trial, but his motion was denied. Thereupon the court imposed a fine of $100 and costs. Subsequently defendant's counsel filed a petition in error in the district court for Colfax county and the court there held that the county court erred in refusing to grant a jury trial pursuant to the defendant's request. The court thereupon entered an order discharging the defendant. The state has appealed to obtain a determination of the law governing the facts here involved.

The state contends that the district court erred in holding that the county court could not refuse a jury trial to one accused of the unlawful sale of intoxicating liquor under a first offense. In this respect, section 53-150, Comp. St. 1929, so far as applicable, provides:

"Magistrates and police courts are hereby vested with jurisdiction to try without a jury all violations of this act (the liquor act) and of all of such ordinances wherein the penalty does not exceed a fine of one hundred dollars or imprisonment for a period of three months, and upon the conviction such magistrates and police judges shall impose sentence."

It is the contention of counsel for the defendant, however, that the above cited section 53-150 is unconstitutional in that it violates the provisions of sections 6 and 11, art. I of the Nebraska Constitution. Section 6 provides: "The right of trial by jury shall remain inviolate." And in section 11 this provision is made: "In all

criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

In *Bell v. State,* 104 Neb. 203, we held: "It is within the power of the legislature to enact a law declaring possession and transportation of intoxicating liquors to be misdemeanors, and providing that violators of the law may be tried before magistrates and police courts without a jury, where the penalty does not exceed a fine of $100 or imprisonment for three months."

Counsel for the defendant contends that the above cited *Bell* case is not decisive of the present case, for the reason that the defendant there was charged with the possession and transportation of intoxicating liquor, while the defendant in the present case was charged with the unlawful sale thereof. We do not agree with counsel. The rule has been stated that the right to a trial by jury should be determined according to the class of cases to which the particular offense belongs. 35 C. J. 191. Under the Constitution, a jury trial was granted in certain classes of offenses that existed at common law. And while the offenses of possession, transportation, and unlawful sale of intoxicating liquor did not exist at common law, nor do they appear to have been recognized by statute, the offense of drunkenness was a misdemeanor and was triable without a jury. It is clearly within the province of the legislature to add new cases to certain classes of subjects previously triable without a jury and this appears to be applicable to the facts in the present case. The provisions of section 53-150, Comp. St. 1929, do not transgress the provisions of sections 6 and 11, art. I of the Constitution.

We conclude that it is within the power of the legislature to enact a law declaring the sale of intoxicating liquor to be a misdemeanor, for a first offense, and also to provide that "violators of the law may be tried before magistrates and police courts without a jury, where the

penalty does not exceed a fine of $100 or imprisonment for three months." *Bell v. State, supra.*

The rule announced in the *Bell* case, above cited, should have been invoked in the present case and we think the court erred in discharging the defendant. Under section 29-2316, Comp. St. 1929, however, the views expressed herein do not affect the judgment entered by the trial court discharging the defendant, and the decision herein shall determine the law to govern in similar cases.

The exceptions of the state should have been and they are hereby

SUSTAINED.

FRANK L. WILLIAMS, APPELLEE, V. ALLA LANTZ: HETTA R. MCDOWELL ET AL., APPELLANTS: MATTIE C. WILLIAMS, APPELLEE.*

FILED APRIL 8, 1932. No. 28049.

1. **Adverse Possession.** Actual, open, exclusive, continuous possession under claim of ownership for a period of ten years is required to obtain prescriptive title to real estate.
2. **Taxation:** TAX LIEN: RIGHT OF REDEMPTION. No one whose interest in real estate will be unaffected by foreclosure of a tax lien has a right to redeem from such lien.
3. **Easements:** ENCROACHMENTS. If, by the terms of a grant, an easement is created of a certain width, no structures can be lawfully erected which encroach upon the width stated. If a party wrongfully erects a structure which encroaches upon such easement, he may, in a proper action, be compelled to remove so much of the structure as encroaches on the easement.
4. ———: ———. Where an easement for a private driveway, 16 feet wide, is created by grant, and one of the parties erects a structure encroaching upon such easement to the extent of three feet, he may not complain of the decree of the trial court ordering the removal of the encroachment, unless the wrongdoer quitclaims to the co-owner of the easement an equal width from the other side of the easement.
5. ———: EXTINGUISHMENT. A cessation of use of an easement for a term of less than the prescriptive period, accompanied by acts clearly indicating an intention to abandon the right, will work an extinguishment of the easement.

* See opinion, p. 790, *post.*

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

Harry R. Ankeny, C. J. Campbell and *J. Jay Marx*, for appellants.

T. F. A. Williams, contra.

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

GOOD, J.

Plaintiff sued to foreclose a tax lien on the north half of a private alleyway, 16 feet wide and 100 feet long. The alleyway in question runs west from the west line of Sixteenth street, in the city of Lincoln, and is midway between S and R streets. Defendant Gamma Phi Beta Building Association (hereinafter referred to as the sorority) has the record title to a tract of land, 100 feet long from east to west, abutting on Sixteenth street and extending from the center of the alley south for a distance of 75 feet. Defendant Mattie C. Williams has the record title to a tract of land, 150 feet long, extending west from Sixteenth street. The east 75 feet lie adjacent to the north line of the alley; the next 25 feet west extend south to the center of the alley, and the west 50 feet of her tract extend south to the south line produced of the alley. Defendant Hetta R. McDowell owns the record title to a tract of land, 50 feet wide, extending from R street 142 feet north, and abutting upon the land owned by Mattie C. Williams. The east end of the McDowell tract abuts the west boundary of the sorority tract.

In 1886 the then owners of the tracts of land lying either side of the center line of this private alley entered into an agreement whereby an easement was created for a private walk and driveway, "to be kept clear of all obstructions, * * * this mutual grant to extend to the heirs and other legal representatives of the parties hereto until same shall be legally set apart by city council as a public alley." It was further provided that the grant might at

any time be annulled by the parties owning the same or their legal representatives. The grant was never annulled by the parties, and the driveway was never set apart by the city council as a public alley.

Many parties were made defendants who were alleged to claim some interest in or to some parts of the tract in question. The sorority and Hetta R. McDowell each filed answers and cross-petitions, the sorority claiming the fee title by prescription to the north half of the alley and asserting the right to redeem from the tax lien. The cross-petitioners made Mattie C. Williams a party defendant.

Hetta R. McDowell alleged that she had acquired and owned an easement over the alley in question by adverse use, and also that by user she had acquired and owned an easement across the land of Mattie C. Williams, extending from the north end of her land to the alley. Mattie C. Williams answered, denying that the sorority had ever acquired title by adverse possession to the north half of the private alley, and alleged that the sorority, in constructing its building, had encroached on the south side of the alley to the extent of four feet, and prayed for a mandatory injunction requiring the sorority to remove the part of its building which encroaches upon the alley. She further denied that McDowell had ever acquired a right of way by user over her land immediately west of the alley.

The trial court found that McDowell had acquired by user for the statutory period a right to use the 100-foot alley, but found that she had not acquired and did not have by user a right of way over the land of Mattie C. Williams to reach the alley, and further found that McDowell had obtained a right of way across a corner of the sorority land whereby she could reach the 100-foot alley. The court further found that the sorority had not acquired title by adverse possession to the north half of the alley, and that it had wrongfully encroached upon the south half of the alley with its building, to the extent of three feet, and ordered the removal of such obstruction

from the alley, unless the sorority would quitclaim to Mattie C. Williams a strip, three feet wide, off the north side of the alley; awarded to McDowell the right to use the center ten feet of the 100-foot alley, and denied to McDowell and the sorority the right to redeem from the tax lien. Incidentally, the decree awarded to Mattie C. Williams a right to redeem from the tax sale the west 25 feet of the north half of the alley, being that part of the alley to which she held record title. The court awarded plaintiff a first lien on the north half of the alley, subject, however, to the easement rights of McDowell, the sorority and Mattie C. Williams, and, subject to such easement, directed a sale of the premises to satisfy the lien. The sorority and McDowell have appealed.

The facts disclosed by the record show that the alleyway in dispute, since its creation in 1886, has been continuously used by the various parties to this litigation, or their grantors, and that at no time has the sorority had the exclusive possession of any part of the alleyway, save that part wherein its building encroaches on the south side of the alley to the extent of three feet, and this for a period of less than five years.

"Title by adverse possession is not established, unless the proof shows actual, exclusive and continuous possession under claim of ownership for the full statutory period of ten years." *Butler v. Smith*, 84 Neb. 78. The evidence is insufficient to support the claim of the sorority to title to any part of the alley by adverse possession.

The sorority and McDowell both insist that each is entitled to redeem from the tax lien. Since the only right that either of these parties had to the north half of the alley was an easement for the purpose of a walk and driveway, and since the decree foreclosing the tax lien orders the property sold subject to these easements, neither the sorority nor McDowell is affected as to any right they may have in or to the north half of the alley. All the right thereto which either of them has is preserved and retained. No one has a right to redeem from

a tax lien on realty whose interest therein will not be affected by its foreclosure.

It appears beyond dispute that, in erecting its building, the sorority wrongfully encroached upon the south side of the alleyway to the extent of three feet by constructing an areaway and stairway in the alley, and that this was done over the objection and protest of Mattie C. Williams.

Where two or more parties enter into an agreement creating an easement for a driveway and walk upon the division line of their respective properties, and for a certain width of such driveway, neither party has a right to encroach thereon and deprive the other of the full width of the driveway created by the contract. In 19 C. J. 984, it is said: "If by the terms of the grant or reservation the way must be of a certain width, no structures can be erected which encroach upon the width stated." See, also, *Ballinger v. Kinney,* 87 Neb. 342. The decree ordering the removal of the stairway and areaway of the sorority which extends into and encroaches upon the 16-foot alley is in accordance with sound principles of equity.

Complaint is made because the trial court would permit the encroachment by the sorority to remain on condition that it would relinquish to Mattie C. Williams its right to the easement in the north three feet of the alley. The court does not compel such action, but leaves it optional to the sorority to either remove the areaway and stairway that encroach or to relinquish its right to a corresponding width on the north side of the alley. This was a favor to the sorority and not prejudicial to it. It therefore has no just grounds to complain of this action.

McDowell complains because of the action of the trial court in not awarding to her an easement across the land of Mattie C. Williams which lies north of and adjacent to the tract owned by McDowell. From the evidence it appears that for many years McDowell had a garage practically on the northwest corner of her tract of land; that the doors of this garage opened to the north; that, in order to enter the garage, it was necessary to travel over a part of the tract of land now owned by Mrs. Williams,

and that it was so used. Whether this was done under a claim of right or by permission of the former owners of Mrs. Williams' tract lying north of the McDowell tract does not appear. It does appear that the plaintiff rented this garage from McDowell and traveled over a part of the tract owned by his wife to enter the garage. In about the year 1921 or 1922, McDowell informed plaintiff that she desired the garage for her own use, and thereupon he vacated, and there was erected upon the southwest corner of Mrs. Williams' tract a garage that was immediately in front of the McDowell garage and which effectually prevented entrance to the latter garage by any car. McDowell did not protest against the erection of the Williams garage, but immediately changed the entrance to her garage so that the doors were on the east, and, in order to reach the 100-foot alleyway, she traveled across the north end of her tract and the northwest corner of the sorority's tract. The evidence justifies the inference that, by mutual consent between McDowell and the Williams, she waived and abandoned any right she might have had to cross over the Williams tract to reach the private alleyway.

In 9 R. C. L. 812, sec. 68, it is said: "An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case; and, as a rule, no one case can be authority for another. Time is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important, and a cessation of use for a term less than the prescriptive period, accompanied by acts clearly indicating an intent to abandon the right, will work an extinguishment of the easement."

It further appears that McDowell had an agreement with the sorority, whereby she consented to its extending its areaway and stairway into the alleyway on condition that she should have a driveway across the northwest corner of the sorority's tract, and that for the last eight or nine years she has had a graveled driveway across its tract by which she has ingress and egress to and from her garage to the private alleyway.

We are of the opinion that the court rightly determined that McDowell did not have an easement or right to cross the tract of land owned by Mattie C. Williams, and that McDowell, having consented to the sorority encroaching three feet upon the alleyway on the south side, may not complain that the sorority, if it so elects, may relinquish its right to the north three feet of the alleyway, since McDowell will still have the right of ingress and egress from her premises to the private alleyway.

No error appears in the record prejudicial to the complaining parties. The judgment is therefore

AFFIRMED.

CHARLES FREEMAN, APPELLEE, V. THOMAS HIGGINS ET AL., APPELLANTS.

FILED APRIL 8, 1932. No. 28188.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: APPLICABILITY. Nebraska workmen's compensation act is not applicable, where the contract of employment was made in another state for services to be performed there and the employer was not engaged in an industry in this state to which the services to be rendered were incidental.
2. *Watts v. Long*, 116 Neb. 656, approved and followed.

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

John C. Hartigan and *Sanden, Anderson & Gradwohl*, for appellants.

Frank M. Coffey, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

DAY, J.

This is a suit under the workmen's compensation act for injuries sustained in Wyoming. It is unquestioned that the plaintiff was injured in the course of his employment and that an award is proper provided the plaintiff comes within the provisions of the Nebraska compensation act. The employer, who is the appellant here, hereinafter referred to as the defendant, contends that (1) the contract of employment was made and was to be performed in Wyoming, which fact removed the parties from the jurisdiction of the courts of Nebraska; (2) assuming that the contract of employment was made in Nebraska, the courts of Wyoming have exclusive jurisdiction, since the industry was entirely carried on in Wyoming and the work there was not incidental to any work in Nebraska; (3) the value of board and lodging should not be considered in computing the amount of plaintiff's wages. On the other hand, it is the contention of the plaintiff that the contract of employment was made in Nebraska between parties resident in Nebraska and that the work carried on in Wyoming was incidental to the business localized and carried on in Nebraska.

The defendant Higgins was a contractor living at Fairbury, Nebraska, who had secured a contract for grading construction work for the Union Pacific Railroad Company in the state of Wyoming. The plaintiff was a resident of Avoca, Nebraska, and worked for the defendant as a "drag line oiler" upon the work in Wyoming where he was injured. There is considerable argument concerning his employment which is not justified by the evidence in the record. The plaintiff had been employed by the contracting firm of Callahan & Walker, which at the time in question did not have employment for him. Its timekeeper suggested that he go to work for Higgins on the Wyoming job and sent him to an employment agency who secured free transportation to Pine Bluff on the Union Pacific

railroad, the situs of defendant's project. At this time the defendant's only project was the one at Pine Bluff, Wyoming, for the Union Pacific railroad. He had no contract and no work within the state of Nebraska. It is the contention of the plaintiff that Callahan & Walker's timekeeper was the agent of the defendant Higgins and that through him the contract of employment was made. It appears that the extent of activity of this so-called agency was to refer the plaintiff to a place where he could secure a job. When the plaintiff arrived at the work in Wyoming he had some discussion with the foreman and the defendant relative to the wages he was to receive. He refused to work for the amount they would pay, but after some discussion they entered into an agreement with reference to the wages and the plaintiff agreed to work. The evidence does establish, therefore, that the contract of employment was not entered into in the state of Nebraska, but rather in the state of Wyoming.

The defendant was engaged in the business of "grading contractor" and his sole business at the time of the employment of the defendant was construction work in the state of Wyoming. There is no evidence that he had his principal place of business in Nebraska or that he maintained any place of business in Nebraska. The plaintiff was listed as an employee in Wyoming at the time of his injury. These facts bring the case within the rule of *Watts v. Long,* 116 Neb. 656, from which we paraphrase the conclusion that at the time in question the defendant was carrying on an industry in the state of Wyoming.

Neither was this contract incidental to the industry carried on in Nebraska. The contract was entered into solely with reference to the work in Wyoming and there was no expectation that the plaintiff would ever be employed in the state of Nebraska. The rule announced in *Watts v. Long, supra,* is conclusive upon this question. We content ourselves with a reference to the able and comprehensive discussion of this question in that case, which is controlling here. This opinion cites and discusses all the Nebraska cases applicable. No good purpose would

be served by another discussion. We approve the rule announced therein and adhere to it.

We conclude that the courts of this state are without jurisdiction in the premises on the ground that the plaintiff's employment was not in an industry in Nebraska and not incidental to any industry conducted in this state. In this view of the case it is unnecessary to discuss whether the value of board and lodging should be considered in computing the amount of plaintiff's wages. It therefore follows that the judgment of the district court should be and is hereby reversed and the suit dismissed.

REVERSED AND DISMISSED.

ARDYCE I. SCHWARTING, APPELLEE, V. HENRY OGRAM, APPELLANT.

FILED APRIL 8, 1932. No. 28159.

1. **Statutes**: CONSTITUTIONALITY: VENUE OF ACTIONS. Section 20-406, Comp. St. 1929, examined. *Held*, that it does not violate section 18, art. III of the Constitution of Nebraska.
2. ———: ———: ———. The legislature having provided that an action for injury to person or property by a common carrier bus or trucking company might be brought in any county on the road or line where service could be obtained on a driver thereof, such action of the legislature in passing this law is not an improper or oppressive exercise of the power of the legislature.
3. **Automobiles**: TRUCKING COMPANY: ACTION: SUMMONS: SERVICE. *Held*, that in said section 20-406, Comp. St. 1929, a provision that services of summons may be made upon bus companies or trucking *companies*, engaged in the business of common carriers, by service of a summons upon a driver engaged in such business will authorize service of summons upon a driver of the Union Transfer "Company," although an individual is the sole owner of said trucking line; it being clear that the legislature intended this section to apply to every *owner* of such a line of business, whether such owner was an individual or a company.
4. ———: SPEED: PROOF. When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision.

5. Damages: PROOF. Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury.
6. ———. Injuries from accident set out in opinion, and it is *held* that a verdict and judgment of $15,000 is not excessive.

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

Kirkpatrick, Good & Dougherty, for appellant.

Max V. Beghtol, Glen H. Foe, J. L. Rankin and *John Riddell, contra.*

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

PAINE, J.

This is a personal injury action, resulting from a collision of motor vehicles, brought on behalf of a minor, by her father and next friend, against Henry Ogram, defendant and appellant. The jury returned a verdict for the plaintiff. The motion for new trial being overruled, the judgment is brought to this court on appeal.

The accident occurred about 11:30 p. m., July 19, 1930, about four miles south of York, Nebraska, upon the Meridian highway, also known as U. S. Highway No. 81. This highway, at the place where the accident occurred, is about 30 feet wide, with a graveled surface.

Ardyce I. Schwarting, a schoolgirl, about 16 years of age, was riding in the rear seat of a 1925 Overland sedan with two other girls, while her mother was with her father in the front seat. They were returning to their home at McCool Junction from York, and driving south. The night was dark, and the air filled with dust by reason of the heavy traffic along this highway at that time. A 2½-ton Hawkeye truck, belonging to the appellant, was going north, en route from Concordia, Kansas, to Fremont, Nebraska, with a load of household goods. The truck was driven by Frank Vittera, and his helper, Wade

Rice, was riding with him. The truck at that time was not running upon any regular or fixed route, but was running on what is called a special order, under which the driver of the truck was permitted to take any direct route between Concordia, Kansas, and Fremont, Nebraska.

The negligence charged in the petition against the owner of the truck was that the truck was being operated at a rate of speed greater than was reasonable and proper, having regard for the traffic, the use of the road, and the condition of the road, to wit, at a rate of speed of 50 miles an hour; that, in meeting the Overland automobile, the driver failed to seasonably turn his truck to the right of the center of the highway, but remained in the center of the road, and that such carelessness and negligence was the proximate cause of the injury.

As a result of the collision, the said Ardyce I. Schwarting sustained a basal fracture of her skull, one of her kidneys was torn loose, her hearing and eyesight were impaired, her ability to walk, read or study was also impaired, she was confined in a hospital for many days, and it was maintained that she would be permanently mentally and physically impaired, and compelled to spend large sums of money for care and attention. The suit was for $75,000, and the verdict of the jury was for $15,000.

1. A special appearance, supported by two affidavits, was filed, setting out that the appellant owns and operates, under the name of the Union Transfer Company, certain trucks used for the transportation of freight and express, and that he is the sole owner of the business, and that he never had an office of any kind in Lancaster county, but admits that his trucks deliver freight therein, and that the pretended service of summons was upon John B. Johnson, one of his truck drivers, by a deputy sheriff of Lancaster county, in Lincoln, Nebraska, on January 9, 1931, and that said driver was not a managing agent for the appellant, or employed otherwise than as a driver of a truck, and charges that the provisions of section 20-406, Comp. St. 1929, do not authorize such service and are unconstitutional and void.

The counsel, in the argument of this case before this court, devoted the greater part of their time to this question of venue, which had been raised by means of this special appearance, and which exception had been preserved at every stage of the trial. The section of our statute under which service of summons was made, being section 20-406, Comp. St. 1929, reads as follows: "An action against a railroad company, or an owner of a line of mail stages or other coaches, *a bus or trucking company,* for an injury to person or property upon the road or line, or upon a liability as a carrier, may be brought in any county through or into which the road or line passes: *Provided that service of summons upon bus companies or trucking companies may be made as upon other persons, or by leaving a copy of the summons by the proper officer with any ticket agent, chauffeur or driver of said bus company or trucking company, or left at the usual place of doing business of said company within said county.*"

This act was originally passed in 1866, and applied to railroad companies and the owners of mail stages or coaches, for an injury to person or property upon that line, and suit might be brought in any county through which the line passed. The legislature of 1929 amended the section by adding the words set out in italics, thus making it apply to bus or trucking companies and providing that service of summons might be made on such companies by leaving a copy of the summons with any chauffeur or driver of said bus or trucking company, as was done in this case, and it is claimed that this is a special law against such trucking companies, and violates section 18, art. III of the Constitution of Nebraska; that it deprives the owner of said trucking company of his property without due process of law, thereby violating section 1 of the Fourteenth Amendment of the United States Constitution; that it is unreasonable and discriminatory against such trucking companies, and cites in support thereof *Galloway v. Wolfe,* 117 Neb. 824; *Althaus v. State,* 94 Neb. 780; *In re De Klotz,* 98 Neb. 861; *Frost Trucking Co. v. Railroad Commission,* 271 U. S. 583; *Louisville Gas*

& Electric Co. v. Coleman, 277 U. S. 32. To meet this argument, the appellee first insists that the court should not inquire into the constitutionality of an act unless upon proper request by one who has demonstrated by evidence that the evil effects claimed have, in the very suit on trial, operated upon him to his detriment, citing 1 Cooley, Constitutional Limitations (8th ed.) p. 338. The appellee pointed out in his argument that the appellant was asked upon cross-examination, "You carry liability insurance that protects you personally against damages by reason of this truck that was involved in the accident, do you not?" A. "Yes, sir;" and that, therefore, as he is protected by liability insurance, he has no personal financial interest in the outcome of this litigation, and therefore his constitutional rights are not invaded, as he does not stand to lose a dollar by the determination of this case, and that the insurance company, upon which the burden of payment of any judgment rests, has not made itself a party to the action, nor even disclosed its name, and having remained anonymous in this litigation, appellee insists that the court will not pass upon a constitutional question upon the request of one who will suffer no injury from the enforcement of the provisions in question.

Admitting there is some point to this argument, the court calls attention to the fact that it is a well-known fact that liability insurance is written in all sums, and the policy in question might be anything from $1,000 to $50,000, or more, and no proof is before us that Ogram may not have to pay a portion of the judgment secured in this case.

The test is whether Ogram actually is injured by some oppressive rule or requirement, and in a recent decision, *Bain Peanut Co. v. Pinson,* 282 U. S. 499, Justice Holmes said: "In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens, we have to consider * * * whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not

alleged or proved here. *Louisville & Nashville R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 434; *Patsone v. Pennsylvania*, 232 U. S. 138, 144. This it is for the corporation to make out. The range of the state's discretion is large. *Armour & Co. v. North Dakota*, 240 U. S. 510, 516, 517. The question seems to be answered by *Cincinnati Street Ry. Co. v. Snell*, 193 U. S. 30, 36, 37, which lays down that, if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded."

It is insisted that the provisions mentioned, of both the state and federal Constitutions, are violated because the classification is unreasonable and without substantial basis with reference to the evil sought to be remedied. Judge Sanborn set out the three indispensable conditions necessary to insure a reasonable classification in *Chicago, M. & St. P. R. Co. v. Westby*, 178 Fed. 619, 47 L. R. A. n.s. 97. These conditions may be set out in brief as follows: (1) There must be a difference between the situation and circumstances of all the members of the class and of others which presents a natural reason or necessity for the difference made by law in their liaibilities and rights; (2) no person who does not belong to the class may be included therein, and all persons therein must be treated alike; (3) all who are in the same situation and circumstances of the members of the class must be brought under the influence of the legislation and treated the same as members of the class.

An act, providing for service in an action against an automobile owner in a county other than that where the injury sued for occurred, was held not invalid as a local or special law, in violation of section 7, art. III of the Constitution of Pennsylvania. *Garrett v. Turner*, 235 Pa. St. 383.

2. Appellant contends that the amendment of 1929 is unreasonable and, by violating the conditions set out by Judge Sanborn, is unconstitutional, in that it singles out common carrier trucking and bus lines and makes them

liable to respond for injuries to person and property in any county in this state in which process can be served upon a driver engaged in the trucking business. While, upon the other hand, hundreds of business firms, such as wholesalers, milling and public utility companies, are operating trucks, indistinguishable from those owned by common carrier trucking lines, over the same highways, and while they are just as liable to cause injuries to person or property, yet they cannot be brought into court for such injuries under this section of our statutes.

We can admit that, if the legislature had provided that any kind of suit, such as one founded upon a note or contract, could be brought against common carrier truck lines in any county where a driver could be served, it would violate the rules announced by Judge Sanborn. Did the legislature do that? No; it clearly limited the actions which could be so instituted to actions for injury to person or property. Why did the legislature do this? Doubtless because such common carrier bus and trucking companies make as continuous use of our state highways for their own private profit as if they had built them, in fact, use them very much as the railroads do their own tracks, so the legislature, after careful deliberation, enacted this amendment, rightfully placing common carrier bus and trucking companies in a separate class from motor vehicles engaged in hauling the property of the owners thereof.

The members of the legislature having determined that a particular law was necessary for the public good, and this question being one particularly within their power and jurisdiction, their action should not be interfered with by the courts unless their power has been improperly or oppressively exercised. 8 Neb. Law Bulletin, 174; *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825.

Is not the real question whether appellant, Ogram, suffered by reason of being compelled to defend this suit in Lancaster county, because of the service of summons upon his driver in this county, rather than being allowed to defend this suit in the county of his residence, at Fremont?

This court knows that in both of these forums he would be given equal protection of the laws of the state of Nebraska, and that such laws are administered in the same manner in the district courts of both counties, and under the recent amendment of our legislature to section 20-406, Comp. St. 1929, it is the right of a person, alleging injury by reason of the negligent operation of a truck, to determine in which county said suit will be brought if summons is served upon a driver of defendant engaged in the trucking business in such county, and this provision operates impartially upon every owner of a bus or trucking company in this state. This court finds that it was within the power of the legislature to enact said provision, and if any injustice appears therein, it must be corrected by the lawmaking power, and not by the courts.

3. It is set out as another ground for reversal that said section 20-406 provides that such service of summons can be made upon the driver "of a bus or trucking *company*," and not, as was done in this case, upon the driver of a truck of an individual owner, as Henry Ogram, the appellant.

In support thereof, we are furnished with a large number of definitions of the word "company" from respectable authorities, defining it as an association of persons for a joint purpose, especially for carrying on a business.

It is undisputed that Henry Ogram is the owner and operator of a trucking business, with its principal office at Fremont, where he has resided for more than 25 years; that he operates more than 30 trucks; that some of these are operated along regular lines, to wit, Omaha to Sioux City, Sioux City to Fremont, Fremont to Norfolk, Fremont to Columbus, Fremont to Lincoln, Fremont to Omaha, and Omaha to Des Moines, upon which routes the trucks operate each way every day. It is further shown by the record in this case that this very extensive trucking business, upon seven regular lines daily, and upon additional special order destinations, all engaged as common carriers of freight and express, and owned personally by

Henry Ogram, have been and are now operated under the trade-name of the Union Transfer *Company.*

We hold that the legislature intended to apply these provisions of law to all common carrier lines engaged in the transportation business by trucks or busses; that it was not concerned with what particular legal agency owned the motor vehicles, but intended to include corporations, firms or individuals, for the first sentence of the said section 20-406, omitting the words which have no application to this case, would read: An action against the *owner* of a bus or trucking company for an injury to person or property upon the road or line may be brought in any county through or into which the road or line passes. It is clear that the legislature intended to have this section apply to every "owner," whether such owner was an individual or a company. *Singer Mfg. Co. v. Wright,* 97 Ga. 114, 35 L. R. A. 497; *Efland v. Southern R. Co.,* 146 N. Car. 135; *Atlantic Coast Line R. Co. v. State,* 135 Ga. 545.

Appellant holds forth to all with whom he does business that they are the property of the Union Transfer *Company,* and to dismiss this judgment secured against him on this technicality would violate every principle of justice and right.

4. Complaint is made that the witness Charles Klone was permitted to testify, over appellant's objections, that he passed the same truck some 600 feet before it collided with the Overland car in this case, and that the truck was then running at a speed of 35 to 40 miles an hour. The bill of exceptions discloses that the trial judge rightly excluded other evidence offered as to the speed of this truck at more distant points, and the question is presented to us whether the admission of this evidence is reversible error. In the days of the horse and buggy, it may be admitted evidence from such a distance would be too remote. But a truck traveling at the speed shown would be at the place of the collision in possibly a half dozen *seconds,* and many courts have held that this would not be too remote. It was held that when a car was being driven at an extra-

ordinary rate of speed a few *minutes* before a collision, such evidence should have been submitted to the jury. *Wilson v. Fleming,* 89 W. Va. 553. That when the machine was going at an excessive rate of speed a mile from the place where the collision occurred, and the speed did not slacken until after the collision, this evidence should be admitted. *Taxicab Co. v. Hamburger,* 146 Md. 122. Testimony properly admitted of speed four blocks from the place of accident. *Wigginton's Admr. v. Rickert,* 186 Ky. 650.

This question of the admissibility of the speed of a vehicle shortly prior to the time of the accident rests largely in the discretion of the court. In the case at bar, no abuse of that discretion is shown. *Traynor v. McGilvray,* 54 Cal. App. 31; 1 Wigmore, Evidence, pp. 514, 574.

5. It is charged, as a ground for reversal, that the court erred in giving instruction No. 9 upon its own motion. This, in the main, was the instruction usually given upon the measure of damages in case the jury found for the plaintiff, but objection is made to this portion thereof: "In fixing the amount of damages for such personal injuries, you will consider the character and extent of the injuries, whether same are temporary or permanent, that is, their *probable* duration with reasonable certainty, the pain and suffering, if any, occasioned by said injuries." It is insisted that the use of the word "probable" destroys the effect of the instruction and leaves the jury in the realm of speculation, and that in the case of *Burkamp v. Roberts Sanitary Dairy,* 117 Neb. 60, a judgment was reversed because the trial court gave an instruction telling the jury that it might consider the pain and suffering which plaintiff "will *probably* suffer in the future," as the language was too indefinite and conjectural, but added: "The only future pain and suffering which the jury is entitled to consider is such as the evidence shows with reasonable certainty he will experience." In *Chicago, R. I. & P. R. Co. v. McDowell,* 66 Neb. 170, Commissioner Ames reversed the case, and said: "The mere fact that the injuries are permanent does not remove the

element of uncertainty as to the amount of damages which they may cause, nor relieve the court from the duty to instruct the jury that only such as are reasonably certain to result therefrom can be compensated by their verdict." The true rule would be that, to entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. In the case of *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550, it was held, in reversing the case, to be the duty of the court, in instructing the jury as to any future damages, to charge that only such as reasonably stand to result therefrom can be compensated by their verdict; and in *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, it is held that the jury could allow damages for such prospective suffering and loss of health, if any, as the jury may believe, from all of the evidence before them, he will sustain by reason of such injuries. *Chicago & N. W. R. Co. v. De Clow*, 124 Fed. 142.

In this ninth instruction, the objection to the words "probable duration" would have much weight if these words had not been followed by the words "with reasonable certainty," which rightly kept before the jury that recovery for such permanent injuries must not be speculative, but must be such as, based upon the evidence introduced, are reasonably certain in the course of human events to result from the original injury. The giving of this instruction was not reversible error.

6. We will next take up the question of the compensation awarded by the jury in this case. In this connection it might be well to call attention to the result of a study for two and a half years of compensation for automobile accidents, made by a committee of the American Bar Association, which sets out the law in many states, and is found in vol. 18, No. 4, p. 221, of the Journal of the American Bar Association for April, 1932.

Five doctors were called as witnesses, and gave detailed evidence in regard to the injuries suffered in this case,

which evidence was supplemented by ten X-ray pictures and 23 pages of graphic charts, prepared daily by the nurses, and it is insisted that the verdict of the jury for $15,000 is excessive, because appellant insists that the skull was not fractured, although Dr. Bell, who took the X-ray pictures of the skull immediately after the accident, testified that there was such a fracture, and pointed out to the jury the exact location of such fracture on the pictures. The injured girl had never had any trouble with her eyes or vision prior to the accident, but has had continual trouble since. She was asleep in the rear seat when the crash occurred, and immediately became as stiff as a board, so that her limbs could not be flexed after the accident. She vomited blood at the hospital, where she remained many days. After returning to her home, she suffered many dizzy spells, her appetite is poor, she has pains in her left ear, has not been able to do any household work or farm work since the accident, she has lost her healthy complexion, has a yellowish cast to her features, and seems somewhat lifeless. One of the doctors testified that her kidney was misplaced and was one-third larger. At the time of the injury she was a student in the third year in high school, with her grades averaging between 90 and 95; the principal testifying that she was then above the average student. Since then she has been compelled by physical disabilities to be absent from school about one-fourth of the time, is very forgetful, and unable to carry her work in school as she did before. She is nervous and cries easily, has severe headaches, and it was testified that, as a result of these conditions, traumatic epilepsy will develop, all as a result of this accident, and that this condition is permanent and cannot be cured; that the trouble with her ear is due to a change in the brain tissues that has come from a contraction of the scar formed at the basal skull fracture. One physician testified that she is progressing towards traumatic insanity.

The appellant insists that the verdict is grossly excessive and entirely disproportionate to the damage done to the plaintiff, and in any event should be reduced, and the

evidence of the doctors testifying for the appellant made light of the symptoms and the seriousness of the results of the accident. The jury, during the days of the trial, doubtless studied the condition of this young lady, who was in court but did not testify, and listened to all of the testimony relating to her injuries.

In *City of South Omaha v. Sutliffe*, 72 Neb. 746, a verdict returned for $10,000 for injuries to a 3½-year-old child, which caused downward pressure of the parietal bones upon the brain, was reduced to $7,000 by this court, while in *Hoskovec v. Omaha Street R. Co.*, 85 Neb. 295, a verdict of $12,750 was held to be no more than compensatory, where a 22-year-old woman was injured so that her mental and physical faculties were impaired and she was unable to engage in her usual avocations.

The jury, after listening to all of the evidence produced during the days of the trial, found that the driver of the truck was negligent, and fixed the amount of the recovery at $15,000, and this court will not substitute its judgment on a question of fact left for the jury to determine; and, finding no reversible error in the record, the judgment is

AFFIRMED.

JACOB WEBER ET AL., APPELLEES, V. G. M. CRABILL, ADMINISTRATOR, ET AL., APPELLANTS.

FILED APRIL 14, 1932. No. 28184.

Specific Performance. Courts will compel specific performance of an oral contract to convey specified real estate in consideration of personal care to be given to the owner during the remainder of his natural life, when the terms of the contract are fair and reasonable and the evidence to establish such contract and its performance is clear, satisfactory, and convincing.

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

Max G. Towle, Farley Young and *Wright & Wright*, for appellants.

Morrow & Morrow, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

DEAN, J.

Jacob Weber and Elizabeth, his wife, began this action in the district court for Scotts Bluff county to obtain a decree requiring the specific performance of an oral agreement which they allege was entered into between them and Ernest Zehner, since deceased, and to have the title in and to the following described real estate, namely, lots 4, 5, and 6, in section 13, township 21 north, range 54, west of the 6th principal meridian, in Scotts Bluff county, of the value of $2,500, quieted in them. The plaintiffs contend that Zehner agreed to convey the above described real estate to them in consideration of the plaintiffs' living with and caring for him during the remainder of his life.

Upon submission of the evidence the trial court entered a judgment in favor of the plaintiffs and confirmed and quieted the title to the above real estate in the plaintiffs. From the judgment so rendered, an adopted minor son of the decedent, the son's guardian, and the administrator of the estate of Ernest Zehner have appealed.

Ernest Zehner was born in Germany and, at the time of his death, was about 70 years of age. He left an estate of the value of $35,000 or more. From certain documents in the record it appears that Zehner was divorced from his first wife and that he was twice divorced from his second wife. No children were born of either marriage nor does it appear that Zehner left any relatives surviving him. The record, however, discloses that Zehner and his first wife adopted a baby boy, but that, in less than a year after his adoption, the baby was committed to the care of the board of commissioners of state institutions when Zehner and his first wife were divorced. And from the evidence it appears that Zehner did not know of the whereabouts of the adopted boy nor did the son, according to the son's evidence, have any knowledge that he had been adopted until after Zehner's death. And it may here be observed that Zehner lived alone most of the time after

his matrimonial difficulties came to an end and until Weber and his wife moved into his home with him.

The plaintiffs Weber were born in Germany and came to the United States in 1924 and, at the time of the trial, each was about 38 years of age. Shortly before the time in question here they occupied a one-room house on the Zehner property, but they later moved into Zehner's home and lived there with him until his death. It was stipulated that Weber delivered to Zehner one-third of the grain and one-fifth of the sugar beets, and one-half of the hay raised on the 38 acres of land during the years 1928, 1929, and 1930, and that no other crop was raised thereon during those years.

The plaintiffs were, of course, precluded from testifying in respect of representations made to them by the decedent Zehner in regard to the property in question. Comp. St. 1929, sec. 20-1202; *In re Estate of Schellenberg,* 122 Neb. 585. But the evidence of many witnesses who were neighbors of Zehner and who had known him for many years was introduced in behalf of the plaintiffs. The defendants offered no evidence. Several witnesses for the plaintiffs testified that they had known the decedent for upwards of 30 years. Their evidence is in effect that, before the plaintiffs lived with Zehner, his home was very dirty. But after the plaintiffs moved into his home Zehner told several of his neighbors that he was very fond of Mrs. Weber's cooking and that she kept his house in good order and kept his clothing clean and in good condition. And these witnesses testified that Zehner told them that it was his intention to repay the plaintiffs for their care and their kindness to him by conveying to them the "home place," that being the real estate in question here. He also stated that he had promised and agreed to give the home place to the Webers if they would continue to take care of him the rest of his life. To substantially the same effect is the evidence of other witnesses who had been acquainted with Zehner for many years and who came into contact with him often. And from the fact that Zehner left an estate valued at more than $35,000 and that the

property in question here is worth but $2,500, the agreement between the parties appears to be reasonable. The plaintiffs had accumulated no property of their own and the witnesses who testified in their behalf could have had no motive in misrepresenting statements made to them by Zehner. That Zehner appreciated what the plaintiffs had done for him clearly appears. In fact, two weeks before his death, he told one witness that he, Zehner, "must go and get that deed made out for Mr. Weber; he said he kept neglecting it and he was afraid that he would neglect it too long." The evidence clearly establishes the fact that it was his sudden death alone that prevented Zehner from executing the necessary papers to effect an actual conveyance of such real estate.

We have held that "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it." *Kofka v. Rosicky,* 41 Neb. 328. See *Davis v. Murphy,* 105 Neb. 839. And in *Harrison v. Harrison,* 80 Neb. 103, we likewise held: "The law is well settled in this state that an oral agreement to convey real estate will be specifically enforced where the evidence of such agreement is clear and satisfactory, and the plaintiff has fully performed on his part." See, also, *McNea v. Moran,* 101 Neb. 476; *Evans v. Kelly,* 104 Neb. 712; *Denesia v. Denesia,* 116 Neb. 789. "If such contract is definite, and is clearly proved, and substantial performance is proved by clear and unequivocal evidence, it has the same force as if written." *Parks v. Burney,* 103 Neb. 572. Courts will compel specific performance of an oral contract to convey specified real estate in consideration of personal care to be given to the owner during the remainder of his natural life, when the terms of the contract are fair and reasonable and the evidence to establish such contract and its performance is clear, satisfactory and convincing.

The judgment is

AFFIRMED.

DAVID BOLSER, APPELLEE, V. FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK, APPELLANT.

FILED APRIL 14, 1932. No. 28201.

1. Insurance: POLICY: DESCRIPTION OF PREMISES. Where the proofs clearly disclose the tract of land a policy of hail insurance was intended to cover, a mere clerical error in the description of such tract should not be permitted to bar the plaintiff's right to reimbursement for the loss of his crop and for which he paid the company the required premium on the policy.
2. ———: ———: ———: REFORMATION. Reformation is not necessary to recover upon a policy which incorrectly states the location of the property intended to be insured.
3. Appeal: DAMAGES. Where the amount of damage by a hailstorm to certain crops is established by the evidence, and the jury were correctly instructed as to the measure of such damage, the judgment will not be disturbed.
4. ———: AFFIRMANCE. When the testimony conflicts on every material point in issue but is sufficient to sustain a verdict for either party, it is to be borne in mind that the jury, as triers of fact, passed on the credibility of the witnesses, and their verdict will not be disturbed unless clearly wrong.

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

E. D. Crites, F. A. Crites, Charles O. Bailey, John H. Voorhees, Melvin T. Woods, Jr., and *John J. Olsson,* for appellant.

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

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS, District Judge.

DEAN, J.

This action was begun in the district court for Sheridan county by David Bolser, plaintiff, against the Fidelity-Phenix Fire Insurance Company of New York, defendant, to recover $3,000, with interest, for damages alleged to have been occasioned by a hailstorm on June 27, 1928, to certain growing crops of wheat and flax owned by Bolser and covered by a policy of hail insurance issued thereon by the defendant company. Upon trial to a jury a verdict

was returned in favor of the plaintiff for $3,555.90, and a judgment was rendered thereon. The defendant company has appealed.

The policy sued on herein became effective June 22, 1928, or the day after the plaintiff made his application therefor. By its terms the policy covered 120 acres of wheat, and 100 acres of flax in one field, and 300 acres of flax in another field. But it appears that the 120 acres of wheat was incorrectly described in the policy as being on the southeast quarter of section 21, township 38, range 40, whereas the correct description was the southwest quarter of section 21 in the township and range above designated. During the trial, counsel was granted leave to amend his petition by striking out the word "east" and substituting therefor the word "west," to conform his pleading to the fact. But no request was made by the plaintiff for a reformation or a change in the wording of the policy. And it is the contention of the defendant company that the court erred in allowing the plaintiff to amend his petition in the absence of any pleading of mutual mistake in entering the description in the policy.

So far as disclosed by the record, it appears that the description of the location of the land was incorrectly designated either by the agent or the plaintiff himself when the policy was issued. But the plaintiff had no wheat on the southeast quarter of section 21, described in the policy, and, of course, no gain could inure to him in submitting an incorrect description of the land. And where the proofs clearly disclose the tract of land which the policy was intended by the parties to cover, a mere clerical error in the description of such tract should not be permitted to bar the plaintiff's right to reimbursement for the loss of his crop and for which he paid the company the required premium on the policy. Reformation is not necessary to recover upon a policy which incorrectly states the location of the property intended to be insured. *State Ins. Co. v. Schreck,* 27 Neb. 527; *Phenix Ins. Co. v. Gebhart,* 32 Neb. 144; *Omaha Fire Ins. Co. v. Dufek,* 44 Neb. 241.

The application for the policy was written on June 21, 1928, and the hailstorm that is alleged by the plaintiff to have caused the crop damage occurred on June 27, following. But the company argues that the plaintiff's crops were damaged by hail June 20, and that he is therefore not entitled to recover under the policy in suit.

After the hailstorm of June 27, the plaintiff presented his claim to the company for the loss he contends he sustained thereby. Thereafter, on July 26, the company's agent and an adjuster for the company called on the plaintiff, and it appears that, in consideration of the return of the plaintiff's premium note to him by the company, the plaintiff's signature was obtained to an agreement which purported to release the company from any liability under the terms of the policy. On this feature of the transaction, it appears from the plaintiff's evidence that he was informed by the adjuster that, if he did not return the policy or release the company from liability thereon, he would be sent to the penitentiary for attempting to collect insurance on crops that were damaged before the policy was issued, as alleged by the company. The testimony of the plaintiff in respect of the threat made against him by the adjuster is corroborated by that of the company's agent. And an extenuating circumstance in behalf of the plaintiff plainly appears in the fact that he cannot readily speak nor can he understand the English language, nor can he write his own name plainly in English. He came to the United States from Russia when he was 24 years of age and at the time of the trial he was 50 years of age. That the release of the company from liaibility was obtained from the plaintiff under duress appears plainly to be established by the evidence, and the jury so found.

The plaintiff and his step-sons testified that there was a hailstorm in "the neighborhood," but they denied that the hail struck the plaintiff's crops on the 20th of June. One witness, who had crops in four sections near the plaintiff's land, testified that, although his, the witness', crops were damaged on that date, the plaintiff's crops

were not struck by hail on the 20th of June. To substantially the same effect is the evidence of other witnesses who testified that the hail did no damage to the plaintiff's crops June 20, the day before the policy in suit was issued to the plaintiff.

From the evidence of the company's agent, it appears that he wrote no hail insurance for the company after the season of 1928, but, so far as disclosed by the record, no charge was made against him by the company. And he testified that no damage was done to the plaintiff's crops by the hailstorm of June 20, although damage was sustained by other policyholders not in the immediate vicinity of the plaintiff.

The company's adjuster testified that an inspection of the plaintiff's wheat revealed that it had broken and "turned up and formed what we call an elbow, and the heads had grown up again towards the light; and the leaves had been broken off after that had happened." The wheat was compared with wheat in an adjoining field that was damaged by hail on the 20th and found to be similar thereto.

On behalf of the company, several witnesses who owned a tract of land adjoining the plaintiff's land testified that their crops were damaged by hail June 20, and that as far away as they could see the ground was white with hailstones. On the cross-examination of the witnesses, however, one of them testified that, in a former trial of the present case, he stated that he knew "practically nothing about" the plaintiff's crops.

In respect of the damage to the wheat and the flax in question here, the plaintiff testified that only about a bushel and a half of wheat to the acre was obtained from that crop after the hailstorm on the 27th of June as compared to the average yield of about 15 bushels to the acre. And in respect of the flax yield, it appears that the plaintiff's crop averaged only one and a half bushels to the acre after the hail as compared to the average yield of from 10 to 12 bushels. The wheat and flax, under normal crop conditions, were worth $15 and $20 an acre, respectively.

The jury were instructed to determine the percentage of the loss and apply that percentage to the gross insurance, and that amount would be the amount plaintiff was entitled to recover, if it was 5 per cent. or more. We do not think the court erred in the rule so submitted to the jury, and we think the evidence supports its finding in respect thereof. And where the amount of damage sustained to the crops by the hail is established by the evidence, and the jury were correctly instructed as to the measure of damages, the judgment will not be disturbed on appeal.

A review of the evidence discloses that it conflicts in respect of material issues. And while the hail storm on June 20 appears to have been general over the vicinity in question, it is not improbable that the storm missed the plaintiff's crops. In fact, it may be assumed that, because of the hailstorm on the day before, the plaintiff made his application for the policy in suit here. The evidence in the present case has twice been submitted to a jury and twice the verdicts rendered were in favor of the plaintiff and against the company. We have held: "The finding of a jury on a disputed question of fact, when supported by sufficient competent evidence, will not be disturbed by a reviewing court, even though, from an examination of the record, the evidence seems to preponderate to the contrary." *Chicago, B. & Q. R. Co. v. Winfrey,* 67 Neb. 13. And at a later period we held: "Of two reasonable inferences deducible from the evidence this court cannot say that the one chosen by the jury is wrong." *Smith v. Chicago, B. & Q. R. Co.,* 81 Neb. 186. And even where, as in the present case, the testimony conflicts on every material point at issue, but is sufficient to sustain a verdict for either party, it is to be borne in mind that the jury, as triers of fact, passed on the credibility of the witnesses and their verdict will not be disturbed unless clearly wrong. *Anderson v. Chicago, B. & Q. R. Co.,* 102 Neb. 497.

As a condition precedent to the overruling of the motion for a new trial, the plaintiff filed a remittitur of $300 from the judgment. The court thereupon entered a

judgment against the defendant company for $3,255.90 and $300 as attorney's fees. Thereafter counsel for plaintiff filed an attorney's lien for $1,627.95 against the judgment so entered. Counsel for the defendant company contend that the court erred in allowing $300 as attorney's fees, to be taxed as costs, in view of this fact. However, it appears that no fee was allowed counsel in the second trial of this case, and we know of no section in the statute prohibiting the allowance of $300 as an attorney's fee to be taxed as costs in the present case.

The judgment is

AFFIRMED.

IN RE ESTATE OF WESLEY L. CURTIS.
ALICE E. CURTIS, APPELLANT, V. ESTATE OF WESLEY L. CURTIS ET AL., APPELLEES.

FILED APRIL 14, 1932. No. 28207.

Wills: CONSTRUCTION. "Where an irreconcilable repugnancy exists between two provisions of a will, the later will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced." *In re Estate of Smith*, 117 Neb. 776.

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

Skiles & Skiles, for appellant.

T. F. A. Williams, contra.

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

PAINE, J.

Alice E. Curtis, the appellant in this court, filed a petition in the county court of Lancaster county, asking that the will of her late husband, Dr. Wesley L. Curtis, who died March 9, 1931, be construed. Deceased left surviving him the appellant and three children by his first marriage, Mary C. Peterson, Martha E. Curtis, and Donald W. Curtis, as his only heirs at law. His last will and testa-

ment was admitted to probate in Lancaster county April 14, 1931. The contention between the parties in this case arises over the residence property in Lincoln, located at 1503 South Twenty-second street, which deceased had deeded to his two daughters, Mary and Martha, upon July 14, 1925, reserving a life estate therein to himself. This residence property was the only real estate in which he had an interest at the time of his death. Upon September 11, 1925, and just prior to his marriage with the appellant, they entered into an antenuptial contract, in which it was set out that each of the parties had children by former marriages, and the appellant waived and disclaimed the right to inherit any right, title or interest in the said residence property, including the waiver of a right to claim a homestead interest therein. She also waived the right to claim any personal property in said home, and, on his part, Dr. Curtis waived claim to any interest in her property, either real or personal, in case she died first. Upon February 13, 1930, Dr. Curtis executed the will in question, and, in the second paragraph of which, he said: "I do hereby give, devise and bequeath unto my said wife, in the event only that she survives me, an undivided one-fourth right, title and interest in and to all of my property of every kind, real, personal and mixed, of which I shall die seised, other than, and not including, the property governed and controlled by said antenuptial agreement." And the remaining three-fourths of his property he divided equally between his three children, thereby giving to the widow and the three children each an equal one-fourth interest in his estate.

In paragraph 6 of his will he provided that the proceeds of three life insurance policies which he carried, in the aggregate sum of $5,000, should be shared equally by his two daughters, Martha and Mary, but further provided in said paragraph: "The proceeds of such policies will constitute no part of my estate, but it is my will that for the purpose of effecting distribution between my wife, my two daughters and my son Donald W. Curtis in accordance with my will, the court administering my estate and the ex-

ecutor, in figuring the respective shares, shall consider any sums received by my daughters respectively as proceeds of such insurance policies, the same as though such sums had constituted a part of my estate and as though paid and advanced to them by the executor out of my estate upon my death." This paragraph of the will is clear and definite; it is not contended but what the value of the insurance they collected should be considered in estimating the total value of his estate, but the contest in the lower courts, as well as in this court, is concerned with the seventh paragraph of his will, the first part of which reads as follows: "It may be that I shall convey real estate to my said daughters prior to my death. In such event the real estate so conveyed will constitute no part of my estate. It is my will, however, and I direct the executor in such event, for the purpose of effecting distribution as recited in the next preceding paragraph of this will, that the executor shall appraise the value, as of the date of my death, of the real estate, or the equity therein, so deeded by me to my said daughters, and the executor, in figuring the respective shares, shall consider the value of such real estate or the equity therein, so conveyed to said daughters respectively, the same as though such sums had constituted a part of said estate and as though paid and advanced to them by the executor out of my estate upon my death."

After the death of Dr. Curtis, the Lincoln Trust Company was appointed executor of his estate, and such executor joins in this action, asking for a construction of this will.

The appellant contends that, by the seventh paragraph of his will, he provided that the appraised value of his residence property should be taken into consideration in estimating the total value of his estate, and that his widow and son should have from his other property a one-fourth value of his estate; in other words, that the appraised value of his home property, which he had deeded to his daughters, Mary and Martha, and in which he had only reserved a life estate, should be added to the

rest of his property, the same as the value of the $5,000 of life insurance should be added, to get the total bulk sum of his property, and from that total so ascertained the widow would have one-fourth and the son would have one-fourth.

It is contended by counsel for appellees that upon February 13, 1930, when Dr. Curtis drew his will, there was nothing to indicate that he was in any immediate danger of death, but, unfortunately, his death did occur some 13 months thereafter; that he did not know, when he drew the will, what real estate he might become the owner of, and that the seventh paragraph of the will would have covered any other real estate that he might have acquired before his death.

Appellees contend that this part of the will was doubtless copied by Dr. Curtis from an older will, especially that portion of it saying, "It may be that I shall convey real estate to my said daughters prior to my death," for the truth was that he had already conveyed the home property to his daughters on July 14, 1925, before he wrote the will, and the only interest he had therein was a life estate; and further contend that, if this widow was to have a one-fourth interest in the value of the home property, deeded to Martha and Mary, it would violate the antenuptial agreement, in that it would give her a one-fourh interest in property which she had renounced in that antenuptial agreement.

Let us consider the condition in case Dr. Curtis had left absolutely nothing but the insurance and his home property, both in the names of the two daughters. If this was the total estate, then, to secure a one-fourth interest for the son and the widow, the executor would be compelled to go into the district court and sell the home property to secure money from which to pay the one-fourth shares going to the son and the widow. Could this be done? The will, in the last sentence of paragraph 7, provides: "Nothing in this will contained, however, shall lessen, hinder or impair in any manner the title and estate in said real estate vested in my said daughters

by my conveyance to them, or the ability of my said daughters, without the license or consent of any court, to sell and convey said real estate by good and perfect title." This sentence, written by Dr. Curtis toward the close of his will, is controlling upon this court, for if two parts of a will are inconsistent or irreconcilable, the last, or subsequent, part is to be taken as evidence of a subsequent intention. *Martley v. Martley*, 77 Neb. 163. The rule is sometimes stated that, where reconciliation between inconsistent provisions is impossible, the latter of the two provisions must prevail. *Porter v. Union Trust Co.*, 182 Ind. 637; Ann. Cas. 1917D, 427, 1155; *In re Estate of Creighton*, 91 Neb. 654, Ann. Cas. 1913D, 128.

In *In re Estate of Smith*, 117 Neb. 776, it was held: "Where an irreconcilable repugnancy exists between two provisions of a will, the later will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced."

Under the present law of Nebraska, as set out in the above case, this court finds no error in the record and judgment of the district court, and the same is

AFFIRMED.

LESTER LUKE V. STATE OF NEBRASKA.

FILED APRIL 14, 1932. No. 28236.

1. Criminal Law: SEPARATE OFFENSES: CONSOLIDATION FOR TRIAL. Where two offenses of the same class, for connected acts, are charged in separate informations, and could have been charged as separate counts in the same information, the consolidation or trying together of such cases, especially with the consent of the defendant, is within the sound discretion of the trial court.
2. ———: ———: SENTENCE. Upon a jury returning two separate verdicts of guilty upon two informations tried together to the same jury, the court should impose sentence for each offense, and such sentences will run concurrently, if the trial judge does not otherwise order. If such sentences are to run consecutively, he should provide that the second sentence shall begin at the termination of the first sentence, and not at any specific date.

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

Haney & Marcell, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

PAINE, J.

This is a writ of error to the district court for Phelps county. The plaintiff in error, Lester Luke, hereafter called the defendant, was found guilty by a jury of being an accessory after the fact of a larceny, Comp. St. 1929, sec. 28-203, and also of unlawfully receiving the goods involved in the same larceny, Comp. St. 1929, sec. 28-513. For the accessory offense, the defendant was ordered punished by imprisonment in the county jail for 30 days and by a fine of $50. For the receiving offense, the defendant was sentenced to imprisonment in the state reformatory for a term of one to three years, said imprisonment to commence at the expiration of the other jail sentence.

Miss Dora Nelson, county attorney of Phelps county, filed two separate complaints against the defendant, one charging the accessory offense, and the other the receiving offense. At the hearing thereon, County Judge Backman found probable cause on each complaint, and bound the defendant over to the district court for trial on each charge. When called for trial in the district court at Holdrege, it was stipulated and agreed that both cases should be tried at the same time by the introduction of one set of witnesses, and tried to the same jury. The finding of the jury was guilty in each case, and sentences on both verdicts were duly entered.

Plaintiff in error sets out, as reasons for a new trial, that the verdict was not supported by sufficient evidence, surprise in the addition of new names to the information, and errors of law at the trial.

1. Among the errors of law, the defendant contends that he has been deprived of his constitutional rights, as provided in section 11, art. I of the Constitution, in being tried simultaneously for two separate and distinct crimes, citing *Stowe v. State,* 117 Neb. 440, which holds: "Under section 10186, Comp. St. 1922, the court will not ignore 'error as to any matter of pleading or procedure' in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art I of the Constitution, have been violated by failure to give him proper notice of the 'nature and cause of accusation' against him."

It has been generally held that, where two offenses charged are of the same class, and for the same act, or for connected acts, the consolidation or trying together of the two indictments is a matter which is within the sound discretion of the trial court, especially where the defendant consents to or requests such consolidation. In *Coxbill v. State,* 116 Neb. 604, the presiding judge, upon his own motion, required the trial of the defendant upon two complaints at the same time, and it was held by this court: "Two complaints accusing the same person of similar misdemeanors may, in the sound discretion of the trial judge, be tried together, where all the offenses could properly have been included in different counts of a single information." In *In re Walsh,* 37 Neb. 454, it was held: "Where a person has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations or in separate counts of the same information, the court may impose a separate sentence for each offense of which the prisoner has been found guilty. In such case the judgment should not fix the day (as was done in that case) on which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence." In *Williams v. State,* 114 Neb. 132, it was held that, where a defendant has been convicted of separate offenses, the

better practice requires the imposition of a separate sentence on each count whereon there has been a conviction.

In the case at bar, the accessory and receiving offenses were charged in two separate informations. By agreement of the parties, these informations were tried together, and no election was ever demanded by the defendant, or objection made by him to trial upon both informations at one and the same time, according to the formal stipulation.

"Where separate indictments were returned against the defendants, which were consolidated at the request of the defendants for the purpose of the trial only, the cases stood for judgment the same as if separate trials had been had, and it is not error to pass sentence upon each conviction." *Parker v. People,* 4 L. R. A. 803 (13 Colo. 155).

The United States courts have gone perhaps as far as any in joinder of offenses for trial, for in *Capone v. United States,* 51 Fed. (2d) 609, it was said by the circuit court of appeals: "Appellant complained because the court consolidated the indictments for the purpose of trial. * * * The alleged error committed by the trial court was in compelling him to go to trial on charges which joined felony counts with misdemeanor counts. There is no merit in this objection." This case involved various felonies and misdemeanors, all being connected with income tax violations. It was held in *Vlassis v. United States,* 3 Fed. (2d) 905: "Where defendants go to trial without objection to consolidation of indictments, it is not open to them to take the objection for the first time after verdict." See *Logan v. United States,* 144 U. S. 263; *Commonwealth v. Rosenthal,* 211 Mass. 50, 47 L. R. A. n. s. 955. In the notes following this last case, found in Ann. Cas. 1913A, 1003, it says: "It is the general rule that in the exercise of a sound judicial discretion the court may order that a defendant shall be tried at one time on two or more indictments, if the offenses alleged are connected or are of the same class of crimes or offenses, the test being whether the offenses could be

properly joined in different counts in the same indictment."

In *State v. Garris*, 98 N. J. Law, 608, separate indictments for desertion and nonsupport of wife and child, by consent of both parties, were tried together, and the rule is that, where the defendant proceeds to trial on two separate indictments for different offenses, the trial court has a heavy burden to see that the defendant is not confounded in his defense, and that the jury's attention is not distracted, and that in no aspect are his substantive rights adversely affected. *Commonwealth v. Skavski*, 245 Mass. 405, 29 A. L. R. 281.

As to the other objections made in this case, this court has held repeatedly that it is within the discretion of the trial court to permit the county attorney to indorse additional names upon the information, and as this was done in this case before the trial, and the defendant made no objection thereto, and did not ask for a postponement, no prejudice will be presumed in this case. *Frey v. State*, 109 Neb. 483; *Barnts v. State*, 116 Neb. 363.

We have examined all of the errors alleged for a reversal of this case, and find no error in the judgment or sentences of the district court, and the same is in all things

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. HARRY E. LAIPPLY ET AL., APPELLEES.

FILED APRIL 14, 1932. No. 28191.

Banks and Banking: SCHOOL FUND DEPOSITS: SECURITIES: ACCOUNTING. Where a village and school district treasurer, who is also president of a bank, has on deposit in that bank funds belonging to said village and school district, and he takes securities from said bank to guarantee such deposits in case the bank is unable to pay such deposits, or the bank is taken over by the department of trade and commerce, such action is not a payment of the deposit, and a receiver for said bank, subsequently appointed, has the right to an accounting as to the value and proceeds of said securities, irrespective of the question of the legality of such pledging, which is not determined.

APPEAL from the district court for Seward county: LOVEL S. HASTINGS, JUDGE. *Reversed, with directions.*

McKillip & Barth, F. C. Radke and *Barlow Nye,* for appellant.

W. T. Thompson, Grant G. Martin, Thomas & Vail and *Stanley A. Matzke, contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and RAPER, District Judge.

RAPER, District Judge.

The petition of Clarence G. Bliss, receiver of the Nebraska State Bank of Milford, alleges that on November 8, 1929, the defendant Harry E. Laipply was president and E. M. Koenig was cashier of said bank, which was then insolvent; that said Harry E. Laipply was village treasurer of the village of Milford, and treasurer of School District No. 5, and that as such treasurer he had on deposit funds to the credit of said village and school district in said bank in the sum of about $11,000, and on said date a written agreement was made between said Laipply, as treasurer of the village and school district, and said bank, by E. M. Koenig, cashier, to the effect that certain enumerated notes shall be held by said Laipply as such treasurer "as a guarantee for moneys deposited by said H. E. Laipply as treasurer of said village of Milford and of School District No. 5, Milford, Nebraska, in the Nebraska State Bank, Milford, Nebraska, under the following conditions: If at any time said Nebraska State Bank is unable to pay to said treasurer, village of Milford and School District No. 5, the amount of said deposit, or when the department of trade and commerce, state of Nebraska, shall take possession of said bank, said treasurer or other proper official of said village of Milford and School District No. 5, Milford, Nebraska, shall thereupon become the owner of the following described securities to the amount of said deposit in said bank and shall have the right to dispose of same. Securities as follows:" A list presumably of notes, 20

in number, is set out, the face value apparently is given, making a total of $11,008.69. A receipt was given for those securities signed by Laipply as such treasurer, on same date.

The petition further alleges that on November 15, 1929, the bank closed and suspended business and was placed under control of the department of trade and commerce, that said Laipply took said notes out of said bank and refused after demand to deliver them to plaintiff. It is further alleged that said acts were without the knowledge or consent of the board of directors of said bank, and that said acts were *ultra vires,* and that the same creates an unlawful preference, and that such transfer of said securities is against public policy and is void.

Plaintiff prays for an injunction to restrain the defendant Harry E. Laipply from collecting, selling or disposing of said securities; that an order issue to said Laipply to deliver said securities to plaintiff; that the village and school district be enjoined from receiving said notes or the proceeds thereof; that said Laipply be required to disclose the amount which has been received from said notes and what notes have been collected and such other relief as to court may seem equitable. School District No. 5, the village of Milford and Laipply individually and as treasurer are joined as defendants. Each of these defendants demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained, and the case was dismissed.

The appellees assert that the bank had the right to pledge its bills receivable to secure deposits by a village and school district, and because village and school district funds are trust funds and as such could have been recovered as preferred claims in the receivership, therefore no prejudice to other creditors could be done. It is not necessary under issues made by the petition and the demurrers to determine those questions. The appellees claim that Mr. Laipply as president or Koenig as cashier could have paid to Laipply as treasurer the amount of

the deposits, and the giving of these notes are in effect payment and no more objectionable than to have paid out the money. There is, however, a clear distinction. When payment is made the claim or debt is extinguished. The giving of these notes, under the written pledge, was to guarantee the payment of the deposits, and was not in fact payment, and if the pledge is valid, the treasurer became entitled to the "described securities to the amount of said deposit in said bank." The petition states that the treasurer had on deposit in the bank funds of the village and school district to the amount of about $11,000, the exact sum being indefinite. There is nothing in the list of notes that gives the amount of accrued interest on any of them; it is impossible to determine what the notes were worth, nor is the amount of deposit definite. The notes having been pledged to guarantee the payments of the deposits, it follows that plaintiff is entitled to an accounting. If the notes are worth more than the deposits, or if more than the deposits is collected, plaintiff is entitled to the residue; and, on the other hand, if the pledged securities are not sufficient to pay the deposits, the village and school district may have a valid claim against the assets in the hands of the receiver for the balance.

It may develop on a proper hearing that the bank had the right to pledge these securities, but that question can be determined on the hearing, and we do not decide that point.

The judgment of the district court is reversed, with directions to overrule the demurrers, have issues joined, take an accounting, and render such judgment as the facts and law warrant.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLANT, V. STATE BANK OF MINATARE, APPELLEE: E. H. LUIKART, SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLANT.

FILED APRIL 16, 1932. No. 28195.

1. **Constitutional Law**: STATE BANKS: INSOLVENCY: LIQUIDATION IN COURT OF EQUITY. Where liquidation of an insolvent state bank is conducted in a court of equity pursuant to law, the proceeding is judicial and not executive.
2. **Appeal**: APPOINTMENT OF RECEIVER. The appointment of a receiver by a court of equity is a judicial order from which an appeal is allowed by statute.
3. **Constitutional Law**: APPOINTMENT OF RECEIVER: JUDICIAL FUNCTION. In a cause properly before a court of equity for determination, the appointment of a necessary receiver is a judicial function which cannot be exercised or controlled by the governor or the legislature.
4. ———: JUDICIAL JURISDICTION. It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.
5. **Banks and Banking**: INSOLVENCY: APPOINTMENT OF RECEIVER. A legislative act providing that the secretary of the department of trade and commerce shall be the sole receiver of all insolvent state banks amounts to no more in a judicial proceeding, properly pending in a court of equity for the liquidation of a bank, than a legislative recommendation to the judiciary to appoint him, as otherwise the enactment would be an unconstitutional encroachment on judicial power.

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

Arthur F. Mullen and *F. C. Radke*, for appellants.

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

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

ROSE, J.

This is a controversy over the appointment of a successor to a receiver who had been engaged in liquidating the affairs of the State Bank of Minatare, an insolvent corporation.

In a proceeding in the district court for Scotts Bluff county, Clarence G. Bliss, secretary of the department of trade and commerce, the branch of government having supervisory control of state banks, was appointed receiver May 31, 1929, and was directed by judicial order to wind up the affairs of the State Bank of Minatare. He qualified and entered upon the performance of his duties, but, during the course of liquidation, resigned as receiver, submitted his final report as such to the district court and, November 2, 1931, applied for an order approving it, releasing his bond and discharging him. On that date E. H. Luikart, who became secretary of the department of trade and commerce July 8, 1931, made in that capacity an application to be appointed receiver in place of Bliss. Upon a hearing on both applications, the trial court approved the final report of Bliss, released his bond, discharged him as receiver, overruled the application of Luikart, and appointed A. E. Torgeson, the latter having been assistant receiver under Bliss. Luikart appealed to the supreme court.

The propositions argued on appeal by counsel for Luikart seem to be about as follows:

The former method of liquidating insolvent state banks by means of individual receiverships in the district courts was superseded in 1929 by legislation transferring that function of government to the department of trade and commerce. Comp. St. 1929, secs. 8-181, 8-191, 8-194. The statute now requires liquidation by that department and gives it possession of the corporate assets. Under the present system of liquidation the secretary of the department of trade and commerce is the sole receiver of insolvent state banks and district courts are without power to appoint any other person. Comp. St. 1929, sec. 8-192. Under the administrative code the governor controls the secretary of the department of trade and commerce and in the last analysis supervises and controls the liquidation of insolvent state banks, the legislature having abolished judicial liquidation and substituted therefor executive liquidation. Receiverships for insolvent state banks are

authorized and controlled by special provisions of statute to which equity power to appoint and direct receivers generally does not apply. Luikart is the receiver designated by law and the judicial attempt to appoint Torgeson was unlawful and void. The order appointing Torgeson is contrary to contemporaneous judicial and executive construction of the present statutes relating to the liquidation of insolvent state banks.

The foregoing propositions were presented at the bar and argued at length in briefs containing excerpts from both statutes and judicial opinions. The solution of the problems thus presented depends principally upon the proper answer to this question: Is the liquidation of insolvent state banks an executive, as distinguished from a judicial, function?

The statutes nowhere provide for the liquidation of insolvent state banks without invoking the judicial power of the state government. The legislature never granted to any executive officer, administrative board, department or tribunal authority to wind up the affairs of an insolvent state bank without the aid of a court. The law is that the secretary of the department of trade and commerce shall report insolvency of a state bank to the attorney general who shall apply to the district court for a decree determining such insolvency and for the appointment of a receiver. Comp. St. 1929, sec. 8-190. The statute requires notice, a hearing and a finding upon evidence in the proceeding for a judicial determination of insolvency. Comp. St. 1929, sec. 8-190. When liquidation is judicially ordered the decree shall place the bank assets in the hands of the secretary of the department of trade and commerce "and liquidation shall thereafter be had under order of court in the manner provided by law." Comp. St. 1929, sec. 8-193. The secretary of the department of trade and commerce conducts the liquidation, but he is required to do so in court. Comp. St. 1929, sec. 8-193. Legislation on this subject makes liquidation a judicial proceeding rather than an exclusive executive function. No doubt the legislature has power to create an executive or administrative

board with power to liquidate the affairs of insolvent state banks independently of the judiciary, but legislation of that kind has not been enacted in Nebraska. Acts so providing have been passed in other states and cases cited by Luikart are more applicable thereto than to the statutes now under consideration.

Both before and after the banking laws were changed in 1929 the executive department, through the attorney general, uniformly applied to the district courts for decrees determining the insolvency of state banks and for the appointing of receivers. This has been the universal practice. The applications have been made to and the proceedings conducted in courts of equity. In the exercise of equity jurisdiction district courts have rendered decrees determining insolvency; appointing receivers and directing them to take possession of bank assets; ordering the bringing of suits for the collection of debts; construing and enforcing contracts; settling controversies between receivers and claimants; passing on reports; ordering distribution of dividends to depositors and other creditors; restoring converted trust funds to beneficiaries; requiring litigation to enforce liability of stockholders; making all other orders essential to liquidation; closing receiverships. These are well-understood proceedings in equity and are inconsistent with executive liquidation. The lawmakers themselves provided for judicial liquidation. The statutes will admit of no other interpretation.

In the present proceeding the state on the relation of the attorney general invoked by petition the power of the district court for a determination of the charge that the State Bank of Minatare was insolvent and was jeopardizing the interests of its depositors. There was a prayer for the appointment of a receiver to take charge of its assets and wind up its affairs. Upon notice, hearing and evidence a judgment conforming to the prayer of the petition was entered. This was a final decree in the sense that it was appealable. Comp. St. 1929, sec. 20-1090; *McCord, Brady & Co. v. Weil*, 33 Neb. 868. By it Clarence G. Bliss, secretary of the department of trade and com-

merce, became receiver. He acted in that capacity under judicial orders from May 31, 1929, until November 2, 1931. Between those dates Bliss was the qualified officer through whom the department of trade and commerce functioned and he was also receiver, a judicial officer performing his duties as such under orders of the court. In the meantime the governor removed Bliss as secretary of the department of trade and commerce and in his place, July 8, 1931, appointed E. H. Luikart who qualified and entered upon his executive duties. Counsel for Luikart insist that consequently the district court was required to appoint him receiver of the State Bank of Minatare under the following enactment of the legislature:

"The secretary of the department of trade and commerce shall be the sole and only receiver of failed or insolvent banks, and shall serve as such without compensation other than his compensation as secretary of said department." Comp. St. 1929, sec. 8-192.

Is this a mandatory statute requiring the judicial department of government to appoint the secretary of the department of trade and commerce "the sole and only receiver" in literal compliance with the statutory provisions quoted, as argued on appeal herein? If so the executive appointment and the act of the legislature require modification of the judgment of the court of equity in the pending proceeding, without regard to the exercise of judicial power, by substituting one receiver and officer of a court for another. Is the person appointed by the court as receiver to liquidate an insolvent state bank removed whenever the governor retires the secretary of the department of trade and commerce? If such a secretary refuses to act or becomes disqualified or makes default, is judicial action in a pending receivership suspended until the governor makes a new appointment? In the event of such contingencies is the court without power to remove a receiver and appoint another? These questions answer themselves in the negative. In a pending cause the chief executive and the legislature cannot change or modify judicial orders or lawfully require the court to do so. A

judicial order in pending litigation does not change with political fortunes or legislative acts or executive appointments. In a cause properly before a court of equity for determination the appointment of a necessary receiver is a judicial function. *State v. Farmers & Merchants Ins. Co.*, 90 Neb. 664. This appointing power came from the Constitution—a higher source than an act of the legislature. Const. art. V, sec. 9; *Matteson v. Creighton University*, 105 Neb. 219; *Burnham v. Bennison*, 121 Neb. 291; *State v. Farmers State Bank*, 121 Neb. 532; *State v. State Bank of Touhy*, 122 Neb. 582. On high authority it was recently held that the legislature cannot compel a court to admit to the bar a person deemed by the judiciary to be unfit to exercise the prerogatives of an attorney at law, a court officer. *State v. Cannon*, 240 N. W. (Wis.) 441. In an opinion relating to the appointment of supreme court commissioners the supreme court of Nebraska in a unanimous opinion said:

"Neither the legislature nor the governor has the right to dictate whom the court shall appoint as its referees or assistants. The court might as well assume to appoint the chief clerk or sergeant-at-arms of each house of the legislature." *In re Supreme Court Commissioners*, 100 Neb. 426.

French legislators once imprisoned judges for failure to comply with the legislative will. Montesquieu suggested a government with legislative, executive and judicial departments, each independent of the other. The framers of the American Constitution and the people of Nebraska adopted that plan. It has been regarded by statesmen and philosophers as an outstanding advancement in the science of government. Throughout the judicial history of the present system the courts have scrupulously respected the prerogatives of the legislative and executive departments and extended to them the comity due to governmental divisions of equal rank, but courtesy does not extend to the surrendering of judicial power. It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.

Legislation that "The secretary of the department of trade and commerce shall be the sole and only receiver of failed or insolvent banks" amounts to no more in a judicial proceeding in a court of equity than a legislative recommendation to the judiciary to appoint him in the interests of economy and business management. Otherwise the enactment would be an unconstitutional encroachment on a judicial prerogative.

The district court gave reasons for appointing Torgeson instead of Luikart. After finding that Bliss had faithfully performed his duties as receiver of the State Bank of Minatare and had accounted for all the assets thereof, the district court made the following findings as shown by the judicial record:

"The court further finds that A. E. Torgeson is now the assistant to the receiver in charge of the liquidation of said bank and is familiar with the condition of all the assets and work in connection with the liquidation of said trust and is a proper and fit person to be appointed receiver of the State Bank of Minatare; that he is now in possession of said assets and has receipted in court for the same."

There is nothing in the record to show that this finding and the resulting appointment of Torgeson were erroneous or illegal or inequitable or unjust or inimical to the best interests of the depositors and other creditors. The trial court acted within its powers on sufficient evidence. No reason for a reversal has been pointed out or found.

AFFIRMED.

PAINE, J., dissenting.

I cannot agree with the majority opinion in this case. To go back to the old custom of each district judge appointing independent receivers in each county for failed banks will, in my opinion, defeat the whole plan worked out so carefully by the legislature.

From the first, our guaranty plan has been approved by the United States supreme court. In deciding the case of *Noble State Bank v. Haskell,* 219 U. S. 104, 55 L. Ed. 112, and its companion case of *Shallenberger v. First State*

Bank, 219 U. S. 114, Justice Holmes said: "If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it"—and decided that the guaranty fund law was well within the state's constitutional power.

That banking is a quasi public business, which the state, in the exercise of its police power, may take under its control to the extent of prohibiting the business of banking entirely except upon such conditions as it may prescribe, was held in effect in *Noble State Bank v. Haskell, supra,* and again approved by Chief Justice Hughes in *Abie State Bank v. Bryan,* 282 U. S. 765, 75 L. Ed. 690.

In Iowa, by section 9242 of the 1927 Code, it was provided that "the superintendent of banking henceforth shall be the sole and only receiver or liquidating officer for state incorporated banks and trust companies." It was held by the Iowa Code that "henceforth" meant the same as "hereafter," and that this section did not thereby oust those receivers who had been legally appointed and acting prior to the passage of the law.

In the case of *State v. First State Bank,* 52 N. Dak. 231, in holding the laws relating to the liquidation of insolvent banks to be constitutional, it was held in the first paragraph of the syllabus: "Under the Constitution of this state all governmental power is vested in the legislature except such as is granted to the other departments of government, or expressly withheld from the legislature by constitutional restrictions." And in the text thereunder, it states: "It is well settled that the legislature is vested with constitutional authority to regulate the business of banking; and * * * clearly had power to say when and under what conditions banking corporations should be deemed insolvent and subject to liquidation; and also had power to prescribe any mode or manner for the liquidation of such insolvent banking corporations, not expressly forbidden by the Constitution."

The great number of failures of state banks threatened the very existence of the remaining banks, and the legis-

lature in 1929 decided upon a more efficient administration of the affairs of the closed banks, cutting down expenses in every possible way, to the end that the depositors might receive a greater percentage upon their deposits than under the old plan. Among the sections of the new law to carry this out was one designed to cut out receiver's fees, and place all of them under one responsible head, so in section 8-192, Comp. St. 1929, it provides: "The secretary of the department of trade and commerce shall be the sole and only receiver of failed or insolvent banks, and shall serve as such without compensation other than his compensation as secretary of said department."

It is claimed that, when Mr. Bliss was succeeded in office of the department of trade and commerce, there were in the neighborhood of 190 receiverships pending, and that similar applications were made and the same constitutional objections advanced, supported by the same authorities now cited to this court, in every district court in the state in which these receiverships were pending, and that in each of these cases the district judges, after listening to these arguments, have appointed E. H. Luikart, the secretary of the department of trade and commerce, as receiver of the liquidated banks in their districts, as clearly provided in this law, with the single exception of the cases now pending before us. It occurs to the writer of this dissent that, if the same question has been presented to many of the judges of the district courts, and the same arguments advanced, and they have each decided that the liquidation of banks was an executive function, to be exercised under the direction of the governor by the secretary of the department of trade and commerce, such rulings of district judges cannot be entirely overlooked.

In *Leach v. Exchange State Bank,* 203 N. W. 31 (200 Ia. 185) it was held: "The propriety of enlarging the power of superintendent of banking, under Acts 40th Gen. Assem. c. 189, which amended Code 1897, sec. 1877, to include liquidation and distribution of assets of an insolvent bank, *without his being appointed receiver,* is matter for legislative rather than judicial concern."

In *In re Citizens Exchange Bank,* 140 S. Car. 471, it was held: "In proceeding to liquidate bank by directors, judge on application for appointment of receiver must act under laws as to receivers." And in the same case it was held that, while the power of the court of equity to appoint receivers in numerous instances has been upheld by this court, it has also been repeatedly decided that this great power should be exercised with caution.

In times past the liquidation of insolvent banks was handled by the district court in the county where the bank was located, but when banks were failing by the hundreds, the legislature, because of the controlling importance of the situation, decided to place the administration of failed banks in the power of the executive, and yet, in so doing, used the office of the clerk of the district court in each county as the place where duplicate copies of the orders made could be found by any interested depositor, and to give the procedure the stamp of local authority, provided that the district court should name the secretary of the department of trade and commerce as receiver of all failed banks. This plan has brought order out of chaos, and tends for a speedy and economical administration of insolvent banks.

The writer of this dissent believes that the legislature has entire power to dictate under what conditions the banks may be allowed to do business and under what conditions they shall be liquidated, and in passing an act placing this in charge of the executive branch of the government, it in no way reflects upon the judiciary of the state in not being allowed to exercise the judgment of each individual district judge in appointing a local receiver of his own choice. There is abundant authority for approving the course taken by the legislature in the enactment of this law. The old plan of individual receiverships under individual district judges having been tried and found wanting, the new plan promises a great improvement, and should not, in these times of distress, be hampered by any undue jealousy on the part of the judiciary for fear its rights may be infringed upon.

This court has held in *State v. Exchange Bank*, 114 Neb. 664: "The department of trade and commerce is vested with general supervision and control of state banks with authority to do all things reasonably necessary for the protection of depositors therein throughout the state. It also stands in the nature of a trustee for the state bank guaranty fund, and it is its duty as such to take such precautions as may be reasonably necessary to conserve and protect this fund."

It may be admitted that a receiver, in the ordinary use of that term, is an officer of the court, and that his duties and powers are entirely limited by the court which appoints him, but does not the secretary of the department of trade and commerce have powers, duties, rights and obligations given him by the legislature, to be exercised by him subject only to the approval of the governor of the state, by whom he is appointed? Is he not much more than a receiver? See *American Southern Nat. Bank v. Smith*, 170 Ky. 512, Ann. Cas. 1918B, 959. In this connection we find that in Tennessee a receiver of a railroad may be appointed by the governor under the internal improvement act. *Newman v. Davenport*, 9 Baxt. (Tenn.) 538.

Doubtless our legislature had in mind the secretary of the department of trade and commerce as a "receiver" who should not be under the control of the district court, the same as receivers of national banks, who are appointed by the comptroller of the currency, and not in any sense officers of any court, but simply the agents and officers of the United States government. *In re Chetwood*, 165 U. S. 443; *United States v. Weitzel*, 246 U. S. 533. And was it not the intention of the legislature, in providing that the secretary of the department of trade and commerce should be the sole and only receiver, to make him thereby the liquidating agent of every insolvent bank? This provision for his appointment as receiver of each bank by the district judge is simply one of those instances of overlapping power which may arise in the twilight zone between the legislative, the judicial, and the executive de-

partments of our government. Justice Holmes once said: "Delusive exactness is a source of fallacy throughout the law." In this instance, should not the judiciary cheerfully cooperate in this appointment, clearly the will of the legislature, to the great end that the depositors may receive the largest possible sum from a prompt, vigorous, and efficient liquidation of banks by one responsible person, to wit, the secretary of the department of trade and commerce?

STATE V. MITCHELL STATE BANK, NO. 28196.
STATE V. IRRIGATORS' BANK, NO. 28197.
STATE V. LYMAN STATE BANK, NO. 28198.
STATE V. AMERICAN BANK, NO. 28199.
STATE V. NEBRASKA STATE BANK, NO. 28203.
STATE V. BANK OF BAYARD, NO. 28204.

FILED APRIL 16, 1932.

APPEALS from the district court for Scotts Bluff and Morrill counties: EDWARD F. CARTER, JUDGE. *Affirmed.*

Arthur F. Mullen and *F. C. Radke,* for appellants.

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

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

ROSE, J.

In each of the above entitled cases the district court overruled the application of E. H. Luikart, secretary of the department of trade and commerce, to be appointed receiver, and appointed A. E. Torgeson to succeed Clarence G. Bliss, resigned. Luikart appealed. For reasons stated in the opinion in *State* v. *State Bank of Minatare, ante,* p. 109, submitted with these cases, the judgments of the district courts are

AFFIRMED.

ALBERT SHAFFER V. STATE OF NEBRASKA.

FILED APRIL 22, 1932. No. 28240.

1. **Larceny**: CATTLE-STEALING STATUTE: VALIDITY. The Nebraska cattle-stealing statute is a valid enactment defining an independent substantive crime and providing penalties therefor.
2. ———: PROOF. Evidence outlined in opinion *held* sufficient to sustain a conviction for cattle stealing.
3. **Criminal Law**: PROCEDURE: WAIVER OF DEFECTS. On preliminary examination before a justice of the peace, accused may waive defects respecting the complaint by failing to object to it and by pleading not guilty, thus defeating objections to jurisdiction when bound over to the district court for trial.
4. ———: INDICTMENT AND INFORMATION: DISCHARGE. The statute providing that "Any person held in jail charged with an indictable offense shall be discharged if he be not indicted at the term of court at which he is held to answer" applies also to a prosecution by information.
5. ———: TIME OF TRIAL. Defendant in a criminal prosecution, though accused by information at the term of court to which he is held to answer, is not entitled as a matter of right to a trial at that term.
6. ———: ERRORS: REVIEW. To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review.
7. ———: JURY: TIME OF DELIBERATION. How long a jury shall be kept together before being discharged for failure to agree on a verdict depends largely on the discretion of the trial court.
8. ———: REVIEW: BILL OF EXCEPTIONS. In a criminal prosecution, affidavits relating to the issue that defendant and his counsel were not in court when the jury were discharged without agreeing on a verdict are not available on review in the appellate court unless embodied in the bill of exceptions.
9. ———: JURY: DISCHARGE. In a criminal prosecution, a proper order discharging the jury, if unable to agree on a verdict, and requiring a retrial does not violate the constitutional provision that a person shall not "be twice put in jeopardy for the same offense."
10. ———: PLEAS: WAIVER. Where a plea of not guilty has not been withdrawn, a subsequent plea in bar and a subsequent plea of former jeopardy may be disregarded or overruled.
11. ———: ADDITIONAL WITNESSES. It is within the discretion of the trial court to permit names of additional witnesses to be indorsed on the information during the trial of a criminal prosecution.

12. ———: HARMLESS ERROR. Harmless rulings in giving and refusing instructions are not grounds for reversing a judgment.

ERROR to the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Joseph E. Daly, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

ROSE, J.

In a prosecution by the state in the district court for Dodge county, it was charged in three counts of the information that Albert Shaffer, defendant, June 12, 1931, stole two heifer calves from Rickles H. Mintken, two heifer calves from Miller Andersen and one heifer calf from Ray Henkens. Defendant was accused of the thefts under the cattle-stealing statute, a valid enactment defining an independent substantive crime and providing a penalty therefor. Comp. St. 1929, sec. 28-515; *Granger v. State,* 52 Neb. 352; *In re Granger,* 56 Neb. 260. Upon a trial the jury found defendant guilty on all three counts and on each he was sentenced to serve a term of four years in the penitentiary, the terms to run concurrently. As plaintiff in error defendant presented for review the record of his convictions.

The sufficiency of the evidence to sustain the convictions is challenged by defendant who did not testify in his own defense. The point is without merit as shown by an examination of all the testimony which was adduced by the state in unnecessary detail. Each owner testified his live stock was taken from his premises in Dodge county at night, June 12, 1931, without his permission. Mintken and Andersen testified they identified and recovered their calves June 13, 1931, and the evidence shows that Henkens identified his calf and recovered it June 14, 1931. Defendant resided at Hooper in Dodge county and owned

and operated an inclosed motor truck with doors in the rear. He sometimes delivered his own live stock at the sales pavilion in Waterloo, Douglas county. Defendant's employee, Jerry Mack, who confessed to participation in the thefts, testified to the details of the felonious acts charged. The substance of Mack's story is that the truck was stopped in the highway at the premises of each of the persons robbed after 10 o'clock at night, June 12, 1931. The calves were led to the rear of the truck and lifted into it by defendant and Mack. With both men in the truck defendant drove to Waterloo where four of the calves, about 2 o'clock the next morning, were unloaded in a pen at the sales pavilion without anything to identify the owners. Defendant did not know who owned the fifth stolen calf or whether the owner would be likely to attend the sale later in the day, and it was taken to Hooper in the truck, unloaded and there tied near the house of a resident with the latter's permission, where the owner found it. The facts outlined were detailed on the witness-stand by Mack, an active participant in the thefts, and are uncontradicted. In addition, Jay Herrington, manager of the sales pavilion, testified defendant telephoned June 12, 1931, that he might have calves there for sale the next day; that Herrington found four unlabeled calves in a pen early June 13, 1931, and tagged them "somebody;" that defendant appeared in the afternoon, asked witness not to sell the four calves in the name of defendant, giving as a reason his wife would be after him for money, if she knew of the sale. Some of the details related by Mack were corroborated by disinterested witnesses. Circumstances supported his testimony. There is no substantial ground for the contention that the evidence is insufficient to sustain the convictions.

In an assignment of error it is asserted that there was a fatal irregularity in an attempt by the justice of the peace, who acted as examining magistrate, to bind defendant over to the district court. Defendant was arrested in less than 24 hours after the calves were stolen. A single complaint charging both him and Mack with the thefts

was presented to the justice of the peace June 16, 1931. Mack pleaded guilty June 17, 1931, and was then bound over to the district court where a transcript of the proceedings below was docketed the same day. The original complaint however remained in the hands of the justice of the peace. Before him defendant appeared in person with counsel June 18, 1931. Defendant then and there stipulated with the county attorney that he would make no objection to arraignment on the original complaint, pleaded not guilty thereto and was bound over to the district court. This is shown by the transcript of the justice of the peace. In addition, defendant promptly appeared in the district court and demanded an immediate trial. The irregularity and the making of a new complaint or the refiling of the original one were thus waived. The district court acquired jurisdiction. 16 C. J. 296; *Lewis v. State,* 15 Neb. 89.

Defendant insisted further that the district court erred in overruling an application by him to be discharged from custody on the ground he did not have a trial within the time required by law. In this connection he invoked the statute providing, among other things: "Any person held in jail charged with an indictable offense shall be discharged if he be not indicted at the term of court at which he is held to answer." Comp. St. 1929, sec. 29-1201. This provision applies also to a prosecution by information. *Nichols v. State,* 109 Neb. 335. The record does not affirmatively show a delay entitling defendant to his liberty. He contends he was entitled to a trial before the jury in attendance at the April term of the district court. That term began April 13, 1931, and expired September 20, 1931. The jury were in attendance June 15, 1931, and as late as June 22, 1931, when they were excused. Other dates and events follow: June 18, 1931, defendant bound over to the district court at the April term; June 20, 1931, demand for immediate trial at April term; July 1, 1931, information filed in district court; September 21, 1931, next or September term opened, at which defendant was brought to trial. The record shows that

the jury in attendance at the April term were excused June 22, 1931—four days after defendant was bound over to the district court and two days after he demanded an immediate trial. The information was filed during the April term within the statutory period, but the law did not grant defendant a right to a trial thereat. The record fails to show he was entitled to a release from custody or error in the order overruling his application therefor. A subsequent motion to quash the information on the same ground was properly overruled.

Defendant's main argument was directed to the assignment that the district court erred in overruling a plea of former jeopardy and a plea in bar. The position taken by defendant on these pleas does not seem to be tenable. The first jury were impaneled at the September term, September 21, 1931, and the cause was submitted to them for their verdict the next day. After deliberating more than 24 hours the district court discharged them on the ground they were unable to agree. Defendant contends that the jury were discharged without cause at a time when defendant and his counsel were absent from court. To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review. How long a jury shall be kept together before being discharged for failure to agree on a verdict depends largely on the discretion of the trial court. *Russell v. State,* 66 Neb. 497; *Jahnke v. State,* 68 Neb. 154. The record in the case at bar does not affirmatively show error in the order discharging the jury before agreeing upon a verdict at the former trial, but does show defendant requested their discharge for that reason 12 hours earlier. The plea of defendant that the discharge of the first jury amounted to an acquittal was controverted by the state. Affidavits relating to the issue that defendant and his counsel were absent when the jury were discharged are found in the transcript, but are not in the bill of exceptions and consequently cannot be considered in the appellate court. In a criminal prosecution a proper order dis-

charging a jury, if unable to agree on a verdict, and requiring a retrial does not violate the constitutional provision that a person shall not "be twice put in jeopardy for the same offense." *Sutter v. State,* 105 Neb. 144. Moreover, the record fails to show that defendant had withdrawn the plea of not guilty when the plea of former jeopardy was overruled. In *Davis v. State,* 51 Neb. 301, the court said:

"There can never properly be more than one issue before the court in a criminal case at one time, and so long as the plea of not guilty remains on the record, a plea in bar is improper, and the state is under no necessity of replying or demurring to such plea, and the court, on its own motion, may disregard it."

For reasons stated the assignments of error relating to these pleas are overruled.

Complaint is also made because the county attorney was permitted to indorse on the information during the trial the names of additional witnesses. This permission was within judicial discretion which was not shown to have been abused.

Rulings in giving and refusing instructions are also assigned as errors, but prejudice to defendant in these and other respects has not been found.

AFFIRMED.

GUS GLANDT, APPELLEE, V. PASQUALE RICCERI, APPELLANT.

FILED APRIL 22, 1932. No. 28029.

Damages. Where, in an action by a husband for expenses for medical attendance and hospital services for his wife and for loss of services in consequence of personal injuries sustained by the wife, there was no evidence of the value of the loss of her services, and the testimony disclosed without conflict the value of the medical attendance and hospital services at a specified sum, the verdict and judgment thereon should be limited to the specified sum.

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

Battelle, Travis & Strehlow, for appellant.

Bryce Crawford, Jr., contra.

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

EBERLY, J.

This is an action for personal injuries suffered by the plaintiff and charged to have been caused by an automobile collision between an automobile driven by the plaintiff with due care and an automobile negligently driven by the defendant. It is a companion case to *Glandt v. Ricceri,* 121 Neb. 878. In that case this court sustained a judgment in favor of Minnie Glandt for injuries caused in the same accident as occasioned by the negligence of the defendant.

We have read the present record with care, and have given due consideration to the contentions of the defendant. The evidence as to the collision, its cause, and the negligence of the defendant are essentially the same as were presented in the companion case. Contributory negligence on the part of plaintiff is not established by the evidence. As to the question of the defendant's negligence being the proximate cause of the accident and of the injuries pleaded by the plaintiff as resulting therefrom, we find no reason to depart from the conclusion stated in the former case. On these questions the case was properly submitted to the jury by the instructions of the court, and their verdict is sustained by the evidence.

We deem the sole question presented by this record is whether the verdict is sustained by the evidence as to the amount of recovery.

The petition of plaintiff sets forth three separate causes of action: (1) For personal injuries sustained by plaintiff whereby his ability to follow his trade had been permanently impaired; (2) that his wife, Minnie Glandt, sustained injuries which wholly destroyed her ability to perform the duties of housewife, whereby plaintiff had been deprived of her services, and had further expended

$394 for medical and hospital expenses for his wife, all to his damage in the sum of $2,500; (3) that plaintiff's automobile had been damaged in this collision in the sum of $100.

The jury returned a verdict for plaintiff on his first cause of action in the sum of $1,000; on the second cause of action in the sum of $1,644; and on the third cause of action in the sum of $100. Judgment was thereupon entered by the trial court for $2,744, the aggregate of said amounts.

A careful consideration of the evidence is convincing that the verdict so far as relating to the first and third causes of action finds ample support therein, and should be sustained.

As to the second cause of action, it may be said that the evidence fairly establishes, if believed, that to a great degree, due to injuries received in this accident by his wife, the plaintiff has been deprived of her services and has suffered damages because of this fact. But the evidence is silent as to the money value of these services, or of any facts from which the value thereof or the amount of plaintiff's damage because of his wife's injuries may be justly inferred, save and except that the expenditure of $394 by plaintiff for and as the reasonable value of the medical and hospital expenses rendered necessary and secured for the wife is amply proved. Solely because of this fact the record discloses a partial failure of proof as to the second cause of action.

The rule applicable to the situation before us is:

"Where, in an action by a husband for expenses for medical attendance for his wife and for loss of services in consequence of a personal injury sustained by the wife, there was no evidence of the value of the loss of services, and the testimony showed the value of medical attendance at a specified sum, the verdict should be limited to the specified sum." *Friedman v. Horn,* 104 N. Y. Supp. 745. See, also, *Houston & T. C. R. Co. v. Roberts,* 201 S. W. (Tex. Civ. App.) 674; *Hale v. Atkins,* 215 Mo. App. 380; 17 C. J. 782.

It follows that the judgment of the district court will be reversed, unless appellee files a remittitur in the sum of $1,250 within 30 days. In case remittitur is filed, judgment in the sum of $1,494 in favor of appellee will be affirmed.

AFFIRMED ON CONDITION.

ZOREDA D. DE WITT, APPELLANT, V. FRANK SEARLES ET AL., APPELLEES.

FILED APRIL 22, 1932. No. 28070.

Specific Performance. The record and evidence examined, and *held* that plaintiff, at the time of entering into the contract for the sale of real estate in suit, and at the time of the trial of this action, was vested with, and the owner of, a life estate only in the lands described therein, and was not the owner of the title in fee simple thereto, and that the title tendered pursuant to contract was not in conformity with the terms thereof.

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

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

J. A. Donohoe, contra.

W. J. Hammond, guardian *ad litem.*

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

EBERLY, J.

This is an appeal by the plaintiff, Zoreda D. De Witt, from a decree of the district court for Holt county denying specific performance of a land contract.

By appropriate pleadings plaintiff alleged her seisin of the premises in suit, the execution of the contract by the defendant Searles, the full performance of its terms by the plaintiff, and the refusal of the defendant to perform.

The answer of the defendant is so framed as to raise the question of the merchantability of the plaintiff's title

so far as it is affected by the provisions of the last will of Viola S. Mullihan, deceased, which, together with the probate proceedings admitting the same to probate, is fully set forth therein. The defendant's contention is that plaintiff's title is not merchantable; that under the provisions of this will interests and estates are created which still exist in George Abel De Witt, Merle Eliel De Witt, and William Glen De Witt, minor children of the plaintiff; and that the plaintiff in truth is the owner of only a life estate in the real estate in suit.

Subsequently a guardian *ad litem* was appointed for the minors named, whose answer tenders issues substantially identical with those set forth in defendant's pleading. To these pleadings plaintiff filed replies. There was a trial to the court resulting in a finding for the defendant, determining that plaintiff possessed a life estate only; that subject to this life estate an estate in remainder was vested in the minors named, and judgment was entered dismissing plaintiff's action. Plaintiff appeals and the cause is here for trial *de novo*.

There is no substantial dispute as to facts, and such as are necessary to understand our conclusion will be stated in the course of this opinion.

At the time of her death, which occurred on the 27th day of July, 1922, Viola S. Mullihan was the owner in fee simple of the premises in suit. She left a last will and testament which was thereafter duly admitted to probate on the 11th day of January, 1924, in the county court of Holt county, Nebraska. This will contained, among others, the following provisions:

"Third. I devise and bequeath to my said beloved daughter, Zoreda D. De Witt, the use, during her lifetime, of all real estate which I shall own and possess at the time of my death. She is not to be the owner of this land, but is entitled to the use of it exclusively for herself so long as she shall live, but she is not to have the power to sell or dispose of it or to devise it by will.

"Fourth. The said Zoreda D. De Witt now has one child living, but realizing that there may be other children

born of her body, I hereby give, devise and bequeath to such children of said Zoreda D. De Witt as may be living at the time of her death all real estate which I shall own and possess at the time of my death, and said children are to take the said real estate absolutely and in fee simple upon the death of said Zoreda D. De Witt, but are not to have the use of it during the lifetime of said Zoreda D. De Witt. If said Zoreda D. De Witt shall have no children living at the time of her death, then I give and devise all of my real estate to my sisters, Hannah S. Phillips and Cora B. Roderick, share and share alike, and if either of said sisters shall die before Zoreda D. De Witt dies, then the share that should go to such sister of mine shall go to and descend to her heirs at law."

It further appears that at the date of the death of the testatrix there had been born to the plaintiff the following children, which still survive, viz., George Abel De Witt, Merle Eliel De Witt and William Glen De Witt, whose ages at the time of the trial in the district court were respectively, twenty, eighteen and sixteen years. Zoreda D. De Witt was, as the daughter of the deceased, her sole heir at law.

The plaintiff thus derives her title to the land in suit solely from Viola S. Mullihan. It is claimed in her behalf that the effect of the fourth provision of the will, hereinbefore quoted, is to create a contingent remainder in favor of the devisees therein named, but which is wholly void, so that the plaintiff as devisee named in the will, and as sole heir of her mother, succeeds to the fee title of the land in suit, wholly unaffected by the limitations of the will.

Contingent remainders, however, are not necessarily void.

"Though law favors vesting of estates, and looks with disfavor on postponement of vesting of title, nevertheless contingent remainders are lawful, and, if a testator by unambiguous language creates a contingent remainder, court must uphold it." *Hackleman v. Hackleman,* 88 Ind. App. 204.

The law permits the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being, and twenty-one years thereafter, to which, in a proper case, may be added the period of gestation. It is only when postponed for a longer period that it is obnoxious to the rule against perpetuities, and the devise or grant is void. *Andrews v. Lincoln*, 95 Me. 541.

"In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A for life, and after his death for such of his children as shall attain the age of twenty-five, the latter trust would be void if the testator were to die before A; yet if A should die before the testator leaving children, of whatever age, the trust will be good, since it must of necessity vest or fail within lives in being, viz., the lives of the children." 1 Jarman, Wills (7th ed.) 271. See, also, *McArthur v. Scott*, 113 U. S. 340.

Conceding only for the purpose of discussion that the fourth paragraph of the will here presented created a contingent remainder for the benefit of the "children of said Zoreda D. De Witt as may be living at the time of her death," what fact, if any, invalidates it in view of the surrounding circumstances as they existed at the time of the death of the testator?

"The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates which by possibility may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth. * * * Still another method of stating the rule is by describing it as prohibiting future interests which may not vest within twenty-one years after some life in being at the testator's death or the execution of the instrument creating future interests." 21 R. C. L. 282, sec. 2.

In the instant case Zoreda D. De Witt was "in being" when the testatrix died; her children, the three minor defendants, were then living. In accordance with natural law, when Zoreda D. De Witt departs this life, all possibility of any further children "born of her body" cannot be deemed obnoxious to the rule as to perpetuities. Indeed this question is in principle so determined in *Bunting v. Hromas,* 104 Neb. 383.

It follows, if the plaintiff is correct in denominating the estate created for the benefit of the children of Zoreda D. De Witt a "contingent remainder," it must be deemed a valid remainder which, outstanding and unbarred, must necessarily destroy the merchantability of the title possessed by her.

There is no dispute between the parties to this litigation that the provisions of the will in suit purport to, and that it was the intention of the testatrix to, create an estate in remainder. The estate so created must of necessity be, therefore, either a contingent or a vested remainder. A remainder vested in the minor children would of course likewise destroy the merchantable character of the title just as we have seen a valid contingent remainder operates so to do.

Plaintiff insists that a contingent remainder and not a vested remainder is created by the language employed in the will, and in an able brief cites numerous cases from the appellate courts of other states in support of her position. However, a Nebraska statute provides that courts in construing an "instrument creating or conveying * * * any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1929, sec. 76-109.

So, too, by the Nebraska statutes it is provided in substance that every devise of land in any will hereafter made shall be construed to convey all of the estate of the devisor therein which he could lawfully devise, unless it

shall fairly appear by the will that the devisor intended to convey a less estate. *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161. According to this legislative test, it is the duty of the court to give to each word and each sentence in the will such significance as will carry into effect the true intent of the testator. *Reuter v. Reuter*, 116 Neb. 428; *In re Estate of Combs*, 117 Neb. 257; *Heiser v. Brehm*, 117 Neb. 472; *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161.

In the light of these statutory provisions and in reply to arguments of a nature similar to those here employed, Day, J., in *Bunting v. Hromas*, 104 Neb. 383, employed the following language: "At the outset of the case, and as a basis for our determination of the question involved, it is necessary for us to construe this singularly phrased will. The decisions of the courts are numerous as to the legal and technical meaning of the words usually employed in wills, and in some of the states some fine distinctions and refinements have been made. These decisions are of but little value in this state in the construction of wills, as we are now committed to the doctrine that the intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. No particular words or conventional forms of expression are necessary to make a valid will. The court without much regard to canons of construction or technical language will place itself in the position of the testator, ascertain his will, and enforce it in all its parts, if it be lawful to do so. *Weller v. Noffsinger*, 57 Neb. 455; *Grant v. Hover*, 103 Neb. 730."

This view, long existing at the time of the statement quoted, has never been materially departed from in this tribunal. *Hiles v. Benton*, 111 Neb. 557; *Reuter v. Reuter*, 116 Neb. 428; *In re Estate of Combs*, 117 Neb. 257; *Heiser v. Brehm*, 117 Neb. 472; *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161.

And with reference to "rules of law," as employed in the statute referred to, we have construed this term as not including rules of construction formerly recognized

and followed at common law which would be in conflict with the "very rule of construction sought to be established by the statute, for this would be a *felo de se.*" *Hiles v. Benton,* 111 Neb. 557.

So, too, without further discussion, it may also be said that the terms, "base or determinable fee," "executory devise," "vested remainder," "estate in remainder," and "contingent remainder," when used in construing wills and in describing interests in devised property, are satisfactorily defined and employed in *Wilkins v. Rowan,* 107 Neb. 180, and that any further discussion of these subjects involving the repetition of definitions is here deemed unnecessary. *Davis v. Davis,* 107 Neb. 70.

Addressing ourselves to the facts of this case, it is quite apparent that for the purpose of the will the testatrix divided her real property into two estates. One was strictly a life estate, which she devised to her daughter, Zoreda D. De Witt. It is definitely described. The exercise of any power or dominion over the real property save such as are incident to proper enjoyment of a life estate are expressly denied to the daughter by the terms of the will. No one questions the fact that the life estate vested in the daughter on the death of the mother, although that event was not specifically mentioned in the will as the date of the vesting of her title. After devising the life estate, a definite estate known in law as "a remainder" was all that remained subject to testamentary action. The disposition of this estate was a vested right of the testatrix, and upon it being lawfully devised, then and not until then all her testamentary rights of alienation of this property had been exercised in the maximum degree. Certainly the language here justifies the conclusion that it was the intent of the testatrix to confer every possible enjoyment of the real estate upon her daughter and her daughter's children. Pursuant to our statute it becomes the duty of this court to construe any devise of this estate in remainder, by the testatrix, as conveying all her interests therein to the devisee designated or described, which could then be lawfully conveyed and devised by her, viz., a vested re-

mainder, unless it shall clearly appear by the will itself that the devisor intended to will a less estate.

In applying this conclusion to the fourth paragraph of the will in suit, it is to be remembered that George Abel De Witt, son of the plaintiff, was *in esse* at the time the will was executed and is referred to therein, and that all the minor defendants were alive at the date of the death of the testatrix. The will speaks from her death. The reasons of the testatrix occasioning the employment of the peculiar language found in this paragraph is stated by her at length in its opening words: "The said Zoreda D. De Witt now has one child living, but realizing that there may be other children born of her body, I hereby give, devise," etc. The language quoted evidences, not the contemplation by the testatrix of the death of the then living child, or of any child subsequently born, but rather the possible increase of those who it was her intention should be equally the objects of her bounty. The language employed and the form of the will thereafter set forth must be deemed intended to meet the contemplated situation, and effectuate the expressed desires of the testatrix. In effect a class was created embracing all children born or to be born to the life tenant. Referring to this class so created the will in suit recites: "Said children are to take the said real estate absolutely and in fee simple * * * but are not to have the use of it during the lifetime of said Zoreda D. De Witt." This language imports the vesting of a present estate in "said children" with the right of possession and enjoyment deferred. Indeed, if such is not its effect the portion thereof reserving the use to the life tenant during her life has no force and effect. But the testatrix employed this language. She intended it to have force and effect. And as already set forth, this court is required to give each word and each sentence in the will such significance as will carry into effect the true intent of the testatrix.

Nor is this conclusion to be modified or rejected because of the employment in the same paragraph of the will of the phrases "as may be living at the time of her

death," and "upon the death of said Zoreda D. De Witt."

Testators are ordinarily and primarily concerned in the commencement, continuance and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as "upon the death of" as, in effect, related to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles. This court is committed to the doctrine that, under the circumstances here presented, the words last referred to do not mean that the life estate and the estate in remainder shall not vest at the death of the testatrix, but rather that "upon the death of said Zoreda D. De Witt" refers to time when, subject to the rights of the life tenant, the enjoyment of the estate in remainder begins. *Davis v. Davis*, 107 Neb. 70.

So, too, as an alternative construction, it is suggested that, taking the force and effect of the language of the will to vest in "said children" a vested estate in remainder in the lands devised, their title, during the life of the mother, in view of the other provisions of the will, amounts to a base or determinable fee, defeasible on a condition subsequent, with right of possession and enjoyment deferred The words of the testatrix that "said children are to take the said real estate absolutely and in fee simple upon the death of said Zoreda D. De Witt" are wholly consistent with the vesting of such a present estate in remainder at the death of the testatrix, and express merely the intention and purpose that upon the death of the life tenant "said children" shall enjoy the possession and use absolutely of the devise, and that their defeasible title theretofore existing, by the full performance of the condition, shall then be and become a full, complete, and perfect title "in fee simple."

The words of the will, "as may be living at the time of her death," in view of the context and the expressed intention of the testatrix, cannot be deemed controlling

in the determination of the nature of the remainder created. Similar words were construed by this court in *Davis v. Davis,* 107 Neb. 70, and the remainder adjudged to be vested, and not contingent.

At least, in the instant case, it may fairly be said that, construing the will as an entirety, giving full force and effect to our statute, it does not clearly appear that the devisor intended thereby to create a contingent remainder, and therefore it will be construed as vesting a present estate in remainder in the children of the life tenant *in esse* at the death of testatrix as a class, subject to be opened up to let in children of the life tenant, if any, born subsequent to the death of the testatrix.

It thus appearing that plaintiff, at the time of entering into the contract of sale in suit, and at the time of the trial of this cause in the district court, was vested with a life estate only in the land in controversy, the action of the district court in dismissing her case was correct, and is

AFFIRMED.

ROSARIO ASTUTO, APPELLEE, V. V. RAY GOULD COMPANY, APPELLANT.

FILED APRIL 22, 1932. No. 28286.

Master and Servant: INJURY TO SERVANT: NOTICE. If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.

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

Crossman, Munger & Barton, for appellant.

Davey & Hayes, contra.

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

PAINE, J.

This is an action brought under the workmen's compensation law by Rosario Astuto, an employee of the V. Ray Gould Company, for an injury and subsequent disability sustained by him while working on the construction of the new Burlington depot at Omaha, Nebraska, on or about January 30, 1930.

The facts in the case disclose that Rosario Astuto, appellee, is a 29-year-old mosaic worker, a married man with one child, and was employed during January, 1930, by the V. Ray Gould Company as a common laborer on the new Burlington depot at Omaha, Nebraska, at 40 cents an hour for a nine-hour day. While so engaged, on or about January 30, 1930, in moving large, heavy stone blocks weighing approximately 1½ tons, which at that time were frozen to the ground, which were being raised by crowbars to a wooden sled about six inches high, and while prying one of these large stones off the ground, appellee felt a very sharp pain in the lower right portion of his back, which caused him to sit down and rest for a period of about 20 minutes. This happened about 3:30 in the afternoon, and appellee, after resting, finished out the day, but did only light work. It is claimed that notice was given to the employer through the timekeeper on the morning after the accident, and he was assigned lighter work. He continued working on light work for about three weeks, at which time he was dismissed from the appellant's employ. Several nights following the accident, the family physician was called, and was told by Astuto of having injured himself, but, notwithstanding, a diagnosis of kidney disease was made and he was treated accordingly.

In June, 1930, appellee, while following his trade, felt a pain in his right lower back and leg, and his physician treated him for sciatic rheumatism, and between that time and November of that year he was treated by four differ-

ent doctors. He continued to suffer increasing pains, and in June, 1931, when much worse, consulted Dr. O'Brien, who diagnosed his condition as a severe sacro-iliac derangement or sprain, and applied a plaster cast in hospital treatment. Appellee claims it was not until then that he learned for the first time that his affliction was traumatic in nature.

Upon August 1, 1931, he filed his petition before the labor commissioner, asking for compensation and medical treatment.

The compensation commissioner decided in favor of the appellee, and he was granted compensation and doctor bills until disability ceased. From this decision the appellant took an appeal to the district court for Douglas county, Nebraska, which latter court affirmed the finding of the compensation commissioner, and judgment was entered in favor of the appellee.

The finding of the district judge, William G. Hastings, was that appellee was injured about January 30, 1930, while employed as a laborer by the appellant company; that such injury was considered but slight, and while he had been treated by several physicians that none of them ascertained the real injury or treated him for it, and so he refused to allow their fees; that Dr. O'Brien began treating him in June, 1931, and discovered the trouble was the result of the original injury, and allowed his fee of $235.50 and St. Catherine's Hospital bill of $58.65. Judge Hastings found that he was now totally disabled, and entitled to compensation of $14.40 a week and attorney's fees of $100.

The appellant takes exceptions to each and all of the findings of the district court. It is insisted that the court erred in refusing to dismiss appellee's petition for failure to make claim for compensation within six months of the disability, as required by section 48-133, Comp. St. 1929, and for failure to file petition for compensation within one year after the occurrence thereof, as required by section 48-138, Comp. St. 1929.

It has been held many times by this court that failure to file claim, or bring suit within the specified time, does not defeat the right to compensation where the injury is latent, provided the notice is given and the action commenced within the statutory period after the employee has knowledge that compensable injury has resulted. *Travelers Ins. Co. v. Ohler,* 119 Neb. 121; *City of Hastings v. Saunders,* 114 Neb. 475; *McGuire v. Phelan-Shirley Co.,* 111 Neb. 609.

In spite of sharply conflicting medical testimony, the district court found that this injury, which at first appeared slight, remained latent, and that it was of a progressive nature, and that claim was made within the time required after the nature of his injury was discovered with certainty. The court also found that the injury was at the time of the hearing permanent. This court has recently held that, while compensation cases are tried *de novo* here, yet this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. *Southern Surety Co. v. Parmely,* 121 Neb. 146; *Enterprise Planing Mill Co. v. Methodist Episcopal Church,* 100 Neb. 29.

It is clear that appellee knew that he had a difficulty in his back and consulted a number of doctors before he found one who finally located his trouble as all coming from the original injury. Under this state of evidence, this court could not find that the appellee knew, during all those months, the cause of his injury, when the doctors were unable to correctly diagnose it. It strikes us that the facts of this record disclose a typical case of latent injury.

No error is found in the record, and an attorney fee of $50 is allowed the appellee for services in this court.

AFFIRMED.

HOLCOMB & HOKE MANUFACTURING COMPANY, APPELLANT, V. N. P. DODGE COMPANY, APPELLEE.

FILED APRIL 22, 1932. No. 28062.

1. **Bailment.** "The legal effect of the trust receipt, set out in the opinion, considered, and *held*, to establish the relation of bailor and bailee." *General Motors Acceptance Corporation v. Hupfer*, 113 Neb. 228.
2. **Guaranty: LIABILITY.** Suit upon an instrument which guarantees the account of a third person for any and all merchandise purchased cannot be maintained, where the goods involved were delivered under a trust receipt, the legal effect of which established only the relation of bailor and bailee.

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

Fradenburg, Stalmaster & Beber, O. T. Doerr, P. M. Klutznick and *Smith, Remster, Hornbrook & Smith*, for appellant.

Crofoot, Fraser, Connolly & Stryker and *Harry Shackelford, contra.*

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

ELDRED, District Judge.

This action was brought by Holcomb & Hoke Manufacturing Company, plaintiff and appellant, to recover from N. P. Dodge Company, defendant and appellee, an amount alleged to be owing plaintiff by C. G. Trimble, Jr., doing business as the Omaha Radio Company, on account of merchandise claimed to have been purchased by him of the plaintiff; the plaintiff's cause of action against the N. P. Dodge Company being founded upon a guaranty of said company. After plaintiff had offered its evidence and rested, the defendant moved for a directed verdict, which motion was sustained by the trial court, and plaintiff appeals. The guaranty relied upon was directed to plaintiff and is as follows:

"The N. P. Dodge Co., holding company of the N. P. Dodge Corp., hereby guarantees the account of the Omaha Radio Co., for any and all merchandise purchased. Such merchandise will be ordered only by Mr. C. G. Trimble, Jr., and only his signature as shown below will be accepted as an order."

C. G. Trimble, Jr., filed answer, but the issues raised by him are not material on this appeal.

On the part of the defendant N. P. Dodge Company, it is contended that the instrument sued upon does not constitute a guaranty of any of the transactions between the plaintiff and the intervener, Trimble, in that such transactions were not purchases of merchandise. It will be noted that the guaranty only purports to cover the account of the Omaha Radio Company for merchandise purchased. The crux of this appeal is: Did the transactions between plaintiff, Holcomb & Hoke Manufacturing Company, and C. G. Trimble, Jr., constitute a purchase and sale of merchandise, i. e., conditional sale contracts? or, were they mere bailments or consignments of personal property?

The evidence fairly tends to establish that plaintiff, in reliance upon said guaranty, shipped and delivered to appellee, Trimble, nineteen electramuse phonograph machines, each involving a separate transaction, and set forth in as many causes of action, and that all of such machines were delivered under the provisions of certain instruments designated "Order Memorandum," "Trust Receipts," and "Time Drafts." The instruments involved in each cause of action are identical in substance and form, except a slight difference in dates and amounts. The order is designated, "Order Memorandum. Trust Receipt Plan." It requests shipment to Trimble of a specifically described instrument and designates Trimble as "Dealer" and plaintiff as "Owner," and recites:

"The Dealer has accepted a time draft as provided for in said trust receipt and contract of even date, payable 90 days from the date of shipment by the Owner of said

instrument in the sum of seven hundred thirty 20/ dollars ($730.20) with interest at the rate of six per cent. (6%) from maturity."

The trust receipt provides:

"C. G. Trimble, Jr., of Omaha, Nebraska (hereinafter called the Dealer), and Holcomb & Hoke Mfg. Co., of Indianapolis, Indiana (hereinafter called the Owner) upon receipt by the Dealer from the Owner, of one Electramuse Phonograph, model number —, serial number 4037 (hereinafter called 'Instrument'), complete with standard catalogue attachments and equipment, in consideration of the following mutual promises, hereby agrees as follows:

"1. The Dealer shall have only possession of, and it is agreed that the Owner is now and shall continue to remain the Owner of the legal title to the Instrument, except as hereinafter provided.

"2. The Dealer shall have the right and privilege of placing the Instrument in the custody of a prospective customer on approval for a period not exceeding three days, and shall be liable to the Owner for all damages resulting therefrom.

"3. The Dealer shall not pledge, loan or part with the possession of the Instrument (except as above provided to a prospective customer) or mortgage the same, and shall pay all taxes thereon, and suffer no claims or incumbrances or liens to be made thereon.

"4. The Dealer hereby signs the acceptance of a time draft, drawn by Owner against Dealer, evidencing the value of said Instrument, and payable in 90 days after the date of shipment of said Instrument by the Owner, and the Dealer shall have the privilege of selling the Instrument at or any time prior to the maturity of said draft and shall within five (5) days after such sale pay said draft in full; and if the Instrument is not sold, either conditionally or unconditionally before the maturity of said draft the Dealer agrees to pay said draft at the maturity thereof. Upon the payment of said draft in full all right, title and interest of the Owner in and to said instrument shall vest in the Dealer.

"5. The Dealer agrees to keep the Instrument in good order and unused (except as herein provided).

"6. The Owner may at any time prior to the sale of the Instrument, whether conditional or unconditional cancel this receipt and contract upon five (5) days' written notice mailed to the Dealer's last business address known to the Owner, whereupon the Owner shall be entitled to immediate possession of the Instrument. If said draft is not paid at its maturity as provided herein and if the Instrument is not sold conditionally or unconditionally at maturity of said draft, the Owner at its option shall be entitled to immediate possession of the Instrument. In the event of insolvency, bankruptcy, compromise, suspension of business or breach of this agreement, said draft shall immediately become due and payable and the Owner shall be entitled to immediate possession of the Instrument without demand, provided the Instrument is not then sold conditionally or unconditionally.

"7. If the Owner becomes entitled to the immediate possession of the Instrument under any of the provisions of paragraph 6 herein, the Dealer agrees to pay to the Owner liquidated damages for the detention of the Instrument a sum equal to one per cent. (1%) of the unpaid balance of said draft for each month or part thereof that the Instrument is detained by the Dealer from the time the Owner shall become entitled to the possession thereof under the provisions of paragraph 6 hereof and to pay to the Owner all costs, charges, expenses, disbursements and reasonable attorney fees in the sum of ten per cent. (10%) of the unpaid balance of said draft. If the Instrument is repossessed by the Owner from the Dealer, the Owner shall retain all payments made on said draft as and for the privileges granted hereunder.

"8. The Dealer agrees to keep a separate account of the Instrument and report to the Owner any sale thereof immediately after the same is made, and shall permit the duly accredited representative of the Owner to examine the Instrument at any and all reasonable times during business hours.

"9. The acceptance of a time draft by the Dealer herein shall not in any way affect the Owner's title to said Instrument and shall not be effective to terminate this trust receipt and contract or affect any other provisions hereof.

"10. This trust receipt and contract shall become binding and effective only on the acceptance thereof by the Owner in writing, at Indianapolis, Indiana, and shall be construed and given effect according to the laws of the state of Indiana."

Accompanying the trust receipt is a time draft payable in 90 days for the sum of $730.20, drawn by plaintiff upon Trimble, and accepted by Trimble. The time draft provides: "This time draft is drawn and accepted pursuant to a trust receipt and contract of even date."

It was stipulated on the trial that the printed portions of the three instruments just referred to were forms furnished by plaintiff, appellant. In arriving at their classification and meaning the purpose sought to be accomplished may be considered. We cannot escape the conclusion that in the preparation of these forms the intention of the plaintiff was to draw such an agreement as would protect appellant's right to the property, without the necessity of filing it for record under the recording statutes, and such as could not be considered a conditional sale contract. Almost every clause betokens such a purpose. In the present case appellant contends that it failed in its purpose; while on the part of the appellee it is urged that the purpose of appellant was accomplished.

Able and instructive briefs have been filed by counsel, discussing the authorities from many jurisdictions, from which it appears that the holdings are far from harmonious; some considering "an absolute promise to pay" as a controlling factor, while others look upon the "right to demand return of property at any time" as of greater effect. However, it would appear unnecessary to determine where the weight of authority may be in other jurisdictions, as this court in the analogous case of *General*

Motors Acceptance Corporation v. Hupfer, 113 Neb. 228, held a similar transaction not to constitute an absolute sale, mortgage, conditional sale, or lease, but to establish the relation of bailor and bailee. Counsel for appellant in the brief, referring to the *Hupfer* case, say: "We do not disagree with the decision and the language of the court in the *Hupfer* case." But it is contended that the transaction was wholly different. Reading the opinion in the *Hupfer* case, without knowledge of all the facts involved in the transaction in controversy, as disclosed by the records then before the court, one may not be clear as to the holding in that case. However, from an examination of the bill of exceptions in the *Hupfer* case it appears that, at the time the receipt set out in the opinion was executed, Trotter, the dealer, executed and delivered to the General Motors Acceptance Corporation his promissory note evidencing the indebtedness. The oral testimony of the general manager of the plaintiff company in that case establishes such fact; the trust receipt in that case bears the identification number C. P. 673; the note given bears the same identification number, and by its terms the dealer unconditionally promised to pay the General Motors Acceptance Corporation $4,479.18 four months after date.

The salient features in that case and the instant case appear the same. While the trust receipt in the *Hupfer* case and in the case at bar differ in form, yet in substance they are closely analogous. They each deal with the terms and conditions upon which the dealer is given the possession of property, indicating a relationship of bailor and bailee, as distinguished from a sale or purchase under conditional sale contract. In each instance, before the owner delivered the property to the dealer, the trust receipt reserving the complete ownership of the property was executed and delivered. In each case the receipt outlined and limited the use that might be made of the property. The receipt in the *Hupfer* case provides that the dealer would return the property upon demand, while

in the instant case it provides that the owner could retake possession of the property upon five days' notice. In the *Hupfer* case a note was taken for the consideration, identified in the same manner as the trust receipt, while in the instant case a time draft was taken for the consideration. In each case the instrument given was an unconditional promise to pay the consideration evidenced thereby, at a fixed and definite time, and in each case title to the property involved could be secured by dealer by paying such evidence of indebtedness. In the *Hupfer* case the receipt acknowledges that the vehicles are the property of the acceptance corporation, while in the instant case the receipt provides that the acceptance of a time draft by the dealer herein shall not in any way affect the owner's title to the instruments. The delivery of the instruments under the receipts involved in this case did not amount to a sale and purchase of merchandise.

We conclude that this case is controlled by the holding in *General Motors Acceptance Corporation v. Hupfer, supra.* The instruments involved in this action having been delivered by plaintiff to Trimble, under the trust receipt, the legal effect of which establishes only the relation of bailor and bailee, the guarantor is not liable to appellant under the guaranty of any and all accounts for merchandise purchased.

The judgment of the district court is

AFFIRMED.

E. P. VAN KIRK, APPELLEE, V. EDWARD L. BECKLEY ET AL., APPELLANTS.

FILED APRIL 22, 1932. No. 28181.

1. Garnishment: ANSWER: ORDER. Where the answer of a garnishee, as in this case, admits that he has funds in his hands which, but for a purported assignment made before the commencement of garnishment proceedings, belonged to the judgment debtor, and the assignee appears in open court and waives all his rights under such assignment to the fund or any part

thereof, the court was empowered under section 20-1061, Comp. St. 1929, to immediately enter an order for the payment of the amount admitted to be due the judgment debtor for the satisfaction of the judgment or a part thereof.

2. ———: DEFENSE. After an assignee has disclaimed and waived all rights to funds garnished under an assignment by the judgment debtor, the garnishee is not required nor may he thereafter assert as a defense to said garnishment proceedings any right in the assignee under his assignment.
3. Estoppel. Where a garnishee answers that he has funds in his hands belonging to the judgment debtor, but that the same have been assigned in part to another, and the assignee, at the time fixed for the garnishee to answer, appears in open court and disclaims and waives all of his rights under his assignment to said funds, such assignee by his express waiver is estopped thereby from thereafter successfully asserting any claim to the funds or any claim against the garnishee under his alleged assignment.
4. Exemptions. "Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons." *Wilcox & Co. v. Deines*, 119 Neb. 692.
5. ———. Where at the time a garnishee summons is served the property thereby impounded is not exempt, a debtor cannot afterwards by transferring his property render the property in the hands of the garnishee exempt.

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

W. A. Meserve, for appellants.

Rice & Rice, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

HASTINGS, District Judge.

This is a proceeding of garnishment after judgment in aid of execution. The appellee, E. P. Van Kirk, recovered a judgment in the district court for Antelope county against Edward L. Beckley, one of the appellants herein, for the sum of $1,655.50. On March 13, 1930, a transcript of said judgment was filed in the district court for Knox county. Thereafter an execution was is-

sued out of said court on said judgment and returned unsatisfied. On August 4, 1930, the plaintiff commenced this proceeding in said court in aid of said execution by filing an affidavit of garnishment, in which it was stated, among other things, that one Bernard J. Huigens, one of the appellants herein, had in his possession and control more than $500, the property of the defendant, Edward L. Beckley, not exempt by law. On said day the court made an order that said Bernard J. Huigens appear on the 6th day of October, 1930, at the hour of 10 o'clock a. m. to answer concerning said money and other property of the defendant, Edward L. Beckley. On August 5, 1930, copies of said orders were personally served upon the garnishee and the defendant, Edward L. Beckley. The garnishee answered on the 4th day of October, 1930, admitting that during the month of October, 1929, a certain sum of money belonging to the defendant, Edward L. Beckley, came into his possession; that he had disbursed all of said sum excepting the sum of $500, which amount was retained by him for the purpose of protecting himself against an order issued by the defendant, Edward L. Beckley, purporting to assign the sum of $350 with interest thereon. He further alleged that Beckley instituted an action in the county court of Knox county against him to recover the said sum of $500, and that one Ed O'Shea intervened in said action claiming to be the owner of said order or assignment, and in said action recovered judgment against him on the 1st day of July, 1930, for the sum of $374 and costs, and that said case was appealed to the district court for Knox county and is pending therein; that he could not safely pay out said money, and requested that he be not required to make personal appearance until said matter was fully adjusted. On the 6th day of October, 1930, at the time fixed in the order or summons of garnishment, the matter came on for hearing and the court entered an order finding, on the pleadings of the plaintiff and the answer of Bernard J. Huigens, as garnishee, that said Huigens, as garnishee, had in his hands the sum of $500 not exempt

from execution belonging to the defendant, Edward L. Beckley, and ordered that said amount should be applied to appellee's judgment. Thereafter on the 4th day of December, 1930, all the parties being present in court and not objecting thereto, it was found by the court that said order of October 6, 1930, did not correctly state the facts and the same was ordered corrected so as to show that it was based upon evidence offered, and that Ed O'Shea, claimant to a part of said fund and assignee thereof, stated in open court that he waived any claim to any money or funds in the hands of the garnishee, Bernard J. Huigens, as against any claim or judgment held or owned by the plaintiff, E. P. Van Kirk. This order was not included in the transcript as originally filed herein. The appellee filed a motion asking that a certified copy thereof be made a part of the transcript; this motion was submitted at the time of the argument of this cause. The motion is sustained and the order is made a part of the transcript. On the 25th day of October, 1930, the garnishee, Huigens, filed a motion to vacate the order of October 6, 1930, requiring him to pay the $500 in his hands to the appellee. The grounds of said motion being, in substance, the same as his answer filed prior to the entry of the order of October 6, 1930, except for the additional ground that the money ordered to be paid was exempt and claimed as such by the defendant, Beckley. The defendant, Beckley, also filed a motion to set aside and vacate said order claiming the money in the hands of the garnishee as exempt. The only evidence offered in support of said motions was evidence in support of the claim of exemption. Both motions were overruled; from said rulings said parties have appealed.

The three principal assignments of error upon which the garnishee, Huigens, relies are: (1) That the court erred in entering the order of October 6, 1930, on the pleadings; (2) in rendering any order or judgment herein on the ground that said property was already in the custody of the court in another case; (3) in not ordering that Ed O'Shea be made a party defendant herein.

The assignments will be considered together. As the record now stands it appears that the order of October 6, 1930, was not based solely on the pleadings; it was made on the answer of the garnishee wherein he admitted he had $500 of funds in his hands which, but for a purported assignment to one Ed O'Shea, belonged to the defendant. O'Shea having, in open court, waived and disclaimed any right to said fund in the hands of the garnishee, the situation presented was the same as if the garnishee had answered unequivocally that he had $500 in his hands belonging to the defendant Beckley.

Where the answer of a garnishee, as in this case, admits that he has funds in his hands which, but for a purported assignment made before the commencement of garnishment proceedings, belonged to the judgment debtor, and the assignee appears in open court and waives all his rights under such assignment to the fund or any part thereof, the court was empowered under section 20-1061, Comp. St. 1929, to immediately enter an order for the payment of the amount admitted to be due the judgment debtor for the satisfaction of the judgment or a part thereof. *Peterson v. Kingman*, 59 Neb. 667.

After an assignee has disclaimed and waived all rights to funds garnished under an assignment by the judgment debtor, the garnishee is not required nor may he thereafter assert as a defense to said garnishment proceedings any rights in the assignee under his assignment. 28 C. J. 283.

Prejudicial error does not appear from the failure to make O'Shea a party, although it would have been proper to have done so. While not bound by the order as an adjudication, yet by the express waiver of his rights under his assignment he is estopped thereby from thereafter successfully asserting any claim to the fund or any claim against the garnishee under his alleged assignment. 21 C. J. 1148; *Blodgett v. McMurtry*, 34 Neb. 782; *Newman v. Mueller*, 16 Neb. 523; *Kirkendall v. Davis*, 41 Neb. 285; *Henderson & Johnson v. Hooper Sugar Co.*, 65 Utah 241.

It is contended by counsel for the garnishee that the fund sought to be garnisheed was *in custodia legis* and not subject to garnishment. It is disclosed by the record that the appellant Beckley commenced an action in the county court of Knox county against the garnishee herein to recover the $500 which it was alleged belonged to Beckley. The assignee, O'Shea, intervened in that action and claimed the fund in the hands of the garnishee, Huigens, under his assignment. On a trial in that court O'Shea obtained judgment against both Beckley and Huigens. An appeal was taken by both parties therefrom to the district court and said action was pending in that court at the time the garnishment proceedings were commenced. The money was in the hands of the garnishee, Huigens, at all times and had never been paid into any court, and at the time the garnishment proceedings were commenced there was no order of any court requiring him to do so. This was the situation at the time he answered in the garnishment proceedings, and with O'Shea waiving any right under his assignment the garnishee cannot be heard now to assert that the funds in his hands are *in custodia legis*. Prejudicial error does not appear in the matters complained of by the garnishee.

Error is assigned by the appellant Beckley in the denial of his claim of exemption. An examination of the evidence offered in support of this claim shows it to be without merit.

On the 6th day of October, 1930, the day the order was made requiring the garnishee to pay the appellee the funds in his hands, the appellant Beckley, acting under the advice of his then attorney, conveyed 160 acres of land owned by him in Antelope county, Nebraska, to one Bloom for an alleged consideration of $1. He and his wife had lived upon this land as his homestead for many years. Sometime prior to April 23, 1930, he and his wife moved to Knox county. After their removal to Knox county the appellee had an execution issued on his judgment and levied upon the land that had been occupied by the appellant Beckley as his homestead. Beck-

ley, to prevent the sale of the land under execution, successfully claimed it as his homestead. His affidavit made on April 23, 1930, claiming the land as his homestead stated that he had not abandoned the same but intended to return and reside thereon, and that the same was not subject to sale. There is no evidence that he abandoned his homestead in Antelope county prior to the service of order of garnishment upon him on the 5th day of August, 1930, or in fact up to the time that he conveyed it on October 6, 1930. It appears from the evidence that the sole purpose of the appellant Beckley in conveying the land that he claimed as a homestead was that he might claim the money in the hands of the garnishee as exempt. We have held: "Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons." *Wilcox & Co. v. Deines,* 119 Neb. 692.

Where at the time a garnishee summons is served the property thereby impounded is not exempt, a debtor cannot afterwards by transferring his property render the property in the hands of the garnishee exempt. *Kilpatrick-Koch Dry Goods Co. v. Callender,* 34 Neb. 727.

The claim of exemption was properly denied. The judgment is right and is

AFFIRMED.

YORK BRICK & TILE COMPANY, APPELLEE, V. UDE MOTOR COMPANY ET AL., APPELLANTS.

FILED APRIL 22, 1932. No. 28045.

1. **Statutory Provision.** "In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of on the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the dis-

trict court or the fact that there may be some evidence in support thereof." Comp. St. 1929, sec. 20-1925.

2. **Mechanics' Liens:** SUFFICIENCY OF EVIDENCE. On the record in this case, *held* that the evidence is insufficient to support the findings and decree of the trial court.

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

W. T. Thompson and *P. I. Harrison,* for appellants.

Benton Perry and *J. L. Richards, contra.*

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

MESSMORE, District Judge.

This is an action brought in the district court for Thayer county for the foreclosure of a mechanic's lien. The findings and decree of the trial court were in favor of appellee, plaintiff below, and against the Ude Motor Company, one of the defendants below and one of the appellants herein, in the sum of $845.05, and a decree of foreclosure entered, from which appellants named appeal.

The petition was in the usual form for the foreclosure of a mechanic's lien. The answer was a general denial, and an affirmative defense of estoppel was set up therein, alleging that appellants had entered into a contract with one Guy K. Cogswell for the exchange of certain used automobiles for oil, tanks and building material, and that the said Cogswell had a credit with appellee company in the sum of six or seven hundred dollars; that prior to the time of entering into said contract appellants inquired of appellee as to Cogswell's representations as to credit, and whether or not appellee would furnish the building material solely in reliance on Cogswell's credit with it and charge the same to his credit; that appellee agreed to do so, and that a contract based on such representation by appellee was thereafter entered into between the Ude Motor Company and Cogswell and that the material was furnished on the credit of the said Cogswell. The reply denies all the allegations of the affirmative defense,

denies that Cogswell ever had any credit with appellee or that appellee ever agreed to furnish material on the credit of Cogswell.

The material evidence discloses that W. R. Ude, president of the Ude Motor Company, and one E. H. Schulz, manager thereof, went to York to the office of appellee to consult with one Frank Burnham, president of appellee company, as to whether or not one Guy K. Cogswell had a credit with said company in the sum of about $700, and had with them at that time certain dimensions and figures for materials necessary to build a garage at Deshler; that Burnham assured them that Cogswell had a credit on the books of the company in the amount of $700 and further that Cogswell's credit was good for any amount over $700 that it took to finish the building in question; that subsequent to this conversation a written contract for the exchange of certain automobiles for certain building and other materials was entered into between W. R. Ude, of the Ude Motor Company, and Cogswell; that after entering into said contract Schulz, as manager of the Ude Motor Company, called Mr. Burnham, stating that the contract between the Ude Motor Company and Cogswell had been entered into and asked that certain building materials be sent to Deshler to construct the garage and for Mr. Burnham to call Mr. Cogswell and verify the sending of the materials on Cogswell's account; that subsequently Schulz went to appellee's place of business in York and obtained certain building materials which were charged to the Ude Motor Company, as shown by the exhibits in the record.

Mr. Burnham testified that he was never asked to charge the building materials to Cogswell and claims that the materials furnished were charged to the Ude Motor Company, hence the filing of the mechanic's lien.

There appears in evidence a letter written by Burnham, dated August 4, 1930, to Cogswell at York, asking what Cogswell intended to do in regard to the Ude Motor Company account and stated that if they did not hear from him by the 14th of the month they would be forced to

file a lien. The record also contains evidence relating to a conversation had between Mr. Ude, Mr. Schulz, Mr. Perry, attorney for appellee, and Mr. Burnham, wherein payment was sought from the Ude Motor Company of this account. Further, that a truck was sold by Cogswell to appellee and certain credits given him by the company and that such transaction was settled between appellee and Cogswell; that Cogswell desired to sell material for appellee on commission, the same having been discussed by appellee through its Mr. Burnham and Cogswell.

The deposition of Guy K. Cogswell was read in evidence, corroborating the testimony of Ude and Schulz as to the credit Cogswell had with the appellee. The only denial in the evidence by appellee of whether or not credit was extended by it to Cogswell was made by Mr. Burnham in direct opposition to the evidence of W. R. Ude, E. H. Schulz, and Guy K. Cogswell.

Appellants appeal upon the insufficiency of the evidence to support the findings and decree of the trial court.

Section 20-1925, Comp. St. 1929, is as follows: "In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of on the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

It might be stated here that appellants filed a motion for a new trial in the district court which was overruled, this for the purpose of having this court review the ruling of the court below upon the admissibility of evidence. Analyzing the evidence and after a careful reading of the record, we are convinced that appellee's evidence, stand-

ing as against the evidence of appellants, is insufficient to sustain the findings and decree of the trial court, in that appellee was in a position to know and did know that the contract in question was contemplated by and between the Ude Motor Company and Cogswell; that appellee had previously done business with Cogswell, knew the nature of his business, purchased a truck from him, and had extended credit to him at different times, admitted the appearance of Ude and Schulz in York at the company's office and had figured the materials necessary from the dimensions given it by Ude and Schulz to be used in building the garage; however, denying that anything was said about Cogswell's credit, admitted the telephone conversation had by Schulz with Burnham, with the exception of denying anything that might have had anything to do with extending credit to Cogswell.

The letter hereinbefore referred to is evidence that appellee had some knowledge of the transaction between the Ude Motor Company and Cogswell, knew of the existence of the contract between these parties, had extended credit to Cogswell, and was willing and ready to furnish materials to the Ude Motor Company on the credit of Cogswell, looked to him for the payment of the materials, and had written him to that effect, threatening to file a lien if he did not pay the amount due.

It is the duty of this court to retry the issues of fact involved in the findings of fact complained of on the evidence preserved in the bill of exceptions and upon a trial *de novo* of such questions of fact reach an independent conclusion as to what findings are required, and without reference to the conclusions reached by the lower court or the fact that there may be some evidence in support thereof.

We therefore conclude that the judgment of the district court be reversed and appellee's action dismissed.

REVERSED AND DISMISSED.

CORNELIUS ZITTING, APPELLANT, V. WILLIAM FACKA ET AL., APPELLEES.

FILED APRIL 22, 1932. No. 28232.

Evidence examined and judgment *held* to be sustained by sufficient evidence.

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

George N. Gibbs and *William E. Shuman,* for appellant.

Beeler, Crosby & Baskins, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

RAPER, District Judge.

Cornelius Zitting, appellant, plaintiff below, brought this action to foreclose a mortgage on a section of land in Lincoln county, 360 acres of which was "deeded" land and 279 acres under school land lease. The mortgage on the 360 acres was properly executed by the owner, William Facka, his wife, Leona, joining therein. The wife was the owner of the leases on the school lands. These leases were of considerable value. The plaintiff held a mortgage on the 360 acres of land which had been given by a former owner of the land. When that mortgage became due the Fackas desired to renew it, and Mr. Zitting, who resided in Illinois, came to North Platte in November, 1925, and after some negotiation arranged with William Facka to renew the mortgage, and in order to induce Zitting to renew Mr. Facka signed an agreement which, after stating that William Facka was making a mortgage, recites, "William Facka is placing, as additional collateral to the above mentioned loan, school leases on the following described land," then follows description of the land. The agreement further provided that, in case a payment is made to Zitting of $6,000, said lease would be surrendered to William Facka and said amount credited on the mortgage. Mr. Zitting, believing that

said agreement was valid, surrendered his prior mortgage, which was amply secured, and took a new mortgage, the security for which will no doubt entail a considerable loss.

Mrs. Facka was not present when the agreement pledging the school leases was made and she did not sign the agreement. Mr. Zitting then knew that Mrs. Facka held the title to the leases. The leases were held by the bank for Mr. Zitting. Some time thereafter the banker had the leases renewed by the state, their term having expired. After renewal they were returned to the bank and held there. Previous to the time of the renewal of the mortgage Mrs. Facka had made an assignment of the leases to the Platte Valley Bank to secure a note of $5,000, which sum she and her husband had borrowed to purchase the school land leases. This note had been paid largely, if not entirely, by Mr. Facka, or out of the proceeds of his property, but that may not be important. Mrs. Facka had never had the leases in her possession. The interest on these leases was not paid for some of the semiannual interest payments, and Mr. Zitting paid these arrears to protect the lien he claimed thereon.

William Facka is placed in a very unfavorable light. At the time he signed the agreement to pledge the school land leases, he either believed he had the right to assign them or that he was purposely inducing Mr. Zitting to accept some security that he knew he had no right to pledge. His testimony does not show commendable frankness, and his statements do not carry much weight. Mr. Zitting was grossly imposed on by the inexcusable action of William Facka, but Mr. Zitting is largely to blame, because he did not get the consent of Mrs. Facka to the pledging of the leases, when he knew that she was the owner. There are some circumstances that indicate rather strongly that Mrs. Facka knew that the leases were to be given as additional security for the mortgage, but she positively denies any such knowledge. She stated at the time that there was a conference held after the later mortgage became due in an attempt to get the mortgage

extended again, that she knew the leases had been assigned to Mr. Zitting, but there is no evidence that she stated for how long a time she had known it. And she explains that statement and a further one that she told her husband she would assign them to him if he wanted her to, by stating that she and her husband had talked the matter over before going to the conference and she told him that she would assign the leases if Mr. Zitting would accept them as a large payment on the mortgage debt, and that Mr. Zitting refused to accept the offer.

The trial judge heard the witnesses, and we feel that his conclusion that she was not bound by the agreement of her husband to transfer the school land leases is sustained by sufficient evidence. The court entered decree of foreclosure of the mortgage, and Mr. Zitting was given judgment against Mrs. Facka for the amounts he paid as interest on the leases, and the decree denied Mr. Zitting the right to hold the leases, and that Mrs. Facka's right and title to the leases were not pledged or incumbered. The appellent, Zitting, appeals only from the portion of the decree which denied him a lien on the school land leases.

The decree of the district court is

AFFIRMED.

MANGNUS TORSKE V. STATE OF NEBRASKA.

FILED APRIL 29, 1932. No. 28114.

1. **Criminal Law: SANITY OF ACCUSED: NONEXPERT TESTIMONY.** Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion.
2. ———: ———: ———. Value of nonexpert opinion on insanity depends upon the facts and circumstances detailed by such witness, the jury reaching their own conclusion from the facts found to be true, the narration of which is aided by the conclusion of the witness.

3. ———: ———: BURDEN OF PROOF. An accused relying upon insanity as a defense and having offered competent evidence to support it, the burden of proof is upon the state to establish his sanity.
4. ———: EXPERT TESTIMONY. The opinion of a medical expert may be based (1) on his acquaintance with the party whose condition is under investigation, (2) upon a medical examination of him which he has made, or (3) upon a hypothetical case stated to the expert in court. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27.
5. ———: ———. Ordinarily, an expert witness testifying from observation or personal knowledge must testify to the facts upon which the opinion is based.
6. ———: SANITY OF ACCUSED: EXPERT TESTIMONY. Physician may testify as an expert as to his opinion as to a person's sanity, basing his opinion solely upon an opportunity for observation and examination.
7. ———: INSTRUCTIONS. Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled.
8. ———: ———. Where the evidence is insufficient to support a finding of a lesser degree than that charged in the information, it is not error to refuse to give an instruction defining the lesser offense.
9. ———: ———. If an instruction be given which is incorrect as an abstract statement of law, relating to a lesser offense than that charged in the information and which is not supported by any evidence in the record and upon which defendant is acquitted, it is not prejudicial to the defendant and does not constitute reversible error.
10. ———: ———. Ordinarily, error cannot be predicated on an instruction given at the request of the complaining party. *Bell v. State*, 114 Neb. 17.
11. ———: DEFENSE OF INSANITY. No form of insanity is recognized in this state as a defense to a criminal act unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed.
12. ———: INSTRUCTIONS. A judgment of conviction will not be reversed for the giving of an erroneous instruction which does not prejudicially affect the rights of the defendant.

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

Carrico & Carrico, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

DAY, J.

Torske was convicted of murder in the second degree and sentenced to 17 years in the penitentiary, from which he prosecutes error proceedings to this court. The plaintiff in error is charged in the information with killing Lewis C. Paulsen, an attorney at law of Hastings, at or near North Platte. The only question of fact litigated was whether or not Torske was sane when he fired the fatal shot. The record is otherwise without dispute that he purposely and maliciously killed Paulsen. The complaint of the plaintiff in error is directed (1) to the admission of the testimony of experts as to sanity, and (2) to certain instructions of the court to the jury.

The tragedy, which resulted in the death of Paulsen, occurred February 27, 1931, upon the farm occupied by Torske near North Platte, Nebraska. The defendant, a tenant farmer, was living upon this place with his family, where he had moved five years before from Minden, Nebraska. While living near Minden, he commenced a series of business transactions with one Kennedy, which continued for a long period of time, and the result of which was that he was continuously and increasingly indebted to Kennedy. During the entire time Torske lived at North Platte, Kennedy and Paulsen, his attorney, were frequent visitors at his home for the purpose of collecting or renewing notes and mortgages to evidence the indebtedness. Among the items included in these transactions were notes for several hundred dollars given to Paulsen and assigned to Kennedy. Defendant claimed certain credits to which he was entitled and which had not been given to him. These items had been in dispute

since 1927, up to the time of Paulsen's death. Each time a new note was given, additional security was demanded and a controversy arose, which terminated in a quarrel of some bitterness between defendant and Paulsen.

This continued from time to time until January 29, 1931, when Kennedy and Paulsen called at defendant's home, at which time an argument ensued about the indebtedness and the credits claimed by the defendant. A demand was made for the mortgaged property. There was again the usual argument between defendant and Paulsen, and finally Paulsen was ordered to leave. Kennedy then had a talk with defendant, and it was agreed that defendant and his son were to come into town that afternoon and fix up the matter. This was done by the son giving a mortgage upon some of his property as collateral security for the defendant's debt. Thereafter, on February 25, Paulsen called the defendant by long distance telephone and demanded possession of the mortgaged property. This was refused by the defendant, who contended that the due date on his indebtedness had been extended. The next day the defendant went to Minden and had a conference with Kennedy. Two days thereafter Kennedy and Paulsen called at defendant's home and demanded that he turn over some horses as a payment upon his debt. Again an argument took place between Paulsen and defendant which resulted in the defendant ordering Paulsen off the place, with which order he complied. After some suave conversation, in which Kennedy told defendant that he ought to adjust the matter, because if he did not Paulsen would start a replevin action and take all his live stock and machinery covered by the mortgage, they got into Kennedy's car and overtook Paulsen walking back to town and brought him back, when defendant agreed to turn over certain horses after dinner. At the appointed time Kennedy returned bringing Paulsen with him. The defendant had requested Kennedy not to bring Paulsen back.

The controversy and quarrel was renewed, but an agreement was reached whereby the defendant was to

deliver 16 head of horses at North Platte for an agreed price of $50 a head which was to be credited on the debt. There was an argument that two more horses should be included. The defendant demanded credit upon the notes before he moved the horses. Paulsen refused to indorse the credit until the horses were delivered. The argument broke out again about the disputed credits, during which time the defendant went to the barn to turn out some calves. While doing this he saw a shotgun left in the barn by one of his sons, which he picked up and with it shot Paulsen. The foregoing statement of facts is established by the record without dispute.

The defendant interposed the defense of insanity. To support this he relied upon the testimony of his wife and three sons, Arnold, Raymond and Viggo Torske. The son, Viggo Torske, testified that he heard the quarrel and walked to a place where he could see his father with the gun. He testified that his father was very excited, his eyes bulged out and glassy, was still quarreling with Paulsen when he fired the fatal shot. This son took the gun and then helped to pick up the body of Paulsen. He did not remember where his father went, but while engaged in getting Paulsen's body into the car saw his father coming from the house with another gun, and he yelled three or four times at the top of his voice, "Leave him lay there." "He was swinging the gun in all directions, eyes were bulged out and he was as white as a sheet, his eyes were glassy and I took one look and jumped out of the car and beat it." This witness then ran, as did his brother Raymond and Kennedy. The defendant brought Kennedy back and talked to him about the claimed credits and ordered Kennedy to write a memorandum relative to them. Kennedy complied with his request. Whereupon, he said he would kill himself, and ordered Kennedy and his two sons around the barn out of sight, when the defendant discharged the gun twice without effect. Then the officers drove upon the scene and quieted the defendant. Obviously, we cannot detail all the testimony in this opinion, but the foregoing is a substantial statement

of the son Viggo Torske and is corroborated almost in its entirety by Raymond. After a delineation of these facts both Viggo and Raymond were asked whether at the time the shot was fired their father was sane or insane, and the answer of both was that he was insane. Mrs. Torske testified as to the defendant coming into the house after the second gun, immediately after Paulsen had been killed, and as to his appearance and actions, and that at that time in her judgment he was crazy. Kennedy, a witness for the state and the only eyewitness to the tragedy except Viggo Torske, denied that Paulsen had abused Torske, that his appearance was such as described by Viggo and Raymond Torske. Thus the facts upon which the conclusion of insanity was based were in a large measure vitally conflicting.

The testimony heretofore set out is the testimony of lay witnesses and was sufficient to raise an issue as to defendant's sanity. Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion. *Pflueger v. State*, 46 Neb. 493; *Lamb v. Lynch*, 56 Neb. 135; *Clarke v. Irwin*, 63 Neb. 539; *Snider v. State*, 56 Neb. 309; *Bothwell v. State*, 71 Neb. 747; *Larson v. State*, 92 Neb. 24; *People v. Casey*, 124 Mich. 279; *State v. Neubauer*, 145 Ia. 337. In *In re Estate of Wilson*, 78 Neb. 758, all the earlier cases are discussed, compared, analyzed and harmonized. The reason, says Jones, Commentaries on Evidence (2d ed.) sec. 1267, is based "upon the obvious ground that it is often impossible for witnesses in such cases adequately to describe to the court or jury the actions, looks and symptoms which properly constitute the basis for determining the question." The court or jury are presumed to be as capable of drawing the conclusion from the facts as the nonexpert witness, but such witness is permitted to augment his powers of description and narration by stating his conclusion based upon the

facts and circumstances previously narrated. The value of such opinion depends upon the facts and circumstances upon which it is based and is to be weighed according to its merits, the court or jury reaching their conclusion from the facts narrated and found to be true, which narration is aided by the conclusion of the witness.

Thus, at this stage of the trial, the accused having relied upon insanity as a defense and having offered competent evidence to support it, the burden of proof was upon the state to establish his sanity. *Wright v. People,* 4 Neb. 407; *Prince v. State,* 92 Neb. 490. This rule applies not only to insanity but to any distinct substantive defense which may be interposed by the accused to justify or excuse the act charged. *Gravely v. State,* 38 Neb. 871. To meet the burden cast upon the state by the defense of insanity, two physicians were called to testify as experts. The plaintiff in error contends that in the admission of their testimony the court committed reversible error, in that their opinion was received by the court without requiring them to detail the facts disclosed by their examination and observation of the defendant. The opinion of a medical expert may be based (1) on his acquaintance with the party whose condition is under investigation, (2) upon a medical examination of him which he has made, or (3) upon a hypothetical case stated to the expert in court. *Omaha & R. V. R. Co. v. Brady,* 39 Neb. 27.

There is some confusion among the authorities as to the correct rule relative to the admission of the opinion testimony of experts, but the great weight of authority sustains the rule that ordinarily an expert witness testifying from observation or personal knowledge must testify to the facts upon which the opinion is based. *Hornby v. State Life Ins. Co.,* 106 Neb. 575. The great weight of authority supports this view. *Hathorn v. King,* 8 Mass. 371; *State v. Megorden,* 49 Or. 259; *Flanagan v. State,* 106 Ga. 109. See, also, the note in 20 Ann. Cases, 883, and cases cited to support this proposition as well as those contra, and 11 R. C. L. 577, sec. 9, and cases

cited. In Jones, Commentaries on Evidence (2d ed.) sec. 1333, it is said: "Ordinarily he must first testify to the facts, or such facts must be stated to him hypothetically, so that the jury may be in possession of the requisites to weigh his answer. But it is not always necessary that the question should be hypothetical in form when the opinion of the witness is sought, not upon assumed facts, but upon his personal knowledge or observations. A familiar illustration of this practice is where a physician is called to give his opinion as to the mental or physical condition of one whom he has examined." The same author concludes a discussion of the cases as follows (section 1334): "On the whole, then, notwithstanding the respectable authorities which support the view that the opinion of an expert witness, based upon his own observations, is admissible without a statement of the facts upon which it is based, the better law undoubtedly is with the majority which calls for statement of the facts." Jones cites the opinion of the United States supreme court in *Raub v. Carpenter*, 187 U. S. 159, with the comment that its argument is unanswerable, "that when the witness states a conclusion on facts which he alone knows and does not disclose, an assumption of the existence of facts occurs for which there are no evidentiary foundations."

However, a few cases have held it sufficient to state the extent of his knowledge and give his opinion, leaving its support from the evidential facts to be deduced by a later direct or cross-examination. In *People v. Faber*, 199 N. Y. 256, it was held that an insanity expert who has observed a person may state his opinion without first stating his observed data, but it was also held that "the jury are undoubtedly entitled to the facts on which an insanity expert bases his opinion, if the same are sought by the prosecution or the defendant." This last case cites *People v. Youngs*, 151 N. Y. 210, in which, although stating this as the New York rule, as above, said: "It is undoubtedly the better practice to require the witness to state the circumstances of his examination and the facts,

symptoms or indications upon which his conclusion is based before giving his opinion to the jury."

Wigmore in his work on Evidence (2d ed.) sec. 1927, says: "When an expert witness, testifying from personal observation, gives his opinion as testimony, it is usually necessary to predicate in express terms, hypothetically, the data upon which the opinion is based. The reason is that otherwise the jury would be unable to tell whether his opinion was meant by him to be applied to the facts ultimately found by the jury." It is Wigmore's theory (section 672) that there are two distinct subjects of testimony—premises and inferences—the latter involves a consideration of the former. But the same author criticizes the rule stated above for that the cross-examination will or can expose the weakness of the opinion. He also adds that it is a fallacy where the witness speaks from personal observation. Quoting from the same author (section 1929): "The remedy (whenever one shall be undertaken) ought to be radical. The only purpose for which we need any weapon of the sort is the potential need of saving the time that in some cases might be otherwise taken by marshalling an interminable multitude of opinions, and of preventing the consequent confusion of issues and the possibility of forcing a verdict by mere preponderance of numbers and influential names. But all this is mere possibility; it would not even be feasible in the ordinary case; and, whenever it was feasible, and if it should then be attempted, the ordinary judicial discretion to limit the number of witnesses, and the rule requiring personal knowledge, would quite answer all practical purposes. For this reason there seems to be no objection against taking a radical step, the entire abolition of the rule as such, leaving only in its place some specific discretion in the judge to meet the possibilities above mentioned." Of course, the radical action suggested as necessary would require legislative action, rather than judicial.

The record in this case discloses that the experts testified from personal examination and observation. They

testified that their examinations and observations were such as enabled them to form and express an opinion as to defendant's sanity. They were qualified to testify as expert witnesses. They stated as their opinion that the defendant was sane at the time in question and was able to distinguish between right and wrong with reference to his act. Thereafter they were subjected to a vigorous cross-examination by the defendant which disclosed the facts upon which they based their opinion of the defendant's sanity. The defendant submitted his theory of the evidence to one of them and asked the witness if, assuming the truth of the facts stated by defendant, he was insane at the time he killed Paulsen. In *In re Estate of O'Connor,* 105 Neb. 88, we held: "The value of the testimony of a handwriting expert on the issue of forgery depends largely on the cogency of the reasons for his opinion." This goes to the weight rather than the admissibility of the evidence.

Again, in *In re Estate of Wilson,* 78 Neb. 758, we held that a nonexpert witness qualified by acquaintance, who had occasion to and did observe a party and his condition at the time when his state of mind is in dispute, may testify that in his opinion such person was of sound mind, while the opinion that a person is of unsound mind must be based on facts indicating unsoundness. Let it be remembered that the experts in this case testified that the defendant was sane at the time in question. While we are of the opinion that the recital of facts in this case was sufficient, taking into consideration the direct and cross-examination, nevertheless, following the rule of the above case, they could have testified to the sanity of the defendant without such recital. Quoting from *In re Estate of Wilson, supra:* "This seems to us to be the common sense view. Sanity is the rule and insanity the exception. What facts or circumstances are there that an acquaintance can relate as a foundation for his opinion that a party is of sound mind, except that he has known him for years, has had a close personal acquaintance, and has never observed anything in his speech or

conduct denoting insanity or mental incapacity? On the other hand, the insanity or mental incapacity of a party is indicated by many acts and circumstances which are observed and which can be narrated by those whose opinions are desired, and it is those acts and circumstances alone upon which the nonexpert must rely for his opinion." In *Braunie v. State*, 105 Neb. 355, this court said: "On the question of insanity the testimony of experts was introduced both on behalf of the defendant and also for the state. No hypothetical questions were asked, but these witnesses based their opinions on their examinations of and conversations with the defendant before the time of the trial. The witnesses for the state testified that the defendant was sane. * * * The jury had before it the history of the crime, showing defendant's actions, statements and conduct for a considerable time both before and after the shooting, as well as the testimony of experts that the defendant was sane. There is ample to support the verdict." Since the experts who testified in this case disclosed to the jury the basis of their conclusion, we conclude that the contention of the defendant as to the evidence of the experts on the question of sanity is without merit.

The plaintiff in error urges with considerable insistence that certain instructions were erroneous. The first instruction complained about relates to manslaughter which was included and charged in the information as a lesser crime. The instruction was as follows: "The jury are instructed that if you find from the evidence beyond a reasonable doubt, that, on the 27th day of February, 1931, in Lincoln county, Nebraska, the defendant, Mangnus Torske, without deliberation, premeditation or malice, did unlawfully and feloniously kill Lewis C. Paulsen, with a shotgun, either upon a sudden quarrel or unintentionally, then said Mangnus Torske would be guilty of manslaughter, and your verdict should be, in case of such finding, convict him of such crime." It is urged that the omission of the words, "while the slayer is in the commission of some unlawful act" following the word "unin-

tentionally," was prejudicially erroneous. This instruction is immediately followed by the statutory definition of manslaughter, as follows: "Whoever shall unlawfully kill another without malice, either upon sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." Comp. St. 1929, sec. 28-403. These instructions were not inconsistent, contradictory, nor confusing to the jury, but, taken together, they correctly state the law. A model instruction should, of course, be as the plaintiff in error contends. But, where instructions, taken together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled. *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813; *In re Estate of Lyell*, 116 Neb. 827; *McVey v. State*, 57 Neb. 471.

The evidence in this case is that Torske purposely and maliciously, but without deliberation and premeditation, killed Paulsen. There is evidence of malice in the defendant's testimony. The most favorable view of the evidence toward the defendant does not permit a finding that he was guilty of manslaughter. Where the evidence is insufficient to support a finding of a lesser degree than that charged in the information, it is not error to refuse to give an instruction defining the lesser offense. *Fager v. State*, 49 Neb. 439; *McConnell v. State*, 77 Neb. 773; *Schultz v. State*, 89 Neb. 34. It therefore follows that if an instruction be given which is incorrect as an abstract statement of law, relating to a lesser offense than that charged in the information and which is not supported by any evidence in the record and upon which defendant is acquitted, it is not prejudicial to the defendant and does not constitute reversible error. *Abbott v. State*, 113 Neb. 524. This rule is dictated by reason and common sense as well as by judicial authority. It would be folly to reverse a case and resubmit an issue of fact to the jury, where upon that issue the evidence is insufficient to support a verdict. The courts are more than mere

mills to grind out correct abstract legal principles for purposes of academic disputation, they exist for the primary purpose of the administration of justice.

The other instruction, identified as 13a, for the giving of which we are urged to reverse the judgment and remand the case for another trial relates to the defense of insanity. One of them was an instruction requested by the plaintiff in error. Ordinarily, error cannot be predicated on an instruction given at the request of the complaining party. *Bell v. State,* 114 Neb. 17; *Peterson v. State,* 84 Neb. 76; *In re Estate of Mattingly,* 121 Neb. 90. In the latter case this court held: "It is a sound and salutary principle that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about." See, also, *Missouri P. R. Co. v. Fox,* 60 Neb. 531. Any other rule would be an inducement and incentive to a defendant to mislead the court and invite error for the purpose of taking advantage of it.

Another instruction, No. 13, is said to be ambiguous. It is an instruction as to the defense of insanity. The particular portion of the instruction complained of is that "no form of insanity or uncontrollable impulse is recognized under the laws of this state which does not so affect the mind of the accused as to render him incapable of distinguishing between right and wrong with reference to the act committed." At an early date (1876) this court held that the degree of mental unsoundness to exempt a person from punishment must be such as to create an uncontrollable impulse to do the act charged. If it be insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts. *Wright v. People,* 4 Neb. 407. Again, in *Bothwell v. State,* 71 Neb. 747, this court spoke upon the question as follows, quoting from *Schwartz v. State,* 65 Neb. 196: "One who knows abstractly what is right and what is wrong must, at his peril, choose the right and shun the wrong." An irresistible impulse does not exempt one from responsibility for crime, who has the capacity to distinguish right from wrong as to the par-

ticular act. The language quoted from the instruction is a correct statement of the law.

Another complaint of this same instruction is that it ambiguously states the burden of proof on the issue of insanity. The language questioned is: "The law presumes that every person is sane and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced, tending to prove the insanity of the accused, the burden is then upon the state to establish the fact of the accused's sanity, the same as any other material fact, to be established by the state beyond a reasonable doubt to warrant a conviction." This instruction as it relates to the burden of proof when insanity is interposed as a defense is approved in *Maddox v. State,* 108 Neb. 809, and *Williams v. State,* 115 Neb. 277. We have previously stated in this opinion that the defendant having interposed the defense of insanity and having adduced evidence to support it, the burden of proof was upon the state to establish his sanity. This instruction complies with the rule and the criticism thereof is hypercritical and without merit.

We agree with plaintiff in error that instruction No. 14 ought not to have been given. It sought to elaborate in detail upon the defense of insanity, which had already been explained in previous instructions. Its statements are self-contradictory to such an extent that it does not convey any clear statement of law. True, it was approved in *State v. Brandenberger,* 151 Ia. 197, but without any discussion, and in effect holding it without prejudice, in the case at bar. We disapprove of the instruction, but find that in this case it could not confuse the jury, because under the facts the other instructions to the jury correctly submitted the issues. *Peterson v. State,* 115 Neb. 302. A judgment of conviction will not be reversed for the giving of an erroneous instruction which does not prejudicially affect the rights of the defendant. *Quinton v. State,* 112 Neb. 684; *McArthur v. State,* 60 Neb. 390; *Keeler v. State,* 73 Neb. 441.

In conclusion, we are of the opinion, formed after a careful and exhaustive examination of the record and a study of the excellent briefs filed in this case, that the defendant had a fair trial; that there was no prejudicial error, either in the admission of evidence on the question of insanity or the instructions to the jury by the court; that the defendant was represented by able counsel both at the trial and in the proceeding in error in this court; that there was no miscarriage of justice; and that the judgment ought to be affirmed.

AFFIRMED.

HENRY B. BABSON, APPELLANT, V. CRETE MILLS, APPELLEE.

FILED APRIL 29, 1932. No. 28241.

Payment. Ordinarily, the mere failure of a creditor to return a check sent him by the debtor in whole or partial payment of the debt does not constitute a payment of the debt, where the creditor does nothing indicating his intention and purpose to receive the check in payment.

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

Thomas & Vail, for appellant.

John E. Mekota, contra.

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

DAY, J.

This is an action by Babson, as assignee of the Blue River Power Company, against the Crete Mills to recover for electrical current furnished by the power company to the defendant. The current was furnished under an oral contract, by which the plaintiff alleges the defendant agreed to pay 2 cents per kilowatt hour additional during the "peak load" hours of 6 to 9 o'clock p. m. The defendant questions the amount of current furnished from October to December, 1923, and alleges an accord and

satisfaction upon this item. It is also denied that the agreement provided for an additional charge for current consumed during the "peak load." It admits that it owed plaintiff $636.21 for October, November, and December, 1925, but alleges that upon May 31, 1927, it delivered its negotiable check in full payment, which has been retained.

This cause arose out of a controversy concerning two questions of fact: (1) As to the quantity of current furnished from September, 1922, to December, 1923, and (2) whether defendant was to pay 2 cents per kilowatt hour additional for current used during the "peak load" period.

Incidentally, the first involves the issue raised by the pleadings as to whether the $1,200 check given in payment of the current used was in full settlement of the disputed account. The amount due at that time was in dispute and the parties seemed unable to agree upon the amount. It was settled in the manner of good friends working under an oral contract. Their dealings thereafter were such as to suggest a final settlement. This was a question of fact and must have been determined by the jury against the plaintiff.

The defendant pleaded as a defense the statute of limitations. The plaintiff complains that the instruction submitting this question to the jury was erroneous, for that the defendant contended that each month was a distinct transaction, while the power company claimed that the whole was a running account. However, the case was tried upon the theory by both parties that a new contract either was or was not negotiated in 1924, and both introduced evidence tending to either prove or disprove this issue of fact. There was no prejudice to the plaintiff from this instruction by which the trial court submitted this part of the argument to the jury.

The second controversial point goes to the terms of the agreement. This oral agreement was made between the heads of these two corporations. The executives were good friends. The terms of the agreement must depend upon the recollection of these two men as to many con-

versations over a period of years, some of them taking place ten years ago. They do not agree as to the terms of this oral contract. It is an unsatisfactory and difficult task. The jury had to reach their conclusion by weighing the testimony of these two men in the light of their conduct under the agreement. Upon this question of fact, with evidence in direct conflict, they found against the plaintiff, upon whom rested the burden of proof to establish the contract. The verdict of a jury will not be disturbed in such a case. *Holst v. Warner,* 116 Neb. 208. This rule is so well established that we omit further citation of cases, but refer the reader to any digest.

But the appellant contends that appellee admits owing it $636.21, the amount of the check, delivered and retained since May 31, 1927, and that the verdict should at least have been for this amount. The pleadings and the evidence of defendant admit liability to that extent. Under this situation the trial court should have instructed the jury to return a verdict for that amount. Instead, the court instructed the jury that they should determine whether the check was accepted in payment by plaintiff and that they "should consider all the circumstances and conduct of the parties." The court further instructed the jury that "mere retention of the check by said company does not of itself prove acceptance of the same as payment, but any unreasonable delay in returning the same may make it equal to payment." This view of the trial court finds some support in the case of *Wheeler & Motter Mercantile Co. v. Kitchen,* 67 Okla. 131, L. R. A. 1918C, 160, in which the court in substance said that delay for an unreasonable length of time to return the check will amount to an election to accept the same as payment in full settlement. This might be true if, in addition to retaining the check, the plaintiff had failed to give notice of its refusal so to accept it. But the plaintiff is not subject to the rule announced in the dictum in this case, because the plaintiff refused to accept this check and from the date of its receipt was from time to time trying to effect a settlement upon it up until this action was commenced.

In addition, this check carried a conditional indorsement, requiring it to be accepted, not alone as settlement in full of the account for which it was sent, but also as a settlement in full of all other accounts between the parties. The rule announced in the last cited case is: "But, in our opinion, more than the mere receipt and retention of the check, with knowledge of the conditions under which it was sent, is essential to constitute acceptance thereof as full payment and satisfaction of the debt." See *Groh v. Great Eastern Casualty & Indemnity Co.*, 155 Ill. App. 18; *Emerson v. Gerber*, 178 Mass. 130. An annotation in L. R. A. 1918C, 160, summarizes the rule of the case as follows: "Ordinarily, the mere failure of a creditor to return a check sent him by the debtor in whole or partial payment of the debt does not constitute a payment of the debt, where the creditor does nothing indicating his intention and purpose to receive the check in payment." There are cases which seemingly are contra. In *Conde v. Dreisam Gold Mining Co.*, 3 Cal. App. 583, the maker of a note forwarded a draft for the full amount due thereon, which was received and retained by the payee's general agent, without any notice that the draft would not be accepted in payment, the retention of the draft operated as payment of the note. It has also been held that unreasonable delay in returning a check may make it equal to payment. *Smith v. Miller*, 43 N. Y. 171; *Mehlberg v. Tisher*, 24 Wis. 607. A long unexplained retention of a check tends to show its acceptance with the conditions upon which it was tendered. *Bloomquist v. Johnson*, 107 Ill. App. 154. Many other cases upon this point are to the effect that, where retention and delay cause loss to the maker, the unexplained retention of a check is equivalent to payment; as, for example, where the bank becomes insolvent, but that is not the situation here.

However, this court is of the opinion that the circumstances of this case bring it under the rule of *Wheeler & Motter Mercantile Co. v. Kitchen, supra.* The evidence is not sufficient to support any other finding upon this ques-

tion. Therefore, the trial judge should have directed a verdict for the amount of the check, $636.21.

There being no other error in the case, the judgment as to this is reversed and remanded to the trial court, with directions to enter a judgment for $636.21, and direct clerk to cancel check by judgment, and is affirmed in all other respects.

AFFIRMED IN PART AND REVERSED IN PART.

CLAUDE FORNEY V. STATE OF NEBRASKA.

FILED APRIL 29, 1932. No. 28217.

1. **Indictment and Information: JOINDER: ELECTION.** A joinder in one information, in separate counts, of different felonies, does not, by reason of such joinder alone, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial.
2. ———: ———: ———. The ruling upon a motion by the defendant, at the close of the state's evidence, to require the prosecutor to elect upon which count of an information he will stand is a matter addressed to the sound discretion of the trial court. The determining question to be considered is whether the defendant will be embarrassed or confounded in making his defense.
3. **Quære.** If personal property mortgaged in Nebraska is feloniously sold in Iowa, can the wrong-doer be convicted in Nebraska of selling, transferring, or in any manner disposing of such mortgaged property, *quære?*
4. **Criminal Law: SELLING MORTGAGED PROPERTY: VENUE.** *Held,* such wrong-doer cannot be convicted in Nebraska on the sole charge of selling such mortgaged personal property when the actual sale occurred in Iowa.

ERROR to the district court for Wayne county: CHARLES H. STEWART, JUDGE. *Affirmed in part, and reversed in part.*

D. Van Donselaar and *P. F. Verzani,* for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

PAINE, J.

This is a writ of error to the district court for Wayne county. The plaintiff in error, Claude Forney, hereafter called the defendant, was convicted of the felonies set out in sections 69-109 and 69-110, Comp. St. 1929, commonly known as selling and removing mortgaged property, which offenses were set out in five counts in the information, and the jury returned a verdict of guilty upon counts 2, 3, 4, and 5, and the district court entered a sentence of two years in the penitentiary upon each of four counts, said sentences to run concurrently.

The information charged that a mortgage was given to Sam Wertheimer and Sol L. Degen, doing business as the firm of Wertheimer & Degen, and the mortgage was given to the partnership. It is charged that the defendant mortgaged 50 head of white face steers, dehorned, of the average weight of 517 pounds, with a U brand on the left hip, to Wertheimer & Degen to secure the payment of $2,921.07. It is charged in count 2 that one white face steer, so branded and weighing 870 pounds, was sold by the defendant without first securing the consent of the mortgagees thereto in writing. The evidence may be set out briefly as follows: Ray Wenzel, who drove a truck, and who stated that he was sometimes known as Art Clymor, and lived at Norfolk, testified for the state that the defendant, Forney, told him to take a steer along with him to Sioux City and sell it, and when he got back defendant told him to keep the money on what defendant was owing him. Wenzel said defendant did not trade the steer to him on the account, and he did not buy the steer from defendant. He delivered the steer to the Walsh Commission Company, and received the money from Walsh, then made the settlement with Forney. It was charged in count 3 that the defendant, without the consent of the mortgagees, sold and transferred one of the above steers, which weighed 1,060 pounds, to Art Clymor,

a name under which Ray Wenzel sometimes went; and in count 4 of the information it was charged that the defendant, Forney, removed eight head of white face steers, above described and so branded, out of and away from Wayne county, Nebraska, without first securing the consent of the mortgagees in writing; and in count 5 of the information it was charged that the defendant, without the consent of the mortgagees, did remove three head of said white face steers out of and away from Wayne county, Nebraska.

James Jensen saw the defendant April 1, 1930, in Omaha, and testified to selling 30 head of white face cattle, a part of the 50 head under the mortgage. Sol L. Degen testified that the firm of Wertheimer & Degen carries on business at the Union Stock Yards, South Omaha, having been in business there for 30 years; that he sold Mr. James Jensen 50 head of yearling steers April 8, 1930, and Mr. Jensen bought these cattle for the defendant, Clyde Forney, and they were shipped to the defendant, who signed the chattel mortgage given on them to the firm, upon April 8, 1930, which mortgage was duly filed in Wayne county, Nebraska, upon April 12, 1930, for the sum of $2,921.07. On March 1, 1931, 30 of the same cattle were shipped back to the Union Stock Yards at South Omaha by the defendant and sold for $1,991.51, leaving a balance due of $1,146.95.

Tom Dunn, a trucker, testified that on November 23, 1930, he got four of these white face cattle out of defendant's feed yard and took them to Sioux City, where he unloaded them in the stock yards; that on February 3, 1931, the defendant met him on the street and told him that he wanted to send three steers down to Sioux City, and to come out in about an hour, which Mr. Dunn did, and they loaded up three steers about 9 o'clock at night and took with them a small calf, all of which were delivered to the stock yards in Sioux City the next morning, and that the defendant rode with them to Sioux City and return on this trip.

Ray Wenzel testified that he had lived in Wayne county and was usually known there as Wenzel, but that he was also known as Art Clymor; that he had known the defendant for three or four years, having picked corn for him, and that his wife had also worked for the defendant, and had sold him chickens; that upon January 5, 1931, witness had planned to take some hogs to Sioux City, and the defendant asked him to take a steer along, and that he took his own hogs and the steer of the defendant to Sioux City, shipping them by some trucker from Wakefield, whose name he does not know, but that he drove down in his own car and sold the steer and hogs to the Walsh Commission Company upon January 5. That about February 26, 1931, when he was shipping some of his own hogs to Sioux City by truck, the defendant told him to take down another steer, and he went over and loaded in the first steer that he could get hold of with his hogs, sold it, and got the check in his name and kept it for money that Forney owed him.

M. K. Berman testified that November 23, 1930, he sold eight head of white face cattle for the defendant, and identified a check, dated November 24, 1930, payable to Claude Forney, Wakefield, Nebraska, for $458.41, sold by Rice Bros., live stock commission firm of Sioux City, Iowa. Mr. Berman, salesman for Rice Bros., testified that he sold three head of cattle as salesman for Rice Bros. Live Stock Commission Company, Sioux City, Iowa, and identified a check given in payment thereof to Claude Forney, Wayne, Nebraska, upon February 4, 1931, for $152.77.

Frank Tyler testified that he had lived in Omaha for 30 years, and had been with the firm of Wertheimer & Degen for about 20 years; that upon February 22, 1931, he went to the farm of Claude Forney to check up the cattle on the loan, and when he counted the cattle he found that only 30 of the mortgaged cattle were there, and inquired of defendant what had become of the remainder. The defendant told him that some of them must have got out in the field; that he thought three of them had died, and that perhaps two or three had been stolen. Mr. Tyler was un-

able to obtain any information from defendant as to the rest of the cattle, and the 30 head remaining were shipped to South Omaha and sold, and credited upon the note and mortgage.

1, 2. The defendant insists that, when the information contains two counts which charge separate and distinct felonies, the state should be required to elect, and cites *Blair v. State,* 72 Neb. 501, which held that the court might, in the exercise of sound discretion, require the county attorney to elect upon which count he would rely for conviction before the accused would be required to make his defense. To this the state replies that, while the trial judge may require such election, it is not the duty of the court to compel the prosecutor to elect in every case. *Cohoe v. State,* 82 Neb. 744.

A joinder in one indictment, in separate counts, of different felonies, of the same class and subject to the same punishment, does not, by reason of such joinder alone, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. *Korth v. State,* 46 Neb. 631; *Bartley v. State,* 53 Neb. 310; *Sheppard v. State,* 104 Neb. 709. This is a matter resting in the sound discretion of the trial court, and the determining question in each case is whether the defendant has been embarrassed or confounded in making his defense. *Baker v. State,* 109 Neb. 558; *Luke v. State, ante,* p. 101.

3, 4. It is alleged as reversible error that, in counts 2 and 3 of the information, it is charged that the defendant, in Wayne county, Nebraska, unlawfully, knowingly, wrongfully, and feloniously, *did sell and transfer* certain steers covered by the mortgage set out, and that the evidence disclosed that the steers charged in each of said counts were transported from Wayne county by truck and sold in each instance at the stock yards in Sioux City, Iowa; that, after the state's evidence was introduced, the court erred in failing to sustain defendant's motion to direct an acquittal as to these two counts.

It is true that a state usually has no jurisdiction to punish crimes committed beyond its limits. 16 C. J. 162. "It was a rule of the common law that, when an offense was constituted by a series of acts, a part of which were done in one county and a part in another, there could be no prosecution in either, unless so much was done in the one as would constitute a complete offense." 16 C. J. 195. See 4 Blackstone's Commentaries, 303. However, this has now been changed by statute in England, and in these days, when mortgaged automobiles can cross the state lines in a few hours for sale there, and with new questions arising concerning the venue of crimes and torts connected with airplanes which do not stop within the state where jurisdiction is demanded, we are confronted by new conditions. See article on "Jurisdiction over Crimes Committed in Air," 2 So. Cal. Law Review, 483.

In our Bill of Rights, a defendant is protected in his right to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Const. art. I, sec. 11. And this right is protected by section 29-1301, Comp. St. 1929. But it may be mentioned in passing that this right of jury trial has been uniformly held to apply only to cases in which the right existed at common law. *People v. Martin,* 188 Cal. 281, 21 A. L. R. 1399.

In New York it has been held that, when a part of the acts constituting a crime are committed in a foreign state, it is sufficient if the transaction would be a crime if committed entirely within the state. *People v. Zayas,* 217 N. Y. 78, Ann. Cas. 1917E, 309.

This court has had before it many times prosecutions for larceny where property is stolen in one county and taken by the thief into another county, and it has been held that he may be prosecuted and convicted in either county. *Hurlburt v. State,* 52 Neb. 428. This court has further held that, in a prosecution for embezzlement of a right of action, the venue is properly laid in the county where the purpose is formed to convert the right in action and the decisive steps taken to carry out that purpose, al-

though the subject of the right of action is situated in another county. *Higbee v. State,* 74 Neb. 331.

It was held in *State v. Gorman,* 113 Kan. 740, that where a defendant ships mortgaged property outside the state, with the intent of selling the same in another state, he may be punished in the county from which the shipment was made, and in the same case it was further held that shipping mortgaged property out of the state, with the purpose of selling it there, amounts to disposing of it in the state, within the meaning of the statute making it a public offense to sell or dispose of mortgaged chattels with intent to defraud. It was thus held that the offense was punishable in the county from which such shipment is made, notwithstanding the state line was crossed from another county; and also held that the evidence will uphold a charge of selling and disposing of the property, whether or not it would have warranted a conviction if the charge had been merely of selling.

"We think that removal of property from the jurisdiction of the state with the purpose or necessary effect of defeating the mortgage lien is such a disposal of property as falls within the meaning of the statute. If intention to defeat the lien is essential, one must be presumed to intend the necessary consequences of his voluntary acts." *State v. Haynes,* 74 S. Car. 450.

"The Iowa statute, providing that if any mortgagor of personal property, while the mortgage remains unsatisfied, shall wilfully sell or dispose of the property without the mortgagee's written consent, he shall be guilty of larceny, etc., covers the case of a sale in Iowa of personalty mortgaged to residents of that state, though the mortgage was executed, delivered and filed in another state by nonresidents of Iowa." *In re Renshaw,* 18 S. Dak. 32, 112 Am. St. Rep. 778.

Section 69-109, Comp. St. 1929, provides generally that, if any person shall sell, transfer, *or in any manner dispose of* personal property which has been conveyed to another by mortgage, without first procuring consent of holder of the mortgage in writing, he shall be guilty of a felony.

In the case at bar, we find that the information in apt language charges in counts 2 and 3 that the defendant feloniously *"did sell and transfer"* certain live stock. It is possible that, under the authorities cited, if the information had also charged that the defendant did sell, transfer, *and dispose of* the steers in question, his conviction could have been upheld upon the ground that when the defendant loaded the mortgaged steers into a truck whose only destination was the stock yards at Sioux City, and whose instruction was to sell them in the morning and bring him back the proceeds, it would doubtless have been within the authorities cited to have held that such act of loading them in Wayne county for sale in Iowa would have been a sufficient *disposal of them* in that county to have warranted his conviction thereof. However, under the facts in the case and the language of the information, we hold that the judgment and sentence under counts 2 and 3 should be, and the same are hereby, set aside, reversed and the counts dismissed.

Error is charged in the giving of several instructions, and while the language used might have been improved and made more definite in some respects, we see no reversible error therein, and suggest that if the defendant's counsel had submitted better instructions they might have been used by the court.

Complaint is made of the interest and activity of the attorney employed by the mortgagees to collect the balance due on the note and mortgage. We are not able to find that any of this activity occurred in the presence of the jury, and his statement to the attorneys for the defense that there was no use of their making a defense, as, in his opinion, a conviction would result, was merely brotherly advice between lawyers. While he was present at one time in the county courtroom when the defendant was there under arrest, and while he testified in the trial in the district court as a witness, we see nothing in the conduct of this attorney that was prejudicial to the rights of the defendant.

A definite, positive charge is made in count 4 of the information that the defendant, Claude Forney, mortgaged certain white face yearling steers and on or about November 23, 1930, during the existence of the lien created by said mortgage, he did then and there unlawfully, wrongfully, knowingly, and feloniously remove eight head of said white face yearling steers out of and away from the county of Wayne, in the state of Nebraska, and that said illegal and unlawful removal was done by the defendant with the intent to deprive the mortgagees of their security.

In count 5 it is definitely charged that on February 3, 1931, the defendant, in the same manner and under the same conditions, removed three more head of said white face yearling steers from Wayne county, Nebraska, with the same felonious intent of defrauding the mortgagee. The jury found the defendant guilty of the crime charged in said counts 4 and 5, herein set out, and thereafter, upon November 24, 1931, the motion for a new trial being overruled, the said defendant was sentenced to be confined in the penitentiary for a term of two years upon each of said counts, and it was directed that said sentences should run concurrently.

We have examined the other errors set out in the brief of defendant and, finding nothing prejudicial to the defendant therein, will not extend this opinion to the length necessary to discuss in detail each of the 24 assignments of error.

There being no error in the information concerning counts 4 and 5, and the record being without error in reference thereto, the sentence thereunder being as provided by law, it is hereby directed that the judgment and sentence relating to said counts 4 and 5 be in all things affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

ROSE, J., concurs in the result.

EDDY MORYS, APPELLANT, V. JOSEPH MORYS ET AL., APPELLEES.

FILED APRIL 29, 1932. No. 28161.

1. Wills: CONSTRUCTION. To render a condition effective, it must affirmatively appear either from the language of the gift or from the will as a whole, when read in the light of the surrounding circumstances. Estates may be devised either absolutely or upon condition, but condition will not be implied.
2. ———: ———. The will provided that, "in and for consideration" of my son taking care of my wife and myself until our deaths, testator bequeathed unto him certain lands. The phrase "in and for consideration" did not mean that the devise was on a condition, but was employed to show motive inducing making of devise, and words "to stay with and care for" have no fixed legal significance and are to be construed according to intent of instrument and surrounding circumstances. Testator's intention under will *held* to be a devise to son of an absolute estate in remainder to land, subject to mother's life estate; expression of motive in making gift not amounting to "condition."
3. ———: ———. The word "then" in the will was intended as an adverb of time signifying when the enjoyment of the vested estate in remainder was in son, and not used as a conjunction signifying a condition upon which the estate was to vest.

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

Wagner & Wagner, for appellant.

Kemp & Brower, contra.

J. H. Kemp, guardian *ad litem.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

Suit to quiet title brought by Eddy Morys, in which defendants brought cross-petition and sought partition. From an adverse decree plaintiff appeals.

The real question to be determined is the construction of the will of Mathew Moryc, and particularly the follow-

ing clause: "In and for consideration of my son, Ladyslaus Moryc, taking care of both my wife and myself until the time of our deaths I bequeath unto him (describing 160 acres of land), and until our deaths he is to pay as rent for the same two-fifths (2/5ths) of all grain rent and one-half of all hay. After my death he is to take care of my wife, Anna Moryc, until her death and then said place will belong to the said Ladyslaus Moryc. She shall have all of my properties and possessions until the time of her death and all the live stock and other movable objects shall be hers to sell or to do with as she shall see fitting and proper."

The testator died in 1926. The will, executed January 9, 1924, was admitted to probate May 6, 1926. Anna Moryc survived her husband and died August 29, 1930. Eddy Morys, appellant, referred to in the will as Ladyslaus Moryc, after his mother's death contracted a sale of the 160 acres in question for $10,000, out of which he had to pay a $3,500 mortgage.

Estates may be devised either absolutely or upon condition. A condition however will not be implied. It must affirmatively appear either from the language of the gift or from the will as a whole, when read in the light of the surrounding circumstances. The intention of the testator herein was to devise to the appellant an absolute estate in remainder to the land in question subject to the life estate of his mother, Anna Moryc. In the clause quoted there are expressions of motive of the testator in making the gift, but they do not amount to a condition upon which he made it.

McCarty v. Fish, 87 Mich. 48, and *Martin v. Martin,* 131 Mass. 547, hold that recitals in a will that the legacy given is in consideration of the legatee's attention to testatrix and her husband or in consideration of being taken care of and well treated by devisee during remainder of testator's life are expression of motive of the testator in making the gift, and not a condition upon which it is made.

The testator's intent to express the motive of consideration is quite clear. Appellant never married. At the time of his father's death he was about thirty-one years of age and had continuously lived on the home farm with his parents. He received nothing during the father's lifetime and was without means at the time of testator's death. Not long before testator's death, at an advanced age, knowing the obligations he owed appellant, the will was executed, which reserved a life estate in the home farm in his wife and remainder to appellant. The phrase "in and for consideration" does not mean that the devise was on a condition, but was employed to show the motive inducing the making of the devise. The words "to stay with and care for" have no fixed legal significance and are to be construed according to the intent of the instrument and the surrounding circumstances. *Bull v. McCrea,* 8 B. Mon. (Ky.) 422; *Bless v. Blizzard,* 86 Kan. 230.

A devise may refer to a service to be performed and yet not be conditional upon the rendition of such service. *Bigstaff v. Lumkins,* 13 Ky. L. Rep. 248. A devise to one with a provision that after receiving the gift he pay certain sums of money or render some specified performance to persons designated is generally construed not strictly a condition the breach of which may forfeit the estate, but rather as imposing a personal liability upon such devisee, or as creating a charge, lien or trust. *Matter of Gray,* 27 N. Dak. 417; *Maynard v. Zellner,* 151 Ga. 72; *Cunningham v. Parker,* 146 N. Y. 29; *Meins v. Meins,* 288 Ill. 463; *Cronin v. Cronin,* 314 Ill. 345.

At the time of testator's death appellant was farming the home place, paying the two-fifths rent, and continued to stay with the widowed mother until she leased the place to another son. Then the mother made her home with her married son, Joe, and visited with the other children at their homes from time to time, and finally died at Joe's home. Appellant also stayed at Joe's considerable of the time his mother was there. When away at his trade he would come back for Sundays. Whenever the mother was sick appellant was there, and in her last sickness of about

eight weeks' duration, appellant was with his mother most of the time. The mother never complained of the care appellant gave her. Appellant ministered to his mother by being with her. This aged mother derived comfort in this unmarried son being actually with her. Anna Moryc had ample means of her own. She neither asked nor expected actual support from the appellant. He was always ready with a protecting arm and actually gave the care, comfort and support of being present in company with his parents until their deaths and fulfilled what the testator actually intended under the circumstances as to the care.

Appellees stress the phrase "and then said place will belong." They claim by the expressed provisions of the will the estate is to vest only at the widow's death, "and then" it is to become appellant's if he had performed the condition. The word "then" is sometimes an adverb of time, meaning existing, acting at or belonging to time mentioned, and is sometimes a conjunction, signifying in that case, in consequence, as a consequence, therefore for this reason. *Western & A. R. Co. v. Smith,* 145 Ga. 276. The testator's intention was to create a life estate in his wife, remainder in appellant. The remainder vested on the death of the testator, but the enjoyment of appellant in the land in question is deferred until the death of the mother. "Then" is intended as an adverb of time signifying when the enjoyment of the vested estate in remainder is in appellant, and is not used as conjunction signifying a condition upon which the estate is to vest.

It is to be noted that the testator's will contains no residuary clause; there is a want of limitation over, and no forfeiture is expressed. The want of any limitation over in a will is entitled to consideration in determining testator's intention.

Upon trial *de novo* we reach the independent conclusion that title to the premises in question should be quieted in appellant subject to any legal liens thereon. Hence, this cause is reversed and remanded to the district court, with directions to enter a decree in accordance with this opinion.

REVERSED.

FREMONT BEVERAGE COMPANY, APPELLEE, V. MARYLAND INSURANCE COMPANY, APPELLANT.

FILED APRIL 29, 1932. No. 28190.

1. Insurance: POLICY: REFORMATION. Insured is entitled to reformation of fire policy in case agents of insurer, with knowledge that insured wanted merchandise located in certain building insured, represented in effect that policy covered said merchandise.
2. ———: ———: ———. Evidence *held* to warrant reformation of fire policy so as to cover merchandise situated in building located across street from those described in policy.

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

Rose, Wells, Martin & Lane and *Cook & Cook,* for appellant.

John Gumb, Jr., and *Abbott, Dunlap & Corbett, contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

This is an action in equity to reform an insurance policy. From a decree granting reformation the insurance company appeals.

The sole question on this appeal is whether or not the appellee was entitled to have its policy of insurance reformed. The Maryland Insurance Company, appellant, on March 10, 1930, issued its policy of fire insurance to the Fremont Beverage Company, through its Fremont, Nebraska, agency, by Reynolds Brothers its agents, insuring for one year the property described therein as:

"$2,500 on merchandise of every kind and description, including live and dressed poultry, materials, supplies, lumber, manufactured or unmanufactured, boxes and other containers for dressed poultry, labels and chemicals, all while contained in the brick building, occupied as poultry feeding, packing and dressing station and cold storage plant and in frame and/or iron clad additions ad-

joining and communicating, situated on the west side of Platte avenue at or near its intersection with Factory street, block 13, Cloverly Addition to Fremont, Nebraska. This insurance shall also extend to cover merchandise as hereinbefore described while in or on platforms and on the premises adjoining and/or in railroad cars on side-tracks within five hundred (500) feet of building above described."

Appellee conducted its business in a plant consisting of several buildings, two of which were on the east side of Platte avenue. On August 14, 1930, appellee sustained a loss by fire on its merchandise in the south building on the east side of Platte avenue. The precise question on this appeal is whether or not, under the pleadings and evidence, the appellee was entitled to have its policy reformed to cover merchandise located in the south building on the east side of Platte avenue.

It is conceded that, if the policy is reformed, appellee should recover for the loss of the merchandise. The pleadings present the claim that appellant's agents knew that there was merchandise of appellee east of Platte avenue; that appellee's general manager wanted that merchandise insured, and that with knowledge of these facts appellant's agents represented in effect that the policy issued covered said merchandise. If the evidence sustains these claims then in equity appellee is entitled to reformation. *Grand View Building Ass'n v. Northern Assurance Co.*, 73 Neb. 149; *Robinson v. Union Automobile Ins. Co.*, 112 Neb. 32.

Upon trial *de novo* we reach the independent conclusion that the evidence sustains the claims of the appellee and that the policy in issue should be reformed to cover the merchandise loss resulting from the fire on August 14, 1930. The agents of appellant, Reynolds Brothers, wrote all the insurance of appellee for some years and were notified as early as 1925 that appellee had merchandise in its buildings east of Platte avenue which was to be covered by the insurance. Appellee's manager was advised that the policies covered such. Several times each

year one of the Reynolds Brothers visited the plant of appellee. Appellee through its representative relied entirely on the Reynolds Brothers in the preparation and writing of all its policies of insurance. Using the same form of coverage for merchandise, appellant renewed the insurance from year to year through its Fremont agency conducted by Reynolds Brothers. In February, 1930, there was a fire loss on the merchandise in the north building of appellee's plant on the east side of Platte avenue. This loss was personally inspected by appellant's agent, proof of loss furnished, and loss paid by appellant.

The policy in issue was written March 10, 1930, very shortly after the February fire. It was a renewal of and exactly similar, except as to dates, to the policy in force upon which the loss was paid. When the policy in issue was delivered, appellant through its agents knew that there was merchandise in the buildings of appellee's plant east of Platte avenue which it wanted and believed was covered thereby. The appellant in effect represented that this policy covered said merchandise. After the August 14, 1930, loss appellee's attention was for the first time called to the fact that the description put into the policy in issue by agents of appellant was claimed to be ambiguous and not to cover the merchandise, although the February fire had covered a similar loss in practically the same location, which loss had been paid by appellant without question.

The judgment and decree entered in the trial court is right and is

AFFIRMED.

OSCAR E. LOWELL, APPELLANT, V. BUFFALO COUNTY, APPELLEE.

FILED APRIL 29, 1932. No. 28051.

1. **Eminent Domain:** DAMAGE TO PROPERTY. The constitutional provision forbidding the taking or damaging of private property for public use without just compensation applies to special damages to land by the vacating of a public highway.

2. ———: ———. The words "or damaged," as used in the constitutional provision forbidding the damaging of private property for public use without just compensation, include all damages thus causing a diminution in the value of such property.
3. ———: ———. The law provides for the ascertainment and payment of special damages to private property by the vacating of a public highway.
4. ———: ———. APPEAL. An appeal to the district court from an award of special damages to private property, caused by the vacating of a public highway, is authorized by law.
5. **Highways:** VACATING: DAMAGES. Upon appeal from an award of damages caused by the vacating of a public highway, the compensation to which claimant is entitled must be ascertained "in the same manner as in actions by ordinary proceedings." Comp. St. 1929, sec. 39-141.
6. **Eminent Domain:** DAMAGE TO PROPERTY. Neither Constitution nor statute excepts from just compensation for special damages to private property by the vacating of a public highway any loss or injury that reduces its value, special benefits considered.
7. ———: ———. A landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree, but this rule does not prevent the recovery of special damages.
8. ———: ———: MEASURE OF DAMAGES. Where private property has been taken or damaged by the vacating of a public highway, the owner, if suffering special damages, is entitled to recover the difference between its value immediately before and immediately after the change.
9. ———: ———. Where a public highway, intersecting an improved farm and extending to markets in both directions, is vacated, leaving the landowner with only one outlet from a *cul-de-sac*, he may thus suffer special damages not common to the community at large.
10. ———: ———: MEASURE OF DAMAGES. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled, where he suffers damages not common to the public generally.
11. ———: ———. Where the owner of real estate is entitled to recover special damages, on the ground that it was depreciated in value by the vacating of a public highway intersecting it, the jury, in determining his just compensation, may consider resulting diversion of travel and removal of a mail box and a

schoolhouse, not as independent items of damage, but for the purpose of determining the market value of the property before and after the vacating of the highway.

12. Evidence: WITNESSES: CROSS-EXAMINATION: VALUE OF LAND. On cross-examination, witnesses may be interrogated as to their knowledge of values of lands in the immediate vicinity of claimant's lands, the value of which is fixed and determined on direct examination. Such cross-examination is admitted for the purpose of testing the knowledge of the witnesses on land values and goes to the credibility of the witnesses, under proper instructions of the court on that subject.

13. Trial: INSTRUCTIONS. Where the pleadings are set out in full by the court in an instruction and which may contain a misstatement which is not allied with the facts produced on the trial, a subsequent instruction admonishing the jury to consider the pleadings merely as statements of the contentions of the respective parties and not as evidence upon which to base a verdict does not make such misstatement prejudicially erroneous.

14. Highways: VACATING: DAMAGES: PROOF. In an action to vacate a highway, where petitions signed by appellant and referring to other highways in the immediate vicinity north and south of the vacated highway are offered and received in evidence, the same may be received as evidence, to be considered by the jury, together with all the other evidence and circumstances in the case, in assessing the amount of special damages that might accrue to appellant in an action of this kind.

15. Trial: INSTRUCTIONS. Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant.

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

Nye & Nye, for appellant.

E. G. Reed, contra.

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

MESSMORE, District Judge.

This is a proceeding brought in the district court for Buffalo county to recover from said county the sum of

$5,000 for damages alleged to have been caused by the vacating of a public highway running north and south through a 200-acre island farm owned by appellant. On the trial of the case to a jury appellant, plaintiff below, recovered a judgment against said county, defendant below, in the sum of $125 and interest. This is the second appeal to this court of this action and the second time that the jury have returned a verdict in a like amount, with the exception that interest was added to the last verdict. Plaintiff filed his claim with the county board originally, was awarded $125, and appealed to the district court.

The petition states a cause of action and contains in detail pleas that plaintiff's dwelling-house and other farm buildings are now on a blind road or *cul-de-sac;* that the distance to his public markets at Gibbon and Lowell is materially increased; that the former general traffic which created a market at his home for some of his farm products is diverted to other highways; that a former mail box and schoolhouse a few rods from his residence are more than a mile away; that these changes were caused by the changing of the highway; that the vacating of the old highway decreased the value of his real estate to the extent of $5,000, for which he demands judgment.

Defendant's answer alleges that plaintiff's lands described in his petition are still connected with a public highway; that at the time of vacating the part of the highway mentioned in said petition defendant, by its officers and agents, laid out, constructed and improved a new highway which lays west of plaintiff's property approximately three-quarters of a mile, which highway is the main highway connecting the villages of Gibbon and Lowell, which are the near trading and market points of the plaintiff; that said highway is state-improved and graveled and serves plaintiff and other residents and property owners of that vicinity; that said state-improved highway is connected with plaintiff's property by a good and suitable public highway; that plaintiff's farm is nearer to market than prior to the change of said high-

way; that said highway, after being vacated by law, has reverted to plaintiff, so that he now has full use of same and receives a special benefit on account thereof to the full value of the land constituting said vacated highway; that he receives benefits from the change of said highway to its present condition; denies that plaintiff has sustained any damages except to the extent of the sum of $125 and offers to pay that sum into court for plaintiff; denies each and every other allegation of the petition not admitted or denied. The reply was a general denial.

The bill of exceptions is quite voluminous, but for the purposes of this opinion, since the evidence has been well set out in the former case of *Lowell v. Buffalo County*, 119 Neb. 776, only so much thereof as may be necessary to determine the alleged errors on the trial of this case will be stated.

Plaintiff's evidence in the main went to the proof of the essential elements of his petition, that is, that there was a decreased value to his lands immediately after the vacating of the highway as compared with their value prior to such vacating; that there was a loss of products sold by him at his farm home for the reason that the highway had been moved to the west and was not accessible to travel as it had heretofore been when on the public highway and main road between said villages of Gibbon and Lowell; that the mail box, formerly near the gate of plaintiff's residence, had been moved to the main highway, a distance of 6,460 feet, approximately, and that the schoolhouse had been moved from the Lowell property over and near the new highway, a distance of about 8,320 feet from plaintiff's residence.

Several witnesses testified as to the value of plaintiff's land immediately prior to the time of vacating the highway and immediately thereafter, which is the rule laid down in *Lowell v. Buffalo County*, 119 Neb. 776.

The evidence of defendant is to the effect that no damage was done by the moving of the schoolhouse and mail box and no decrease in the value of plaintiff's lands of any kind or nature resulted thereby; that said lands

are as valuable now, with conditions changed, as prior to the vacating of the highway. Exhibits were introduced both by plaintiff and defendant which gave the jury a graphic picture of the improvements on plaintiff's farm and of the vacated and new highways.

We will not discuss the propositions of law relied upon by plaintiff for a reversal, which involve section 21, art. I of the Constitution, and sections 39-124, 39-138, and 39-141, Comp. St. 1929, for the reason that the same have been interpreted by this court in the previous decision rendered in this case, and it is not necessary to review or reinterpret these sections in view of the instructions given by the trial court and in view of the previous holding of this court in this case.

The principal assignments of alleged error complained of by plaintiff may be summarized as follows: Error of the trial court in disregarding the law of the case which was set forth in the former opinion of this court in this case; error of the trial court in examining witnesses from the bench on elements of defense not pleaded and in disregard of the law of the case; error of the trial court in directing the attorney for defendant to disregard the law of the case; error of the trial court in admitting evidence of value of other lands in disregard of the law of the case; error of the trial court in admitting evidence of the establishment and of the vacating of other roads in disregard of the law of the case; error of the trial court in manifesting disapproval of the law of the case in the presence of the jury. In support of these assignments of error is cited the case of *Lowell v. Buffalo County,* 119 Neb. 776.

Plaintiff complains of the examination of the witness Howard Wells by the court, wherein it inquired of him upon what part of his farm plaintiff raised sugar beets, how they are harvested and how they are delivered to market, and the distance they would have to be delivered to market. No objections were interposed to the court questioning this witness, as shown by the record at questions 1,467 and 1,475, inclusive. There is some evidence

in the record of plaintiff raising sugar beets and having had a good crop of same. We find nothing in the questions so asked by the court that is prejudicial to the interests and rights of plaintiff.

To question 2,240 there was an objection interposed as leading. The court replied that it was leading and the question was withdrawn. Attorney for plaintiff then stated there was no question and the court made this remark, "Ask him how that road ran." Certainly, this is not a direction to an attorney as to how to conduct his case; the court might well have asked that question to clarify the fact for the jury.

With reference to question 2,500 the court made this statement: "What are we at? Why don't you object, Mr. Reed?" This remark was followed by some argument, after which the attorney for plaintiff withdrew the question.

Plaintiff complains that in giving instruction No. 2 the court committed error by setting out the answer in full. That part of the instruction complained of is to the effect that the answer sets out that plaintiff is nearer to market on the new road than he was prior to the vacating of the old road. In the instruction the court set out in detail the contentions of the parties, as contained in such pleadings, and which he further instructed were not evidence to be considered by the jury. Instructions 3 and 4 govern this proposition, and such error, if any, would not be prejudicial to plaintiff's rights, more especially when the jury are apprised of the purpose and effect of the pleadings of the parties.

Plaintiff complains because there were received in evidence exhibits 9 and 10, purporting to be petitions to vacate roads and which had been signed by plaintiff. While these petitions were not petitions to vacate the highway immediately in front of plaintiff's place, they were petitions that were signed and presented to the county board to vacate roads north and south of his place and which do, more or less, run over his property. We cannot see that this would prejudice the rights of plaintiff, but on the

whole evidence it might be a circumstance that could be taken into consideration by the jury, together with all the other evidence in the case, in estimating any damage that might accrue to plaintiff by virtue of the vacating of the road in question.

Plaintiff complains of the court permitting witnesses to testify as to their knowledge of the values of other lands in the immediate vicinity of plaintiff's lands and in reference to the sales of lands in close proximity to his lands during the year 1927 or close to that time, as to the value of plaintiff's lands and also as to plaintiff's evidence on the different lands he owned, which evidence the court admitted for the sole and only purpose of testing the witnesses' knowledge of values of lands and which evidence was elicited on cross-examination, after the values of plaintiff's lands had been stated on direct examination by plaintiff and his witnesses. The knowledge that the witnesses may have in reference to the values of lands, at the time inquired about, in the same vicinity with the lands in question may be elicited on cross-examination, when said values have been gone into on direct examination, as testing the knowledge of the witnesses on values. It goes to the reasonableness or unreasonableness of the story told by the witnesses, to their credibility, to what they know about the facts about which they are testifying, and in this case was proper cross-examination and not prejudicial error.

There is a great deal said in the record by plaintiff's attorney and the court in reference to the moving of the schoolhouse and the mail box and some evidence about the time of moving the schoolhouse and the minutes of the school board showing the vote on the removal of the schoolhouse. The debate in reference to this evidence and the values to be placed on the two items in question seems to have been between plaintiff's attorney and the court. In getting at what this court said in its previous decision in this case we quote from *Lowell v. Buffalo County*, 119 Neb. 776: "Where the owner of real estate is entitled to recover special damages, on the ground that it was

depreciated in value by the vacating of a public highway intersecting it, the jury, in determining his just compensation, may consider resulting diversion of travel and removal of the mail box and a schoolhouse, not as independent items of damage, but for the purpose of determining the market value of the property before and after the vacating of the highway." The mail box and schoolhouse were moved and the facts and circumstances attending their removal were received in evidence. Having been moved, it becomes a question as to what damage, if any, especially plaintiff has suffered by virtue of their removal, not as independent items, but as announced in the rule just quoted. There is no impropriety in the trial court interrogating witnesses, when its tendency is only to develop the truth. *Leo v. State,* 63 Neb. 723. When the whole record is considered in this case, even though more care might have been exercised in some instances, prejudicial error in this respect is not shown. It is entirely proper for the trial court to aid in preventing misconception of the evidence by properly directed questions or remarks.

Plaintiff complains of the giving of instruction No. 9 as follows: "You are instructed that the plaintiff will be entitled to recover all damages sustained by him in respect to his property not suffered in common by the public generally. You are instructed to also take into consideration any special benefit, if any, which the plaintiff has received by reason of the return of the lands over which the old road ran and the fact that his farm is now in one tract and not divided by the road vacated." On vacating the highway in front of plaintiff's place the land reverted to him; he owned the fee simple title thereto and any benefit that would accrue to him by virtue of this fact was also for the jury to take into consideration in assessing and determining his damage, if any. *Kirkendall v. City of Omaha,* 39 Neb. 1; *Wagner v. Gage County,* 3 Neb. 237. The instruction is not erroneous when considered together with all the other instructions in the case. The instructions must be construed as a

whole, and where they, in their entirety, fairly submit the issues to the jury, even though there is a seeming misstatement in one part or a failure to give a requested instruction, it is not ground for reversal. *Bailey v. Kling,* 88 Neb. 699.

Plaintiff complains that the court inquired about lands owned by plaintiff nearer to the new schoolhouse site than the lands in question in this action. We have carefully read the remarks made by the court and do not believe the same to constitute prejudicial error.

On the retrial of this case the evidence heretofore not admitted on the first trial, which this court said should be submitted to the jury, laying down the rule in reference to any special damages suffered by plaintiff, was submitted to the jury by and under proper instructions of the court detailing the rules of law that govern this case, and the jury considered the diversion of travel, inconvenience of access, diminution of business carried on on the property, the removal of the schoolhouse and mail box, not as independent items of damages, but for the purpose of determining the market value of the property before the vacating of the highway and its market value after the highway had been vacated, which is the rule announced in *Lowell v. Buffalo County,* 119 Neb. 776.

We have carefully examined the record and the remarks of the trial judge, as contained therein, and find the same to be without prejudicial error as affecting the rights of plaintiff. We believe that the trial court properly admitted the evidence incident to the elements of proof set forth in plaintiff's petition and instructed fully and properly under the rules laid down in *Lowell v. Buffalo County,* 119 Neb. 776; that the jury had before it all the evidence of an admissible character which might tend to prove or disprove the allegations of plaintiff's petition, and in arriving at their verdict and in assessing the amount of plaintiff's recovery in the sum of $125 and interest, we feel that under the circumstances this case should be affirmed and the judgment of the lower court is hereby

AFFIRMED.

EMELIA MANCUSO ET AL., APPELLEES, V. STATE OF NEBRASKA, APPELLANT.

FILED APRIL 29, 1932. No. 28224.

1. Statutes: CONSTRUCTION. It is an established rule of construction in this state that special provisions in a statute in regard to a particular subject control general provisions.
2. ———: ———. Generally, where there is a conflict between a general and a special statute applicable to the same subject-matter, the latter must prevail.
3. ———: REPEAL: PRESUMPTION. Presumption is against implied repeal of provisions of a local or special statute by a later general act.
4. ———: CONSTRUCTION. Statutes should be construed so as to sustain rather than defeat them; so as to make them valid, if the language will permit, rather than without effect.
5. ———: REPEAL. Section 29-2407, Comp. St. 1929, enacted in 1873, is not repealed by section 40-101, Comp. St. 1929, of the homestead law, passed in 1879.
6. Fines: LIENS: HOMESTEAD. A fine and costs imposed for a criminal offense, unless the sentence is for a term of more than two years in the penitentiary or death, creates a lien on the homestead of such convict, and the homestead is subject to sale under execution issued on such judgment for the fine and costs.

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

Henry J. Beal, John W. Yeager and *Frank H. Woodland,* for appellant.

Wear, Moriarty, Garrotto & Boland, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

RAPER, District Judge.

Emelia and Pietro Mancuso, husband and wife, own as tenants in common two lots in Omaha, on which they have resided as a homestead since October, 1924. On January 27, 1925, Pietro Mancuso, on a plea of guilty, was sentenced by the district court for Douglas county to serve a term of 30 days in jail and pay a fine of $500 and costs. He served the jail sentence and was released.

The fine and costs have not been paid. The homestead owners allege these facts in their petition, and claim that the homestead is exempt from the fine and costs, and pray to quiet their title as against the apparent lien of the judgment for such fine and costs. The State of Nebraska is named as the sole defendant. No service of summons was made, but Frank H. Woodland, as attorney for the defendant, filed demurrer to the petition on the ground that the petition did not state a cause of action. The court overruled the demurrer, and entered decree that the state is barred from any claim or right by virtue of said fine and costs, from which decree the state appeals.

The sole issue is whether a judgment for a fine and costs, where the sentence is less than two years in the penitentiary, is a lien on the homestead of the convict.

The homestead law, section 40-101, Comp. St. 1929, defines a homestead and provides it "shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided." Section 40-103, Comp. St. 1929, makes homestead subject to execution or forced sale in satisfaction of judgments obtained for debts secured by mechanics', laborers', or vendors' liens upon the premises, and on debts secured by mortgages executed and acknowledged by both husband and wife or by an unmarried claimant. The homestead act was amended to read as above and the exceptions in section 40-103 were adopted in 1879. The law of 1866 provided that the homestead shall not be subject to attachment, levy or a sale upon execution or other process issuing out of any court within the territory so long as the same shall be owned and occupied by the debtor as his homestead.

Section 199, ch. 16, Laws 1866, provided: "The property, real and personal, of every person who shall be convicted * * * shall be bound, and a lien is hereby created on the property, both real and personal, of every such offender, * * * at least so far as will be sufficient to pay the fine and costs of prosecution. And it shall be the duty of the clerk * * * to issue an execution for

every fine * * * and for all costs, * * * which execution shall be delivered to the sheriff * * * and shall be by him levied on all the estate * * * which the defendant * * * possessed, as his or her own real or personal estate * * * which property, so to be levied upon, shall be advertised as in civil cases, and sold."

It is probable that under those statutes the homestead would not be exempt from fines and costs, as the homestead law was a general one and the law concerning the lien for fines is in the nature of a special provision. It was so held under similar statutes in *Enderman v. Alexander,* 68 Colo. 110, 10 A. L. R. 767. Both of these laws appear in the 1866 statutes presumably passed at the same session.

In 1873 the legislature changed the act of 1866, sec. 199, *supra,* to read as follows: "Judgments for fines and costs in criminal cases shall be a lien upon all property of the defendant within the county from the time of docketing the case by the clerk of the proper court, and judgments upon forfeited recognizance shall be a like lien from the time of forfeiture. No property of any convict shall be exempt from execution, issued upon any such judgment as aforesaid, against such convict, except in cases where the convict shall be sentenced to the penitentiary for a period of more than two years, or to suffer death, in which cases there shall be the same exemptions as at the time may be provided by law for civil cases." Laws 1873, ch. 58, sec. 524. There has been no change in this statute since 1873, and it now appears in 1929 statutes as section 29-2407.

The homestead law of 1879 does not refer to or in terms repeal the above statute.

The 1873 statute is complete in itself and is limited to special cases in favor of the sovereign state, and the homestead law is complete within itself, but of general application. It is not always easy to determine the distinction between what are general and special statutes, but in this case it seems reasonably clear that section 29-2407 should be classed as a special statute, and being by

its terms clear and positive will prevail unless the homestead act of 1879 repealed it by implication.

In *State v. Cornell,* 54 Neb. 72, this court held: "It is a firmly established rule of construction in this state that special provisions in a statute in regard to a particular subject control general provisions." And in *State v. Nolan,* 71 Neb. 136, it is stated: "Where general and special provisions of a statute come in conflict, the general law yields to the special without regard to priority in dates, and a special law will not be repealed by general provisions, unless by express words or by necessary implication."

California, in *Banks v. Yolo County,* 104 Cal. 258, states: " 'Repeals by implication are not favored. * * * This rule has peculiar force in the case of laws of special and local application, which are never deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect.' Cooley, Constitutional Limitations (6th ed.) 182." Cases to the same tenor might be multiplied indefinitely. If both the acts can be construed by any reasonable hypothesis as valid, this should be done in order to avoid repeal. The effect of the 1879 homestead law is to be resolved by the intent of the legislature. It may be presumed that the legislature was familiar with the prior legislation, and if it intended to repeal the existing law, it would have said so. Applying the foregoing principles, we hold that section 29-2407 was not modified or repealed by the general homestead act, and is valid and in force. The appellee claims that the statute by the use of the word convict is applicable only to one convicted of a felony, while the appellee was convicted of a misdemeanor, but its plain meaning is as though it read "such convicted person." A convict is defined as one who has been tried by process of law and found guilty.

Several cases are cited from the federal courts which granted exemptions from fines and costs, but they are no assistance here. The federal law provides that judgments for fines or penalties may be enforced by execution in

like manner as judgments in civil cases are enforced, and they further hold that homestead exemption laws given by the laws of a state may be asserted against a judgment in a federal court imposing a fine, even though under state decisions the exemption does not extend to executions for torts or for fines imposed under the criminal laws of the state. *United States v. Stacey,* 155 Fed. 510. In *Allen v. Clark,* 126 Fed. 738, it is stated that, in the absence of any statute expressly providing therefor, an execution on a judgment for a fine in favor of the United States cannot be levied on defendant's homestead in Virginia, although under the state law such homestead is only exempt from contract debts, and not from judgments for torts or in favor of the commonwealth in criminal cases. Cases are also cited from Arkansas, Missouri, Kentucky, and Illinois. In none of those states are the statutes similar to ours.

It is well said in the opinion in *McClure v. Braniff,* 75 Ia. 38, which holds homestead liable for costs and attorney's fee in a prosecution for crime: "It may be that this consideration of the law will in some cases cause a loss of homestead rights, and lead to hardships; but, if so, it is beyond our control. We must interpret the law as we find it. The general assembly may have thought it better to make the homestead liable in such cases than to permit the homestead right to operate as a shield for the protection of the offender against the consequences of his wrongful acts."

It is clear that the legislative intent in enacting the statutes under consideration herein was that the public welfare would be best promoted by the enforcement of the criminal laws, and one of the most potent means of the enforcement is by fines imposed for their violation. The homestead is not exempt from execution sale for a fine and costs imposed against the owner.

The decree of the district court is reversed and the cause is dismissed at the cost of appellees.

REVERSED AND DISMISSED.

RED WILLOW COUNTY, APPELLANT, V. GEORGE MCCLAIN ET AL., APPELLEES.

FILED MAY 6, 1932. No. 28220.

1. **County Commissioners: JUDICIAL FUNCTIONS: CLAIMS.** "County commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed." *Mitchell v. County of Clay*, 69 Neb. 779.
2. ———: ———: COLLATERAL ATTACK. In fixing the amounts allowed a sheriff for the conveyance of prisoners, as involved here, the law requires a county board to decide questions of fact; hence, it is *held* (1) that their act is quasi judicial and (2) their decision is not subject to collateral attack by original action in the district court.

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

C. D. Ritchie, for appellant.

Cordeal, Colfer & Russell, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

PER CURIAM.

The county appeals from a judgment dismissing its causes of action for alleged overpayments by the county to a sheriff.

The amended petition, filed in February, 1931, contained 43 causes of action against the sheriff and his bondsman. Each involved a separate claim—for conveying prisoners to industrial schools, to reformatories, to the penitentiary, and for the return of fugitives. Each cause quoted a specific and itemized claim allowed the sheriff by the county board and pleaded the facts upon which prayer for recovery was based. The first cause was based on an alleged overpayment of a claim arising September 21, 1921, allowed by the county commissioners October 5, 1921, for taking a girl to the industrial school.

The last cause, for taking a boy to the reform school at Kearney on May 21, 1930, was allowed June 3, 1930. The other causes were based on intervening transactions.

The defendants demurred to each cause of action as not stating sufficient facts. The court overruled the demurrer to all the causes relating to the reformatory for boys and to the penitentiary, except the fifteenth (wherein the conveyance to the penitentiary was by automobile); and sustained the demurrer to the fifteenth and all other causes. Appellant elected to stand on its petition on the causes as to which the demurrer was sustained, so they were dismissed. Issues were joined on the causes relating to the penitentiary and reformatory for boys, and, upon trial, judgment of dismissal was rendered dismissing them also. Error is assigned because the court sustained the demurrer to each of the 18 causes of action and because the judgment on these and the causes tried to the court is said to be contrary to law.

As the claims arose from time to time the sheriff filed them with the county clerk. They were considered, duly allowed and paid. No direct appeal was ever taken. The actions involved here were brought directly in the district court. The sheriff and his bondsman, as appellees, assert that the county board in passing on the claims of the sheriff acted in a quasi judicial rather than ministerial capacity, and that the attack made here by original action in the district court is therefore a collateral attack and unavailing. The district court so held.

Our leading case, in which former decisions were reviewed by Pound, C., and the principles were discussed and announced, is *Mitchell v. County of Clay*, 69 Neb. 779. It was there held, in substance, that, when the law commits to county commissioners the duty of looking into facts and acting upon them after a discretion in its nature judicial, the function is quasi judicial. If the amount to be allowed by them is fixed by law and their allowance of the claim is merely a formal prerequisite to the issuance of a warrant, their act is ministerial only. On rehearing the court vacated its former judgment, but

stated: "We have no doubt that the correct rule, by which to determine whether the action of the county board, in any given case, is ministerial or judicial, is announced in the opinion referred to." *Mitchell v. County of Clay*, 69 Neb. 796.

As to some of the causes of action involved here, it is questioned whether the sheriff was entitled merely to his actual expenses. In the others his allowance would require a determination of the mileage in conveying the prisoner. The county board had no judicial function or power to decide whether, under a particular statute, the sheriff was entitled to mileage or to the actual railroad fare. In other words, the county board has no judicial power or discretion as to the interpretation of the law. But, if the proper legal interpretation of the statute ruling the particular claim under consideration of the board required the allowance of actual expenses, or of the then current railroad rate, or of the actual mileage necessarily traveled, the determination of the facts in each instance would be a quasi judicial act on the part of the board.

Stating, but not conceding, "that an affirmance is one of the possibilities in this case," the appellant asks the court to make certain for the guidance of the counties the correct interpretation of the statutes as to the proper fees for conveyance of prisoners to the various state institutions, "regardless of the final result of this case." We are of the opinion that the county board acted quasi judicially in allowing each of the claims and, no direct appeal having been taken as provided by law, the attack now made is a collateral attack and cannot be entertained. We do not pass upon the statutes involved in the claims allowed by the county board, as requested by appellant. To do so in the circumstances would be violative of the practice here and everywhere. If and when a direct attack upon a judgment of the county board in such matters properly comes before us, we shall rule on it. For the reasons stated, the judgment of the district court is

AFFIRMED.

DOLL WATKINS, APPELLEE, V. BRUNSWICK RESTAURANT COMPANY, APPELLANT.

FILED MAY 6, 1932. No. 28248.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY. Where a restaurant employee fell and injured her right side, in the course of her employment, thereby necessitating the removal of her appendix four days thereafter, and the evidence sustains the finding that the fall caused the appendicitis, *held*, that such injury is compensable under the provisions of the workmen's compensation act.
2. Evidence: OPINION OF EXPERTS: ADMISSIBILITY. The evidence of a plaintiff's physician, based upon observation and an examination of the plaintiff and upon the assumption of the truth of the evidentiary facts, is admissible.

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

Rosewater, Mecham, Burton, Hasselquist & Chew, for appellant.

Robins, Yost & Lamme, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

DEAN, J.

On or about December 14, 1930, Mrs. Doll Watkins was in the employ of the defendant, Brunswick Restaurant Company, of Fremont, as a waitress and, while in the course of her employment, she fell and injured her right side thereby necessitating the removal of her appendix four days thereafter. The defendant company appealed to the district court for Dodge county from an order of the compensation commissioner awarding the plaintiff compensation for her injuries. The judgment was affirmed and the district court decreed that for six weeks, commencing December 14, 1930, the plaintiff should receive from the defendant $9 a week, and hospital and medical expenses, and $50 as attorney's fees. The defendant company has appealed.

The accident occurred when the plaintiff was standing on a table in the restaurant so that she might reach the overhead shelves. And while in this position, she grasped a board which became loosened and she fell backward striking her right side on a table. Two days passed before the plaintiff consulted a physician and upon his advice she rested for several days. But when she returned to work she was compelled to stop within an hour on account of her injury. And her appendix was removed by two physicians that evening.

One of the physicians testified that the plaintiff's appendix was "red and inflamed, more so at the tip." And in answer to a hypothetical question as to whether the attack of appendicitis could have been caused by the fall, this physician made this general statement: "The opinion I have would be that she may have had a diseased appendix, and if she did, having received the blow of that kind might light up this appendix." He testified that the fall may have aggravated the plaintiff's condition at the time. And the other physician who was present when the plaintiff was operated upon testified that her lower right abdomen was tender and somewhat rigid as compared with the left. In his opinion, "trauma can cause an appendix that has had previous trouble to flare up," and he testified that the injury received by the plaintiff aggravated her condition and caused an attack of subacute appendicitis.

On the part of the defendant, and as grounds for reversal, it is contended that the plaintiff's fall was not the proximate cause of the appendicitis attack, and that the court erred in finding that she sustained an injury arising out of and in the course of her employment that was compensable within the provisions of the workmen's compensation act. And, in behalf of the defendant, two physicians testified that they had never seen a case of traumatic appendicitis, or appendicitis caused directly by an injury. In the opinions of these physicians, there was nothing in the evidence indicating that the plaintiff had suffered traumatic appendicitis.

The defendant also argues that the expert opinion of a physician, based upon the history of the case submitted to him by the patient, is not admissible in evidence. The history of the case may be considered so far as it relates to the treatment of a patient based upon complaints made to the physician at the time. In the present case, the plaintiff's physicians stated the history of the case, as related to them by the plaintiff, and they gave their conclusions based upon an examination of her. But the testimony and opinions of these physicians depended upon the assumption of the truth of the evidentiary facts in respect of the accident as related by the plaintiff.

We have held that "expert testimony must be based upon supposed facts of the existence of which there is evidence before the court." *Goken v. Dallugge,* 72 Neb. 16. And in *Hornby v. State Life Ins. Co.,* 106 Neb. 575, we likewise held: "An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion."

We think the evidence of the plaintiff's physicians, based upon observation and an examination of the plaintiff and upon the assumption of the truth of the evidentiary facts related by her, is clearly admissible.

In *Oliverius v. Wicks,* 107 Neb. 821, it was the contention of the defendant there, as in the present case, that appendicitis was not caused by a blow, and testimony was offered for and against such contention by the respective parties. But the attending physician in the *Oliverius* case testified that, in his opinion, the appendicitis was caused by a blow, and the judgment in favor of the plaintiff was sustained. In *Clark v. Department of Labor and Industries,* 131 Wash. 256, where an employee was struck on the abdomen while sorting blocks, the court there held that the evidence sustained the finding that the blow caused appendicitis and that the plaintiff was entitled to compensation under the provisions of the workmen's compensation act.

The evidence discloses that, several months before the removal of her appendix, the plaintiff underwent an operation for a rectal fistula and infection of the Bartholin gland. And, at the time her appendix was removed, one of the plaintiff's infected Fallopian tubes was also removed. However, both of plaintiff's physicians testified that neither of the above mentioned operations would have any bearing on the appendicitis operation. And the rule has been stated that "one suffering from a disease, or predisposition to disease, may recover for the aggravation of such condition caused by another's negligence." *Blomquist v. Minneapolis Furniture Co.*, 112 Minn. 143. In the *Blomquist* case the plaintiff suffered an attack of appendicitis as the result of a blow on the right side of her abdomen. And it has also been held that, where an attack of appendicitis was caused by a severe wrench upon the person of an employee, such injury came within the meaning of the workmen's compensation act, although the disability may have resulted from an accidental aggravation of a chronic ailment. *Fritz v. Rudy Furnace Co.*, 218 Mich. 324. And in *Roland v. Employers Casualty Co.*, 290 S. W. (Tex. Civ. App.) 895, where an employee sustained an injury while attempting to lift a heavy object, thereby causing a rupture of his appendix and resulting in the removal thereof and from the effects of which he died, it was held that the beneficiary was entitled to recover under the policy of insurance there in suit. And it was also held in the above cited *Roland* case that, notwithstanding the deceased employee had a predisposition toward appendicitis, this fact would not preclude a recovery.

From a review of the authorities it appears that injuries resulting in the removal of an appendix in the injured person are compensable under the provisions of the workmen's compensation act. And it also appears that, while there is a lack of entire harmony by medical authorities in respect thereof, a trauma or blow may cause appendicitis. In the present case there was no bruise on the plaintiff's abdomen as a result of her fall, but from

the evidence of her physicians it appears that a severe trauma might be occasioned to the internal organs without outward evidence of such injury.

The defendant company endeavored, without success, to prove that the accident could not have happened as described by the plaintiff. But, as pointed out by the plaintiff, the trial judge visited the scene of the accident upon the request of the defendant's counsel and the court found that the accident could have happened as the plaintiff testified.

We conclude that where the plaintiff, while in the course of her employment, fell and injured her right side thereby necessitating the removal of her appendix four days thereafter, and where the evidence sustains the finding that the fall caused the attack of appendicitis, that such injury is compensable under the provisions of the workmen's compensation act.

The judgment is

AFFIRMED.

SCHOOL DISTRICT OF CITY OF BAYARD, APPELLEE, V. WILLIAM W. VANATTA ET AL., APPELLANTS.

FILED MAY 6, 1932. No. 28129.

1. **Depositories: SCHOOL DISTRICT DEPOSITS: DEPOSITORY BOND: LIABILITY OF SURETIES.** A bond given by a state bank to secure a school district deposit is a valid obligation of the sureties.
2. *State v. American Bank of Mitchell*, 121 Neb. 862, *Liberty High School District v. Currie*, 122 Neb. 173, and *School District v. Currie*, 122 Neb. 176, adhered to.

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

Neighbors & Coulter, for appellants.

R. O. Canaday and *F. E. Williams, contra.*

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

EBERLY, J.

This was an action at law brought by the School District of the City of Bayard, appellee herein, against William W. Vanatta, R. Frank Durnal, and Earl R. Vanatta, appellants, upon a bond signed by appellants, given to secure a deposit of funds made by the school district in reliance thereon in a state bank of which appellants were officers and stockholders. The petition, in appropriate language, set forth this bond, together with the terms of an agreement supplemental thereto, and also facts showing a breach of the conditions of the obligation by the defendants, appellants, with a prayer for relief consistent with the terms of the bond. To this the defendants, in the district court, filed an answer which, in effect, admitted the execution of the instrument sued upon, but challenged the legal capacity of the plaintiff to sue; alleged there was a defect of parties plaintiff; that the several causes of action in the petition set forth were improperly joined; that the alleged contracts sued upon were in excess of the powers vested in the district to make; and that the bond upon which the action was based had, under the express terms of the statute, expired January 1, 1929, prior to the commencement of the action.

To this answer appellee, plaintiff, filed a general demurrer, which was sustained by the trial court. Defendants electing to plead no further, judgment was entered in accordance with the prayer of the petition. Defendants appeal.

It may be said that these proceedings were had in the trial court prior to the announcement of the views of this tribunal in *State v. American Bank of Mitchell,* 121 Neb. 862; *Liberty High School District v. Currie,* 122 Neb. 173, and *School District v. Currie,* 122 Neb. 176. The doctrines announced in these cases, and upon which they proceeded, are controlling in the instant case. This court is committed to the view that a bond given by a state bank to secure a school district deposit is a valid obligation of the sureties, notwithstanding the absence of statute expressly authorizing such deposit; and also that

the statute providing that all depository bonds shall expire on January 1 of each year is inapplicable to school district deposits and to the bonds given to secure the repayment thereof.

It also appears from a careful examination of the petition that it is not vulnerable to the objection that it contains "several causes of action which are improperly joined."

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

AFFIRMED.

H. MALCOLM BALDRIGE, TRUSTEE, APPELLEE, V. MARIE FLOTHOW ET AL., APPELLEES: MYRON KAHN ET AL., APPELLANTS.

FILED MAY 6, 1932. No. 28164.

1. Joint Adventures: RIGHT OF CONTRIBUTION: WAIVER. Instrument in writing entitled, "Declaration of Interest," set forth in opinion, construed and *held*, in light of circumstances surrounding it, ineffectual to operate as waiver of rights of contribution to which parties thereto were otherwise entitled, or to preclude the enforcement thereof.
2. Account Stated. 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 demands between them, and the amount due. Palpable errors, when shown to exist therein, operate to prevent the meeting of the minds of the parties and to deprive an account stated of its legal force and effect.
3. ———: IMPEACHMENT. In order to impeach an account stated for errors or mistake, it is not necessary that they should be mutual.

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

Ziegler & Dunn and *G. W. Becker*, for appellants.

Battelle, Travis & Strehlow, for appellees Flothow *et al.*

H. Malcolm Baldrige, Trustee, pro se.

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

EBERLY, J.

This is an action in the nature of a bill of interpleader filed by H. Malcolm Baldrige, as trustee, wherein it is alleged that the petitioner has in his possession the sum of $117.73 in which he has no interest. It is further alleged that defendants, Charles F. Weymuller and Marie Flothow, on one part, and all the other defendants on the other part, are asserting mutually adverse claims thereto, and petitioner prays that the defendants may be required to interplead to determine who is entitled to the money by the trustee tendered and paid into court.

The defendants, Myron Kahn, Mabel Kahn, Carrie Kahn Alperson and Mrs. Hannah Kahn, thereupon appeared and by answer and cross-petition set forth their claims to the money referred to, and likewise defendants Weymuller and Flothow, by answer and cross-petition, joined issue with the defendants first named, and set forth their respective claims to the fund in suit. Replies were filed. A trial was had to the court which resulted in a finding and judgment in favor of defendants Weymuller and Flothow, from which the other defendants appeal.

Facts in dispute as shown by the evidence are few. In 1909 a corporation known as the Ralston Realty Company was organized. In the same year it purchased, subject to a first mortgage thereon, sixty acres of land situated near Ralston, Nebraska. It appears that at the organization of this company ten shares of its stock, each of the par value of $100, was subscribed for in the name of Kahn Brothers, fully paid up, and certificates of stock duly issued in that name. But it also appears that Kahn Brothers actually contributed to the purchase of this stock the sum of $500, and that Charles F. Weymuller and Max Flothow contributed for this purpose the sum of $250 each, and were therefore the equitable owners of an interest in these ten shares of stock to this extent. Some years later, during the continued existence of the

Ralston Realty Company, Kahn Brothers, it is said, purchased an additional three and one-third shares of the capital stock of this corporation. Thereafter, evidently pursuant to a mutual agreement, certain but not all of the stockholders of the Ralston Realty Company made loans to this corporation in amounts equal to 50 per cent. of the par value of the stock owned by such contributing stockholders. There was at this time paid in by Kahn Brothers for this purpose the sum of $666.66. A promissory note for that amount was made and delivered to them by the Ralston Realty Company, and to secure the same and other like loans, which together aggregated $7,000, this corporation duly executed and delivered a second real estate mortgage on the sixty acres of land then owned by it, hereinbefore referred to. To this loan to the Ralston Realty Company, it appears that Kahn Brothers evidently contributed $416.66, and Charles F. Weymuller and Max Flothow paid in the sum of $125 each. After the making of this loan of $7,000, represented by the second mortgage, due to accrual of interest on the first mortgage, taxes assessed, and other indebtedness of a similar nature, it appears it became necessary, in the protection of the security, to obtain further advancements from the beneficiaries of the second mortgage. These, so far as the persons involved in the present litigation, were made as follows: November, 1924, by Kahn Brothers, $70.86; March, 1926, by Kahn Brothers (per M. Kahn and Sam Alperson, as their successors in interest) $41.71; by Max Flothow, $12.50, and Charles F. Weymuller, $12.50; June, 1926, by Kahn Brothers (per Alperson) $104.16; December, 1928, by Kahn Brothers (per Alperson) $132.65.

Thus it is clear that, in proper and necessary protection of the interests originally represented by the second real estate mortgage, the defendants now representing Kahn Brothers, as successors in title, are entitled to credit for advancements made for that purpose in the sum of $349.38, and the Flothow and Weymuller interests the sum of $25.

As to this conclusion there is really no substantial disagreement of the parties. The defendant Weymuller testified to making the following payments in the transactions: An original payment of $250, made at the time of the incorporation of the Ralston Realty Company, which was devoted to the payment of the ten shares of stock in the same; a like amount which was also paid by Flothow for the same purpose; then an assessment of $125 advanced by Weymuller and also an identical amount paid by Flothow; thereafter a payment of $12.50, which it will be noted is credited to Weymuller in the statement made heretofore, and a like credit for that amount given to Flothow. A payment of $62.50 additional is also claimed by Weymuller, and a like amount claimed in behalf of the Flothow interest; but Weymuller admits that this payment was made by him by check of that amount, payable to the order of Mr. Randall, as trustee, which check, however, was never cashed and never charged against his bank account, and evidence in the record, taken as an admission against interest, by Flothow, established a similar condition of affairs as to a check of $62.50 drawn at the same time by Flothow, payable to the order of Mr. Randall, trustee. It is quite obvious that the representatives in interest of Flothow and Weymuller are not entitled to credit in this transaction for the checks that were never cashed; and it stands without controversy in the record that these are the only advancements made by or in behalf of the Weymuller and Flothow interests.

In the second mortgage transaction herein outlined, in view of the circumstances surrounding it, and the purpose sought to be effected thereby, we have substantially the elements of a joint adventure, which may be defined as a special combination of two or more persons where, in some special venture, a profit is jointly sought without any actual partnership or corporate designation.

"To constitute such a contract no particular form of expression or formality of execution is necessary. It need

not be express but may be implied in whole or in part from the conduct of the parties." 33 C. J. 847.

"Within the scope of the enterprise" the participants "stand in a fiduciary relation each to the other, and are bound by the same standards of good conduct and square dealing as are required between partners. This obligation begins with the opening of the negotiations for the formation of the syndicate, applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated." 33 C. J. 851, 852.

So, also, a joint adventurer who pays his share of the amount employed in the joint adventure, for which a mortgage is given to secure, acquires thereby a vested equitable interest in the obligation as an entirety, as well as in the profits to be derived therefrom, and also in any real estate acquired by the enforcement thereof in law or equity. 33 C. J. 854.

It is also true that a joint adventurer who contributes to the capital employed in the enterprise more than the amount which he agreed to contribute as his share, or who pays a joint liability of himself and his associates, or who contributes more than his share to the amount necessary to discharge prior liens against the property venture, does not thereby acquire any greater interest in the venture or any greater share in the profits thereof, but is entitled to demand from each of his associates the repayment to him of such sum as will equalize their contributions to the enterprise as expressly or impliedly agreed among themselves, and may enforce such demand in law or in equity. 33 C. J. 855.

Indeed, this rule of contribution "is not restricted to any special relation, but applies to any relation, except that of joint tort-feasor, where equity between the parties is equality of burden, and one discharges more than his share of the common obligation." 13 C. J. 826.

While an action at law lies against a joint adventurer on account of his default in paying his proportionate share of loans and advances made toward the common

enterprise by the member, still "the fiduciary relation existing between the members of a joint adventure confers upon courts of equity jurisdiction to hear and determine all controversies arising between them, and this jurisdiction will be exercised, even though complainant may have a remedy at law for the redress of his grievance." 33 C. J. 867.

An added reason sustaining the right of the Kahn interest to contribution from the other defendants is the fact that ultimately the rights of all parties in the second mortgage became merged in the rights of all parties in the land secured by enforcement thereof by foreclosure and sale; and that the $349.38 advanced by the Kahn interest, in part in excess of their just share, resulted in the payment of senior liens, charges and incumbrances thereon for the benefit of all parties in interest, including Weymuller and Flothow.

However, the Weymuller and Flothow interests in the present litigation contend that the right to contribution which the facts set forth might require is wholly foreclosed by the due execution, at a time subsequent to the making of the last of such payments, by all parties to this litigation, of the following instrument in writing:

"This Declaration of Interest is made by the parties who have signed their names below for the purpose of handing this to Mr. H. M. Baldrige, trustee of certain property located in Ralston, Nebraska, which has been sold. The parties below hereby declare that they have the following interest in said proceeds which has been listed with Mr. Baldrige under the name of 'Kahn Brothers.' Under the term Kahn Brothers, Isaac Kahn owns one quarter, Myron Kahn owns one quarter, Chas. F. Weymuller owns one quarter, and Max Flothow owns one quarter. Max Flothow is now deceased and his estate and his heirs are entitled to this money. Isaac Kahn is also deceased and his interest is to go to Hannah Kahn, Carrie Kahn, and Mabel Kahn, and this is instructions to Mr. Baldrige, trustee, to distribute the money as the interest of each party is shown above. (Signed) Mrs.

Hannah Kahn, Carrie Kahn, Mabel Kahn, Myron Kahn, Chas. F. Weymuller, Mrs. Marie Flothow."

It is claimed on the part of the appellees that this instrument, in legal effect, constitutes an account stated between the parties, as to which the evidence in the record, being insufficient to impeach because of fraud or mistake, is conclusive, and that they are therefore entitled to the $117.73 in suit.

It is to be noted that this instrument, upon which appellees rely, does not definitely define the subject-matter to which it relates, and assumes to control. True, reference appears therein to "certain property located in Ralston, Nebraska, which has been sold," and of which it may be inferred H. M. Baldrige is "trustee." But the scope of the agreement is apparently limited to "said proceeds which has been listed with Mr. Baldrige under the name of 'Kahn Brothers.'" Webster's New International Dictionary defines "list" in this connection: "To enter or enroll in a list; * * * esp.: To enter in an official list or schedule; as, to list property for taxation." The Century Dictionary definition is: "To put into a list or catalogue; register; enroll." No such "list" was introduced in evidence, nor is the existence of any "list" at any time established as having been made and in Mr. Baldrige's possession. Neither is the total amount of the proceeds designated or intended to be covered by the words, "Kahn Brothers," set forth in the "Declaration of Interest." So, at least, as a contract it must be deemed ambiguous to the extent of requiring parole evidence to identify the property to which its terms apply. So, too, this instrument in terms does not purport to be a statement of account. It does not expressly waive but rather presents the form of a stipulation of the respective "interests" of the parties in a subject-matter which it does not definitely describe. Webster's New International Dictionary defines "interest" as including "A right, title, share, or participation in a thing." It must be admitted that "the word 'interest,' when applied to property, has a variable meaning to be determined in any case by the context, in-

tention, and circumstances. It may be used as synonymous with 'estate,' or 'title,' or 'property.' " 33 C. J. 261, 262.

Now, in view of the circumstances detailed in the evidence, there can be no question that the "interest" of defendants Weymuller and Flothow, as thus defined, was originally created and measured by the fact of their contribution of $125 each to the $500 paid in as part of the $7,000 second mortgage in the name of Kahn Brothers. They thereby acquired a vested equitable interest or equitable title to a proportionate share in $500 included in this second mortgage, which was continued in the real estate when that was taken over in foreclosure, and also in the proceeds of this land when sold.

True, Kahn Brothers from their own funds loaned an additional amount of $166.66, which also entered into and became a part of the indebtedness secured by the second mortgage already referred to. But no facts appear therein which sustain an implied waiver of any rights created by this transaction to which the Kahns were entitled. Indeed, the recital of "interests" of the several parties as made in the so-called "Declaration of Interest" is wholly consistent with the facts that such "interests" were entirely created and determined by the contribution of the Kahns of the sum of $250 and Weymuller and Flothow of the sum of $125 each to the original $500 loan which constituted a part of the sum secured by the second mortgage. For, as we note, there is no substantial dispute in the record as to the fact that $349.38 was advanced by Kahn Brothers from their own funds. This fact of advancement vested them and their successors with a cause of action, not only against Weymuller and Flothow, but against all participating in this joint adventure who failed to contribute their just share for the purpose for which the advancement was made. These rights of action were enforceable at law or in equity, at the election of the Kahns and their successors in interest. There is no express waiver of their rights of action on the part of the Kahn interests in the "Declaration of In-

terest," and nothing contained therein from which such waiver can be implied. Indeed, as a necessary element of proof, in an action prosecuted to enforce this right of contribution, would be competent evidence to establish the "interests" of Weymuller and Flothow to be as set forth in the "Declaration of Interest." It would seem, therefore, that in view of the surrounding circumstances the terms of that instrument are wholly unavailing to deprive the Kahns of their rights of contribution.

But even if appellees' contention be granted, and the "Declaration of Interest" be deemed to include a settlement of the mutual obligations of the parties thereto, in addition to determining their several "interests" in the proceeds of the sale, it is equally obvious from the record before us that, so considered, it is the result of mistake, and therefore not binding.

The rule applicable is: "If palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent." *Chappedelaine v. Dechenaux*, 4 Cranch (U. S.) 306. See *Kennedy v. Goodman*, 14 Neb. 585, *Keller v. Keller*, 18 Neb. 366, and *Haish v. Dillon*, 71 Neb. 290.

So, also, "in order to impeach an account stated for errors or mistake, it is not necessary that they should be mutual." 1 C. J. 712.

The conclusion is that the parties hereto are entitled to receive from the trustee herein such sums as they and the parties now represented by them have contributed for the benefit of this adventure, after the acquirement of their several "interests" therein, viz., by the Kahn interests, $349.38, by the Weymuller interest, $12.50, by the Flothow interest, $12.50; that these sums, together with like contributions made by others in like situations, will be deducted from the total net proceeds derived from the sale of the real estate herein referred to, and the proportionate share of the parties to this proceeding, to wit,

one-fourteenth, to so much of such proceeds as shall then remain, if any, shall then be disbursed as provided by the "Declaration of Interest."

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

REVERSED.

CLIFFORD COLLINS, APPELLEE, V. CASUALTY RECIPROCAL EXCHANGE, APPELLANT.

FILED MAY 11, 1932. No. 28326.

1. **Master and Servant: PLEADING: ISSUES.** In a proceeding under the workmen's compensation act, an award need not necessarily be reversed in the supreme court on the ground that the compensation allowed was not within the issues, where such issues were tried by the litigants without any objection to the pleadings.
2. ———: **INJURY TO SERVANT: NOTICE.** Where a plaintiff was awarded compensation for temporary total disability but his injury was latent and did not culminate in permanent disability for more than six months thereafter, in such case the injured employee may recover for permanent partial disability where he filed his application therefor within a year from the culmination of the injury.

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

William E. Shuman, for appellant.

C. S. Beck and *Halligan, Beatty & Halligan, contra.*

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

DEAN, J.

This action was begun pursuant to the provisions of the workmen's compensation act by Clifford Collins against his employer, the Artificial Ice & Coal Company of North Platte, and its insurer, the Casualty Reciprocal Exchange, defendants herein, to obtain certain additional compen-

sation for the permanent partial loss of the use of the second finger of his right hand. From an order of the compensation commissioner awarding the plaintiff additional compensation in the sum of $14 a week from June 16, 1930, and for 12 weeks thereafter, the defendants prosecuted an appeal to the district court for Lincoln county wherein the order was affirmed. From the judgment so rendered the Casualty Reciprocal Exchange alone has appealed.

The insurance company contends that the court erred in entering any judgment against such company, and alleges that there is "no allegation in any pleading against said appellant and no evidence of any kind indicating any liability of the appellant." But the pleadings disclose that the insurance company was named a party defendant from the very beginning of the proceedings herein, and that the same counsel appeared for both the ice company and its insurer in the original hearing before the compensation commissioner and that such counsel now appears in this court in behalf of the insurer. No objections to the pleadings were made before the compensation commissioner, nor was any objection interposed or reference made on appeal to the district court in respect of this contention. And we have held: "Where a party fails to test the sufficiency of a pleading by demurrer or otherwise, and proceeds to trial on the merits on the theory that it tenders a certain issue, which is litigated and submitted to the jury, if by any reasonable construction of the language the pleading can be construed to raise such issue, it will be held to do so." *Frederick v. Buckminster,* 83 Neb. 135 And we likewise held: "When the sufficiency of a petition is not attacked until after judgment, all reasonable intendments should be indulged in support of the judgment." *Merrill v. Equitable Farm & Stock Improvement Co.,* 49 Neb. 198; *Urban v. Brailey,* 85 Neb. 796. In a proceeding under the workmen's compensation act, an award need not necessarily be reversed in the supreme court on the ground that the compensation allowed was not within the issues, where such issues

were tried by the litigants without any objection to the pleadings.

The plaintiff filed his petition for additional compensation before the compensation commissioner in January, 1931, and the Casualty Reciprocal Exchange was the only party defendant named therein. On July 8, 1931, however, the plaintiff filed a motion to make his employer, the ice company, a party defendant and, on the same day, a voluntary appearance was entered by the company. The insurer argues that any defenses the employer may have waived thereby could not be extended to such insurer. It may be noted that the insurer was made a party defendant within a year from the month of June, 1930, when the latent injury culminated into permanent disability, while the voluntary appearance was not filed by the employer ice company until more than a year had elapsed. Under section 48-147, Comp. St. 1929, this provision is made, namely: "Jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer; and that the insurer shall in all things be bound by and subject to the awards, judgments or decrees rendered against such insured." The statute appears clearly to provide that the insured and the insurer shall jointly be held liable. In view of the facts, we do not think the defense advanced in this respect is tenable.

The salient facts appear to be that, on or about August 26, 1929, the plaintiff was injured while in the employ of the ice company, and that he was in the act of lifting ice out of a truck when the ice tongs slipped and one of the prongs became imbedded in the middle joint of the second finger of his right hand. As compensation therefor, the plaintiff was awarded the sum of $56 for temporary total disability covering a period of four weeks and, in addition thereto, his medical and hospital expenses were paid by the insurance company. The plaintiff signed a receipt wherein he acknowledged settlement of any claim existing against his employer and, in the receipt, the Casualty Reciprocal Exchange was recognized as the insurer of the ice company.

The plaintiff was confined in a hospital for about a week after the occurrence of the accident and, upon his release therefrom, the injured finger appeared to have healed, with the exception that he was unable to straighten it and it was sensitive to the touch. But it appears that the plaintiff returned to his usual work in the latter part of September, 1929, and that his physician informed him that the finger would subsequently become normal if he continued in his work. And no indication appeared then nor was anything said about the finger becoming permanently stiff. In February, 1930, when the plaintiff's finger was again examined by his physician, no infection was discovered. But in May of the same year the finger had developed an infection, and the skin cracked and considerable pain had been thereby caused to the plaintiff.

The plaintiff's physician testified that when the plaintiff was discharged from his care his finger appeared to have entirely healed and there was then no evidence of acute infection. And he gave the plaintiff "to understand that the chances of that finger returning to normal were very good." It appears that some time in May, 1930, however, he discovered that the finger would be permanently stiff and he made a report of this fact to the insurer of the plaintiff's employer shortly thereafter. Another physician corroborated the evidence of the plaintiff's physician in respect of the percentage of permanent disability in the use of the plaintiff's finger. And thereafter, in January, 1931, and within a year from the time the injury culminated into permanent disability, the plaintiff filed his application for additional compensation.

The evidence discloses that neither the plaintiff nor his physician knew, at the time the compensation for the four-weeks' period following the injury was paid, that the injury was latent and that it would culminate in permanent disability. In fact, an examination of the plaintiff's finger five months after he was released from the hospital failed to reveal any infection therein. His physician apparently believed that the plaintiff's finger would

eventually straighten and that no permanent stiffness would result. And in view of the evidence and the law applicable thereto, we conclude that, where the plaintiff was awarded compensation for temporary total disability for the injury to his finger but such injury was latent and did not culminate in permanent disability for more than six months thereafter, in such case he may recover for such permanent partial disability as then appeared, when he filed his application therefor within a year from the culmination of such injury. *Selders v. Cornhusker Oil Co.*, 111 Neb. 300; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *City of Hastings v. Saunders*, 114 Neb. 475; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121. The judgment is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BEEMER STATE BANK: CLARENCE G. BLISS, RECEIVER, APPELLEE: MARY SCHLICKBERND, INTERVENER, APPELLANT.

FILED MAY 11, 1932. No. 28042.

Evidence examined and *held* to sustain the judgment of the district court dismissing intervener's petition.

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

John J. Gross, for appellant.

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

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

EBERLY, J.

This is an action in the receivership of the Beemer State Bank by Mary Schlickbernd as intervener. She alleges that on the 12th day of December, 1921, there was deposited in said bank for safe-keeping $4,000 in Liberty

bonds under an agreement with the bank that it should place said bonds in its vault for the purpose of keeping them safe from fire, theft and other hazards; that she is the owner thereof; that thereafter said bank returned to intervener $1,000 of said bonds; that the numbers and amounts of the bonds remaining were as follows:

Issue	Number	Amount
3d	135130	$500.00
3d	671520	$500.00
4th	00559022	$500.00
4th	00559023	$500.00
4th	unknown	$1,000.00

Intervener further alleges "that, at some time unknown to intervener, said bank converted said bonds into money and placed said money with the money belonging to said bank, all without the knowledge or consent of intervener, said bank becoming thereby trustee for the use of intervener for said sum of three thousand dollars," and that said sum "constituted a part of the alleged assets of said bank" that came into the possession of the receiver; and intervener prays that she may be paid in full out of the assets of that institution. To this petition the receiver tendered as his answer a general denial. There was a trial to the court resulting in a finding for the receiver and an order of dismissal of intervener's petition, from which order an appeal is prosecuted.

From the record it appears that for a number of years prior to September 17, 1928, this institution was a going concern at Beemer, Nebraska, and at the close of business on that date was taken over by the guaranty fund commission in an insolvent condition. A report of its then financial condition on that day made by its cashier sets forth that its "resources" then totaled $974,089.81, and embraced among others the following items: Due from Union National Bank at Fremont, Nebraska, $42,574.49; from Omaha National Bank, $73,889.09; deposits $817,928.37; bills receivable (approximately) $749,000; cash items $39,068.56.

None of the parties to this litigation now question the fact that the original bonds in suit were not in possession of the bank on the date of this report, and had not been for an indefinite number of years prior thereto, and it may be said that there is an entire failure to establish, as a fact, that the proceeds thereof in any manner entered into or became the source of any of the items of property set forth in this report of the financial condition of this institution which were taken over by the guaranty fund commission, or which ultimately came into the possession of the receiver, the defendant herein.

This report, already referred to, is sworn to positively by J. S. Severa as cashier of this bank. It also appears that he had occupied that position and had been active in the conduct of the affairs of this bank for many years, including the entire scope of the transaction in suit. He was thus in a position at the time he made such report to know the facts, and he verifies this report positively under oath as "a true statement of the condition of the bank;" that therein "all resources and liabilities are shown under the proper designation," and that "said bank has no liabilities of any character * * * whatsoever not set forth in said statement."

It is also a conceded fact that intervener's claim in suit, so far as based on the bonds purchased in 1919, is not included in, and forms no part of, the liabilities of the bank listed in this report, nor so far as disclosed by satisfactory evidence are there any entries relating thereto to be found in the public records of this bank. True, the report is a false report. The fact is established that on its date the true credit balance of the Beemer State Bank in the Omaha National Bank was approximately $7,000; that instead of a credit balance with the Union National Bank of Fremont, Nebraska, it was in fact overdrawn more than $3,000; that the true amount of actual deposits therein previously made which remained unpaid to the depositors was in excess of $1,200,000, and of the $749,000 of bills receivable then carried on its books and listed in this report as assets approximately $484,000

were forgeries, and but $264,000 were genuine. Indeed, this same Severa as a witness, in his oral evidence, confirmed the fact that "Mr. Wupper as president of the bank was several hundred thousand dollars short at the time the bank was closed," and that they "had forged papers in the bank."

The appellant, in this court, in effect frankly admits that the original bonds which Henry Schlickbernd purchased in 1919, and which under the allegations of her pleading constitute the bonds in suit, are not now in the assets of this insolvent bank, and that no proceeds thereof can now be identified in any specific item of property or fund now owned or possessed by this institution. It is also now insisted that this bank at some indefinite and uncertain time sought to, and did, replace and substitute for the bonds it received in 1919 (the bonds in suit), and which had previously been disposed of in some manner, certain other and different United States bonds obtained by it, through means and on a date not disclosed, aggregating the same amount, viz., $3,000. These substituted bonds were the bonds identified in intervener's petition by issue, number, and denomination, and were mistakenly alleged to be the bonds delivered to this bank in 1919, which were with others transmitted by it to, and sold by, the Omaha Trust Company on January 7, 1924. The sale price of these bonds was thereupon transmitted to the Omaha National Bank, and credited by that institution to the Beemer State Bank. By the 22d day of January following, this credit balance had been reduced by withdrawals made in the usual course of banking business to $811.40. Still subsequently the entire balance due this Beemer State Bank was offset by the Omaha National Bank against, and applied to, bills payable of the former institution that it owned. These facts, under what claimant denominates the "Federal rule" as announced and applied by this court, would not sustain intervener's contention. But it is insisted by this transaction the assets of the Beemer State Bank were $3,000 richer than they otherwise would have been, and thus intervener's claim

of preference is sustained. In fact, this constituted the sole basis of her claim.

The testimony of the intervener affords little light on the controlling issues of this litigation. It is, in substance, that her husband owned $4,000 in Liberty bonds at the time of his death on November 11, 1921; that these bonds were bequeathed to her in his will, which was duly probated; that such bonds, though left at the bank, were not kept by the testator in his box at the Beemer State Bank; that "he had the slip;" that on December 12, 1921, Mary and Fred Schlickbernd called at the bank and "must have" talked to President Wupper about these bonds; that at that time a written receipt was given them, dated on that day, and reciting that the Beemer State Bank had "Received of Mary and Fred Schlickbernd, Executors, Liberty bonds amounting to four thousand dollars," but the numbers, series, kinds and denominations of these bonds are not stated in this receipt; that intervener has never seen these bonds, and they were not produced at the time this receipt was given; that thereafter she received the interest on these bonds annually, in the spring of the year, but no interest was ever paid her in the fall of the year; that she never told anybody to sell these bonds, but one $1,000 bond was sent in and the proceeds credited to her account. There is no evidence that she ever had any information as to any disposition by the Beemer State Bank of the remaining $3,000 of the bonds received from her husband until after the "failure" of this institution in September, 1928, or that she ever consented to, or approved, any claimed substitution of bonds therefor made by the officers thereof, or indeed had any knowledge that it ever occurred.

The record before us discloses that the sole support of intervener's contention is to be found, if at all, in the testimony of J. S. Severa, who was the cashier of the Beemer State Bank during the time all the transactions involved herein occurred. His evidence, which in a number of material matters is in direct conflict with the statements of the report already referred to, is in part

substantially as follows: Henry Schlickbernd was a customer of this bank and he had known him for fifteen years; that on the following dates Schlickbernd bought, through the bank, government coupon bonds in amounts and numbers as follows, viz., February 12, 1919, two, fourth issue, No. 2,223,535 and No. 2,223,536, $1,000 each; on May 29, 1919, one, first issue, No. 1,818,464, of $1,000; and on May 29, 1918, one Liberty bond, third issue, No. 330,426, of $1,000—total $4,000; that Schlickbernd left these bonds at the bank; that he had a safety deposit box in the bank, but these bonds were not put therein by Schlickbernd, nor taken therefrom by the bank employees; that "Mr. Wupper told him (Schlickbernd) that they wanted to keep them in the cash box in the vault because it was short and that is where they were kept, and he (Wupper) gave the customers receipts for them." As to the time these original bonds were taken from this bank cash box by parties whose identity is not disclosed, and disposed of in some manner, this witness testifies on direct examination, "I could not be accurate. It was between the time they were purchased and the closing of the bank. That would be as near as I could fix it." As to the method of replacement of these original bonds after they had been disposed of, he testifies as follows: "Q. When you purchased the substitute bonds, what did you do with them? A. Replaced the ones we had taken out. Q. Do you mean you gave them back to the Schlickbernds? A. No, sir. They were carried as a bank asset. Suppose we were short of cash. The bonds would be sent away. Later on we would purchase bonds and put in as assets." He further testifies that if customers' bonds were stolen no entry would appear on the books of the bank of that fact.

It is to be remembered in this connection that property of which this bank was bailee, or which came into its possession as a special deposit for a particular purpose, and which was subsequently removed from its possession, embezzled, or stolen by its officers, agents, or servants for their own private enrichment or private benefit, and

which did not augment the assets of the institution, cannot be made the basis of the preference claimed in this proceeding. The books of the bank are not produced in this case, and there is no satisfactory evidence of any entry therein concerning the receipt by the bank of these bonds or of the disposition made thereof appearing in this bill of exceptions.

It would seem beyond question that the original transaction between this bank and Schlickbernd was not a mere bailment of bonds for safe-keeping, but rather an accommodation loan thereof to that institution for the express purpose of being used as the assets thereof. Being made pursuant to an express agreement of, and actually contemplated by, all parties in interest, the placing of the bonds of 1919 among the assets of this bank in its cash vault to cover an existing shortage therein, and their use by the bank as its own property for this limited purpose at least so long as the bonds themselves remained in its actual possession and control, could not be deemed a technical conversion thereof. It was only, if at all, when these obligations, in violation of its engagement, actually passed out of its possession and control by actual sale or other disposition made by such bank, and the proceeds of such sale or the avails arising out of such transaction were actually received by it or actually applied to its benefit, that an actual conversion by the bank has occurred, within the meaning of the rule which intervener invokes to sustain her present claim.

So, also, these bonds, in effect payable to bearer, and under the arrangement established by the testimony placed in the bank's cash box for the express purpose of covering or concealing a "shortage" in the contents thereof, not only clothed the bank with every indicia of ownership, but constituted a device pregnant with fraud and obviously deceptive and dangerous to the examiners of the state, as well as to boards of directors. There is no evidence of any subsequent change in the terms of this agreement of 1919 in December, 1921.

Again, intervener's pleading limits her recovery to conversion of bonds in violation of a contract of bailment of 1919 or 1921, and finds no support in the evidence. *Allegata et probata* must agree.

However, waiving all questions of pleading, and assuming the action as tried to the court by mutual consent of the parties to be based on the alleged conversion of certain "substituted bonds" (so called) in January, 1924, there is no satisfactory evidence of the receipt by the Beemer State Bank of any proceeds or benefits for, because of, or arising out of the removal of the bonds received by it from Schlickbernd in 1919 from its assets and possession, nor does it appear that any such proceeds arising from the disposition of the bonds of 1919 constituted any part of, or entered into, the consideration paid by it for the bonds sold by it in the transaction had in January, 1924.

So, too, there is no satisfactory evidence in the bill of exceptions that the bonds disposed of by the Beemer State Bank were purchased and set apart to and for the intervener. The undisputed evidence is that these bonds, sold in January, 1924, were purchased by that bank as disclosed by its records, as its own assets, and were exclusively employed by it as such. They were not set apart as the property of the intervener on its public records, nor kept as such among its assets.

The evidence wholly failing to establish the facts essential to the creation of a trust fund, it follows that the action of the district court in dismissing the intervener's petition is right, and is

AFFIRMED.

ROSE, J., dissenting.

In my view of this case, the affirmed judgment directs the receiver to distribute the proceeds of claimant's converted bonds to bank creditors having no lawful right thereto. Regardless of the purpose for which the bonds were procured from claimant, the Beemer State Bank is accountable to her as trustee under established rules of law and equity. Without authority, it officiously under-

took to manage the securities of claimant for her and consequently is answerable to her for its acts as her trustee. Civil consequences of a corporate swindle are not necessarily averted by insolvency. The insolvent state bank remains in existence as a corporation for the purposes of liquidation, including accountability as trustee where it acted in that capacity.

In a proceeding to wind up the bank's affairs, Mary Schlickbernd, claimant, intervened and presented a preferred claim for $3,000, payable in full as a trust fund out of the assets in the hands of the receiver. Confidingly trusting the corporation which had been chartered by the state to conduct a lawful banking business, she had left with it for safe-keeping a meager estate consisting of bonds to the extent of $4,000. The bank did not confine its control or duty to the safe-keeping of the bonds, but officiously, without the consent of claimant, controlled and managed them for her; paid her the interest on them; returned bonds in the sum of $1,000; retained the remaining bonds for $3,000 and exchanged them for others. The bank procured for itself and used in its banking business the proceeds of the bonds received in exchange. The tainted fruits of the trustee's officious management and betrayal of trust did not inure to any officer of the bank. As I understand the record, evidence of these facts is uncontradicted. The bank is not in a position to escape accountability by blaming its iniquities on its officers. The controlling rule of equity has been stated as follows:

"A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid." *Nebraska Power Co. v. Koenig,* 93 Neb. 68. See *Wright v. Smith,* 23 N. J. Eq. 106.

The supreme court of Nebraska unanimously committed itself to the following doctrines:

"It is firmly established, both by English and American courts, that a trustee is bound to perform faithfully the

duties relating to his trust, and that in doing so he cannot allow his own interests to interfere. If he unites his personal and representative capacities, he confuses transactions which the law requires him to keep separate and distinct. If he attempts to acquire an individual interest in the subject-matter of his trust or agency, he creates a temptation to serve himself at the expense of the beneficiary or principal, and enters a realm where his secret purposes with reference to trust property or interests may escape judicial scrutiny. To prevent evil consequences from growing out of the advantages which his position gives him, it will be presumed that what he does in relation to the interests or property involved in the trust or agency is done in a representative capacity. For the same reason, any advantage beyond proper expenses and compensation belongs to the *cestui que trust.* Adherence to these doctrines keeps personal and representative transactions free from entanglement, removes from the fiduciary the temptation to gain an undue advantage, and permits courts of equity to enforce the rights of the beneficiary. The philosophy on which these rules of law and equity rest came down through the centuries from the Chancellor of Galilee. The wisdom and necessity of such doctrines become more apparent as the forms in which property is held multiply under new conditions, and as earning capital in the custody and control of agents or trustees follows new enterprises over the world, where it is not under the watchful eye of the owner. Courts of equity do not set bounds to the principles which control the conduct and fix the accountability of trustees. The elasticity of these rules extends their applicability to all of the devices invented by unfaithful fiduciaries to evade their obligations or to defeat the imperative demands of business integrity and sound public policy." *Nebraska Power Co. v. Koenig,* 93 Neb. 68.

The proceeds of the bonds or the equivalent thereof in money were procured and used by the bank in banking transactions. If they are not now in the hands of the receiver, they either augmented the bank assets or re-

duced the bank indebtedness to the extent of $3,000. The trust fund in some form went to the credit of the bank. In the changed form it belongs to claimant, the beneficiary of the trust. It was not a deposit subject to check. Claimant did not elect to treat it as a deposit. It is not an asset of the bank. It is not property belonging to creditors. Neither the legislature nor the court of equity has any right to turn claimant's trust property over to depositors. Depositors entrusted their money to the bank to be used by it in commercial transactions. Claimant did not. In equity her claim is not in the same class as claims of depositors. There is no legal or moral justification for classifying claimant with general depositors. Claimant did not commit any wrong. She traced her individual property into the bank. The bank unlawfully mingled it with bank assets, the mass of which is chargeable in equity with the trust fund of claimant. She is entitled to have it restored in its changed form out of the assets in the hands of the receiver. *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 472; *State v. Farmers State Bank,* 121 Neb. 532; *State v. State Bank of Touhy,* 122 Neb. 582. The devices employed by rascals to cheat honest and confiding persons out of their property should not be allowed to multiply faster than the means of equity to redress civil wrongs. The judgment permitting the receiver to distribute the trust property of claimant among the depositors of the Beemer State Bank should be reversed and the receiver ordered to pay her claim in full out of the assets in his hands.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, RELATOR, V. JOHN M. PRIEST, RESPONDENT.

FILED MAY 11, 1932. No. 26159.

1. **Attorney and Client:** DISBARMENT. Misappropriation by an attorney of money belonging to his client is such a disregard of duty as to warrant disbarment.
2. ———: ———. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in

the public interest whether he should be permitted to practice.

3. ———: OBLIGATIONS OF ATTORNEY. Attorneys, upon their admission to practice law, assume certain obligations and duties, and in their performance they must conform to certain standards in relation to clients, to courts, to the profession, and to the public.
4. ———: DISBARMENT. Ordinarily, settlement with clients on a basis satisfactory to them does not preclude an inquiry into the moral and professional quality of an attorney's acts in connection with the complaint.
5. ———: ———: SETTLEMENT WITH CLIENT. The court will not permit matters affecting the character of its officers to be compromised and settled by private arrangement.
6. ———: ———: ———. Settlement with client after disbarment is not a sufficient showing to entitle a disbarred attorney to reinstatement.
7. ———: ———. The decisive question on such an application is whether the applicant is of good moral character and is a fit and proper person to be entrusted with the privileges of the office of attorney.
8. ———: ———: REINSTATEMENT. The conversion of a client's money by an attorney involves moral turpitude and requires evidence of reformation before such attorney may be reinstated.
9. ———: ———: ———: BURDEN OF PROOF. Disbarred attorney has burden of proof to establish good moral character to warrant reinstatement.
10. ———: ———: ———: PROOF. The mere formal proof of good character required under an original application for admission to the bar is not enough. It must overcome the former adverse judgment as to applicant's character.
11. ———: ———: ———. Ordinarily, settlement will not be given much weight in determining the question of moral fitness for reinstatement, since it may depend more upon financial ability than upon repentance or reformation.
12. ———: ———: ———. Evidence examined and *held* not sufficient to entitle petitioner to reinstatement.

MOTION for judgment on application of respondent for reinstatement as an attorney at law. *Motion denied.*

C. A. Sorensen, Attorney General, Lester C. Dibble and *Homer L. Kyle,* for relator.

John M. Priest and *L. T. Fleetwood,* for respondent.

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

DAY, J.

This is a supplemental application by John M. Priest for reinstatement as an attorney and counselor at law. The applicant was disbarred by this court February 13, 1929. *State v. Priest,* 118 Neb. 47. The ground of disbarment was that Priest as an attorney in his professional capacity had appropriated to his own use money belonging to his client. The client had, prior to the disbarment proceedings, secured a judgment against the attorney for the amount converted, which had been affirmed upon appeal to this court. The original motion for reinstatement was filed in this court June 29, 1931, and was overruled by the court. The supplemental application presents practically the same situation as the original motion. Both motions and the showing in connection therewith ground the request upon the fact that Priest has settled the judgment in favor of his former client.

It appears from the reports that the most frequent ground for disbarment of an attorney is the misappropriation of money belonging to his client, which was received in his professional capacity. This is not to say that it is a common occurrence, for, considering the number of transactions and the amount of money handled by attorneys for their clients, it is an uncommon offense. But it ought never to happen. There can be no question that this is a disregard of duty sufficient to warrant disbarment. *In re Disbarment of Kahner,* 180 Minn. 556; *In re Garrity,* 60 N. Dak. 454; *State v. Priest,* 118 Neb. 47; *In re Bryans,* 52 N. Dak. 673; *Slemmer v. Wright,* 54 Ia. 164; In re O——, 73 Wis. 602; *State v. Rohrig,* 159 Ia. 725; *People v. Story,* 265 Ill. 207; *In re Washington,* 82 Kan. 829; *Thomas v. Ogilby,* 44 Fed. (2d) 890; *In re Walder,* 247 N. Y. Supp. 14. It has been held that delay and failure of attorney to pay a client money collected for him justifies disbarment *(In re Disbarment of Cherry,* 166 Minn. 448) even though some of it is remit-

ted after proceedings are commenced. *In re Disbarment of Larson,* 169 Minn. 194.

The sole ground for reinstatement of applicant is that he has settled the judgment secured against him by his client for the misappropriated funds. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice. Attorneys, upon their admission to practice law, assume certain obligations and duties, and in their performance they must conform to certain standards in relation to clients, to courts, to the profession, and to the public. *State v. Kern,* 203 Wis. 178; *State v. Barto,* 202 Wis. 329; *In re Egan,* 52 S. Dak. 394.

Ordinarily, settlement with clients on a basis satisfactory to them does not preclude an inquiry into the moral and professional quality of an attorney's acts in connection with the complaint. 6 C. J. 601. The court will not permit matters affecting the character of its officers to be compromised and settled by private arrangement. *People v. Chamberlain,* 242 Ill. 260. In the case of *In re Davies,* 93 Pa. St. 116, in answer to the contention that a settlement operated as a remission of the attorney's offense, the court said: "This view of the case ignores the fact that the exercise of the power is not for the purpose of enforcing civil remedies between parties, but to protect the court and the public against an attorney guilty of unworthy practices in his profession. He had acted in clear disregard of his duty as an attorney at the bar, and without 'good fidelity' to his client. The public has rights which Mrs. Curtiss (the client) could not thus settle or destroy." If settlement with the client is not a remission of the offense as to a disbarment proceeding, it loses much of its potency as a ground for reinstatement. The decisive question on such an application is whether the applicant is of good moral character, and is a fit and proper person to be entrusted with the privileges of the office of attorney. 6 C. J. 615; *In re Simpson,* 11 N. Dak. 526; *In re Egan,* 52 S. Dak. 394. The

conversion of a client's money by an attorney involves moral turpitude and requires evidence of reformation before such attorney may be reinstated. *In re Kaas,* 39 S. Dak. 4. A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. *In re Petition of Morrison,* 45 S. Dak. 123. The mere formal proof of good character required under an original application for admission to the bar is not enough. It must overcome the former adverse judgment as to applicant's character. Ordinarily, settlement will not be given much weight in determining the question of moral fitness for reinstatement, since it may depend more upon financial ability than upon repentance or reformation. *In re Hawkins,* 4 Boyce (Del.) 200. It cannot be said that it is not some evidence, however slight, for an entire failure to recognize the obligation would indeed be said to indicate a radical misconception of the duty of an attorney to his client.

The record in this case discloses that the judgment secured by the client against the applicant for the conversion of money was settled for $55. It will be remembered that the original judgment was for $709.05, was entered July 20, 1923, and has borne interest at 7 per cent. since that date. This judgment has been final since the mandate of this court was issued, March 23, 1926, after an appeal to this court, wherein it was affirmed. This settlement was made in 1931, just ten years after the misappropriation by the applicant occurred. It is possible that the long struggle of a client, living in a far distant state, to secure a settlement from applicant without success, may have been an inducement to such a settlement. The record discloses that the applicant has resorted to many artifices conceived by his ingenious mind to avert a settlement. His latest move, to vacate the judgment for perjury and fraud in the procurement thereof, is a fitting sequel to his long continued effort to avoid his professional responsibility. The client, undoubtedly weary and exhausted from his fruitless efforts, wished to avoid further litigation and trouble, and

was willing to settle for a small fraction of the amount misappropriated. There was no judicial determination of the issues of the suit to vacate the judgment, which was dismissed. The record does not even raise a suspicion as to the integrity of that judgment. We have read the record with patience, having in mind the importance of the issue to the applicant, but it does not appear that he regrets anything about this transaction except the consequences. It apparently is beyond his conception that his conduct as an attorney has been improper and that he acted in bad faith, to the detriment, damage and injury to his client and in express violation of his oath upon his admission to practice. Such a settlement, made after so long a delay, does not establish good moral character in the sense in which it is applied to attorneys. Such being the case, we are constrained to hold that the evidence is not sufficient to support a finding of repentance or reformation; or of that good moral character to entitle him to be entrusted with the privilege of the office of attorney. But even if the evidence would support such a finding, the motion of applicant does not allege that such is the case. He has filed nothing in this court asking for such a finding. Even now, in this court, after many years, he deliberately and persistently justifies his conduct.

It is proper to here take notice that 19 reputable attorneys of Lincoln, Nebraska, have petitioned this court as follows: "We, the undersigned, *understand that amends have been made* by John M. Priest, and respectfully petition this honorable court, to reinstate him as an attorney and counselor at law." We have the highest respect for the judgment of these petitioners, even though they represent a small minority of the bar of the locality in which this applicant practices law. But it must occur to even the casual reader that it is based upon an understanding, probably hearsay, or self-serving declarations, while this court has the entire record before it. They may have been influenced by sympathy for the petitioner. The members of this court are just as sympathetic, but

sympathy must not influence them in the performance of their duty. The fact must not be overlooked that the question is of broader significance than its personal aspect. The reinstatement of the applicant upon the motion and showing now before the court would indicate a tendency to treat lightly this grave offense. The motion will be denied.

MOTION DENIED.

MILLER RUBBER PRODUCTS COMPANY, APPELLANT, V. GLEN M. ANDERSON: K. P. PALMER, APPELLEE.

FILED MAY 11, 1932. No. 28269.

1. Pleading: AMENDMENT. Our statute provides that, "When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." Comp. St. 1929, sec. 20-833.
2. ———: ———. At any stage of a proceeding an amendment to a pleading may be made which does not change the issues nor affect the quantum of proof as to a material fact. Prejudice to a party as a result of an amendment to pleadings must appear from the record to constitute reversible error.
3. Appeal: INSTRUCTIONS. It is error to instruct the jury upon an issue upon which the evidence is not sufficient to support a verdict, where such instruction has a tendency to mislead the jury to the prejudice of the complainant.
4. Trial: INSTRUCTIONS: PRINCIPAL AND SURETY. In an action against a principal and his surety, it is reversible error to submit by instructions the issue to the jury of the principal's liability, where the evidence is insufficient to support such a finding and when the court properly sustained a motion to direct a verdict against the principal.

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

Clarence A. Davis, Wilber S. Aten and *F. C. Leslie,* for appellant.

Frank A. Anderson and *A. W. Storms, contra.*

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

DAY, J.

This was an action upon a written contract and bond. Anderson contracted with the Miller Rubber Products Company to sell its wares at Holdrege and Palmer executed a bond as surety for Anderson to secure his performance. Under the contract, the plaintiff delivered merchandise to Anderson, for which it is alleged there is an unpaid balance, which is the basis of this suit. Judgment was entered by the court against Anderson; the issues as to Palmer were submitted to the jury, who returned a verdict in his favor. The plaintiff appeals from the judgment entered upon the verdict in favor of Palmer.

Numerous assignments of error are urged. Most of them are not discussed exhaustively because most of the questions involved are so well settled or so elementary that a discussion would not be helpful, either in the retrial of this case or in the trial of other cases.

A motion to make more definite and certain the defense pleaded in the answer by naming the agents who made fraudulent representations for the purpose of procuring the execution of the bond was overruled. They were described in the answer; they were the agents of plaintiff who secured the contract and bond; they were as well known to plaintiff as the defendants. Our statute provides that, "When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." Comp. St. 1929, sec. 20-833. The plaintiff was in no way prejudiced by the action of the trial court in overruling the motion. Furthermore, plaintiff waived the question when an amended answer was filed and cannot urge it here.

Defendant was allowed to amend its allegation of fraud in its answer, after nearly all the evidence had been adduced at the trial. The Code of Civil Procedure, section 20-852, Comp. St. 1929, permits, either before or after

judgment, in furtherance of justice, an amendment to any pleading, by asserting allegations material to the case or where the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved. The court has interpreted this statute in *Deck v. Smith,* 12 Neb. 205, *Cate v. Hutchinson,* 58 Neb. 232, *Bliss v. Beck,* 80 Neb. 290, and *Folken v. Union P. R. Co.,* 122 Neb. 193. The rule deduced from these cases and supported by many other cases is that an amendment to a pleading may be made, which does not change the issues, nor affect the quantum of proof as to a material fact, at any stage of the proceeding. Prejudice to a party, as a result of an amendment to pleadings, must appear from the record to constitute reversible error. *Omaha & R. V. R. Co. v. Moschel,* 38 Neb. 281. In *Marodolac v. Uhe,* 113 Neb. 450, the disallowance of an amendment was approved because it would have changed the original cause of action and proof under it would have been in conflict with proof to sustain the original cause. To the same effect is *Western Cornice & Mfg. Works v. Meyer,* 55 Neb. 440, *Johnson v. American Smelting & Refining Co.,* 80 Neb. 255, and *Westover v. Hoover,* 94 Neb. 596, all cited in the foregoing case. The amendment to the pleading allowed in this case did not change the cause of action or the quantum of proof. It is argued that for the first time in the proceeding it pleaded a sufficient legal affirmative defense and therefore changed the quantum of proof. Even if we concede this, which we do not, there was no prejudice to plaintiff, as the necessary and the only witnesses were present and testified. In *Dunn v. Bozarth,* 59 Neb. 244, it was said: "It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just." The appellant continued with the trial, making no motion for a continuance. We conclude that the trial judge did not err

in making the order permitting the amendment to the answer during the trial.

As heretofore stated, this is an action brought upon a contract and a bond against Anderson as principal and Palmer as surety. The surety is only secondarily liable after default in payment by the principal. The surety has other and independent defenses from those of the principal. But the very gist of this action is the default of the principal. The appellant, at the close of defendant's testimony, made a motion for a directed verdict against Anderson, which was sustained. However, at the close of the case, the court did not actually do this, but instructed the jury that the controversy between the plaintiff and Anderson was withdrawn from their consideration and that the only matter for their consideration was the liability of Palmer on the bond. Subsequently, the court entered judgment in favor of plaintiff against defendant Anderson, without having a verdict actually returned against Anderson. As to Anderson, such procedure has been held irregular, but not prejudicial. *Segear v. Westcott*, 83 Neb. 515; *Kirshenbaum v. Massachusetts Bonding & Ins. Co.*, 107 Neb. 494; *Holmquist Elevator Co. v. Omaha Elevator Co.*, 110 Neb. 655. The rule has the support of sound reason as well as authorities. As a practical result, what is the difference whether a court enters judgment on the motion or has a verdict returned by a jury under coercion? The court therefore properly entered a judgment against defendant Anderson.

But the plaintiff complains because the jury were not so instructed because the liability of Anderson was the basis of the action against the surety Palmer. Instead the court submitted to the jury the question of Anderson's liability as affecting plaintiff's right of recovery against Palmer. The court by its instruction No. 2 told the jury: "You are instructed that in this case the controversy and contest between the plaintiff and the defendant, Glen M. Anderson, has been withdrawn from your consideration, and you are not in any way to con-

sider the same. The only matter for your consideration in this case is as between the plaintiff and the defendant Palmer, as to his liability on the bond." Then followed instruction No. 3, from which we quote as much as is applicable to demonstrate our point:

"In order to entitle the plaintiff to recover in this case, he must prove by a preponderance of the evidence the material allegations of its petition, which material allegations are: 1. That there was a contract entered into by and between the plaintiff and the defendant Anderson for the sale of tires. 2. That under said contract the plaintiff furnished to the defendant certain merchandise which was accepted by the defendant Anderson and handled in the course of his business, as provided in the agreement. 3. That in making settlement between the plaintiff and the defendant Anderson there was a shortage in the sum of $3,487.57. 4. That said amount has not been paid. 5. That the defendant Palmer signed a bond guaranteeing the payment of any amount due at the time of the expiration of the contract or at the time the same was canceled. If you find from the evidence in this case that the plaintiff has established each and every material allegation of its petition as above set forth, then it would be your duty to find for the plaintiff against the defendant Palmer for the full amount prayed for, unless you find that the defendant Palmer has established by a preponderance of the evidence all of the material allegations of his defense, in which case it would be your duty to find for the defendant Palmer and against the plaintiff."

Then follows the material allegations necessary to be proved as an affirmative defense, which are not necessary to set out here as they are not related to the discussion.

It will be seen that the question of the liability of Anderson, the principal, is submitted to the jury for their determination by the first four material allegations, which they are required to find have been established by a preponderance of the evidence before plaintiff is entitled to recover. The court had sustained a motion for a directed

verdict as to Anderson on this same evidence and subsequently entered judgment against Anderson. In the first instance, the court found that, taking the most favorable view of the evidence toward Anderson, the evidence would not support any verdict except one against him; that from the evidence reasonable minds could not reach any other conclusion; that a verdict in favor of defendant for want of evidence could not be permitted to stand. *Union Stock Yards Co. v. Conoyer*, 38 Neb. 488; *McLean v. Omaha & C. B. R. & B. Co.*, 72 Neb. 450; *Burke v. First Nat. Bank of Pender*, 61 Neb. 20; *American Surety Co. v. Musselman*, 90 Neb. 58.

The direction of the verdict against Anderson, though not presented by an appeal by him, is here considered for the purpose of determining whether the issue of his liability should have been submitted to the jury in the determination of the liability of the defendant Palmer. The submission of that issue to the jury was inconsistent with the order of the court in sustaining a motion for a directed verdict against Anderson. We have held that inconsistent verdicts cannot be permitted to stand. *Gerner v. Yates*, 61 Neb. 100; *Mansfield v. Farmers State Bank*, 112 Neb. 583. We are of the opinion that the evidence does not support any verdict against Anderson, except the one directed by the court. Therefore, the jury should have been instructed that the liability of Anderson under the contract had been established by the evidence to such an extent that no other finding was possible and the liability of Palmer, as surety, then submitted to the jury. "The instructions of the trial court to the jury should be confined to those issues presented by the pleadings and supported by competent evidence." *Muller v. Pratt*, 108 Neb. 473. In stating issues of fact in its charge to the jury, only such issues should be presented as find support in the evidence. *Koehn v. City of Hastings*, 114 Neb. 106. It is reversible error to instruct the jury upon an issue upon which the evidence is not sufficient to support a verdict, where such instruction has a tendency to mislead the jury to the prejudice of the complainant.

Sabin v. Cameron, 82 Neb. 106; *Esterly & Son v. Van Slyke*, 21 Neb. 611. The jury were invited by the instructions of the court to find as a fact that Anderson was not liable. The evidence would not support such a finding. This is particularly prejudicial in a case of this nature, since the liability of appellee Palmer was dependent upon the liability of Anderson. Palmer was only the surety, while Anderson was the principal. Palmer pleaded and offered evidence supporting other defenses, but he was not entitled under the evidence to have this one submitted to the jury. In an action against a principal and his surety, it is reversible error prejudicial to the plaintiff to submit by instructions the issue to the jury of the principal's liability, where the evidence is insufficient to support such a finding and when the court properly sustained a motion to direct a verdict against the principal.

For the foregoing reasons, the judgment is reversed and the cause remanded.

REVERSED.

CLARENCE G. BLISS, RECEIVER, APPELLEE, V. H. F. SCHLUND ET AL., APPELLANTS.

FILED MAY 11, 1932. No. 28221.

1. **Vendor and Purchaser: DEFECTS IN TITLE: WAIVER.** When the contract of sale provides an unlimited time for the vendor to perfect his title, then the fact that the vendee takes possession on the date provided in the contract will not be held to be a waiver by vendee of defects apparent in the title.
2. **———: MERCHANTABLE TITLE.** A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser. If there are defects such as exist in this abstract, the title is unmerchantable, on the ground that it is subject to future litigation.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Reversed and dismissed.*

Cleary, Suhr & Davis, for appellants.

G. W. Irwin and *T. F. Neighbors, contra.*

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

PAINE, J.

This is a suit brought by the vendor to enforce the specific performance of a contract for the sale of real estate, and, in case of nonperformance, for a decree that the premises be sold and the proceeds applied upon the contract and a deficiency judgment entered for the balance, if any, due thereon. At the conclusion of the trial in the district court, the plaintiff and appellee had judgment, and the defendants were ordered, in the decree filed September 30, 1931, to accept the deed and the title as shown by the abstract, and pay the amount due, $1,597.30. Notice of appeal was filed October 12, 1931.

It appears that the Nebraska State Bank of Bridgeport, at the time it was taken over by the department of trade and commerce, on April 10, 1928, was the owner of 939.36 acres in Morrill county, Nebraska, and that upon October 1, 1928, the guaranty fund commission, which was in charge of the bank, sold the above real estate, by a written contract, to H. F. Schlund, of St. Michael, Nebraska, for $7,828, of which $500 was paid in cash, and the vendee was to assume a mortgage thereon of $6,000, and the balance was to be paid on or before the day of final settlement. H. F. Schlund, the vendee, is the father of Charles Schlund, and the son, immediately after the execution and delivery of the contract, took possession of said real estate, lived thereon, and received the income therefrom. The contract provided that final settlement should be made on or before November 1, 1928, "or as soon thereafter as title is shown to be merchantable." It further provides if "the title is not shown to be merchantable, then this contract shall not be binding upon first party, and shall be of no force or effect."

Clarence G. Bliss, as receiver of the Nebraska State Bank of Bridgeport, filed his petition July 23, 1930, alleging that the guaranty fund commission had duly per-

formed all the conditions of said contract, had tendered to H. F. Schlund and Charles Schlund an abstract of title, showing a good and merchantable title to said real estate, together with a warranty deed conveying said premises to the vendees, and praying for an accounting of the amount due under the contract and other relief as set out above. Prior to the time of trial in the district court, all of the remaining assets of said bank, including this cause of action, were sold to H. K. Tiller, who is the real party in interest, and who has been substituted as party plaintiff and appellee. The appellants asked for a reversal in this court for the reason that the title tendered by the plaintiff was not merchantable and therefore the court erred in requiring the appellants to accept a warranty deed and pay the balance due on the contract when the title was defective, as shown by the abstract.

It appears at entry No. 18 of the abstract, introduced in evidence, that upon September 24, 1919, Thirza C. Ely and husband gave a real estate mortgage for $18,000 upon the real estate in litigation to Moses P. Hatch and Nevada D. Hatch, who was his wife, and upon September 3, 1929, being unable to pay said mortgage, the above mortgagors gave a warranty deed to M. P. Hatch, and no release of this mortgage appears in the abstract.

At entry No. 22 of the abstract, it is shown that a sheriff's deed was given to the Nebraska State Bank of Bridgeport, said sheriff's deed being given after an execution sale under a judgment rendered March 16, 1925, against M. P. Hatch, but not against Nevada D. Hatch.

Up to this point there is little dispute about the facts in the case, and the question is now presented to this court for determination whether the sheriff's deed under execution sale, to which Nevada D. Hatch was not a party, conveyed her ownership of the undivided one-half interest in the $18,000 mortgage which she held upon the land, as set out above, and which mortgage is unreleased of record. Appellants claim that her interest in that mortgage was her own separate property; that it could not be

taken from her by an execution sale on a judgment secured against her husband, to which she was not a party, and that the proceedings by which the judgment was obtained against her husband could not affect her undivided one-half interest in the mortgage, and the fact that she claimed that her husband's equity in the land was the family homestead does not invalidate her claim to an undivided one-half interest in the $18,000 mortgage, which has never been released.

Moses P. Hatch, by taking back a deed to the land from the mortgagors, had his interest in the mortgage merged in the fee title, which he thereupon acquired. *McLaughlin v. Nelson,* 113 Neb. 308. But, would this fact extinguish the mortgage interest which Nevada D. Hatch owned in the land? It is contended that this half interest in the $18,000 mortgage belonging to Nevada D. Hatch, which has never been released, would not become barred by the statute of limitations until March 1, 1935. If the appellants are compelled by the order of the district court to accept the title, what defense would they have to an action by Nevada D. Hatch to foreclose her one-half interest in the unreleased mortgage?

1. The appellee contends that a title, to be good and merchantable, need not be beyond the possibility of attack, citing *McLaughlin v. Nelson,* 113 Neb. 308, and insists that, as the appellants took possession of the land, and retained possession after they had knowledge of the defect, they will be held to have waived such defect. *Schlake v. Healey,* 108 Neb. 35; *Pollard v. Larson,* 115 Neb. 136.

It is admitted that appellants were in possession of the land from April 1, 1929, to March 1, 1931, and that this suit was brought upon July 23, 1930, while Charles Schlund was living upon the land, and that appellants have retained the rents and profits of the land for practically two years.

The evidence showed that the vendor made effort to correct title after it was first submitted to the vendees upon October 13, 1928, and was resubmitted upon March

20, 1931, and it was not until the abstract was last submitted to them that defendants knew that the title had not been perfected, and defendants surrendered possession of the land March 1, 1931.

In *Schlake v. Healey, supra,* it will be noted that the evidence showed good record title in vendor at the time of the trial and the decree, and that vendee was in possession, and that in the case of *Pollard v. Larson, supra,* the vendor perfected the title before the trial.

In the case at bar, the appellants have never renounced the contract of purchase, and have always been ready and willing to carry it out, and, if given a warranty deed with a merchantable title, held themselves ready to pay the balance due, and the prayer of their answer, as filed in this case, is for specific performance against the plaintiff of the contract. This would indicate that the authorities which apply in the case of a rescission by the vendee cannot be applied as the rule in this case.

In the contract itself it provided an unlimited time for the vendor to perfect his title and make it merchantable, and also provided that the vendees were to take possession on March 1, 1929, and, therefore, such possession would not be a waiver of defects apparent in the title. 39 Cyc. 1524; 27 R. C. L. 513, sec. 240; *Read v. Loftus,* 82 Kan. 485, 31 L. R. A. n. s. 457; *Lillienthal v. Bierkamp,* 133 Ia. 42; *Jones v. Taylor,* 7 Tex. 240, 56 Am. Dec. 48.

2. "A clear title means that the land is free from incumbrances. *Roberts v. Bassett,* 105 Mass. 409. A good title is one free from litigation, palpable defects and grave doubts, comprising both legal and equitable titles, and fairly deducible of record. *Turner v. McDonald,* 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; *Reynolds v. Borel,* 86 Cal. 538, 25 Pac. 67. A clear title means a good title (*Oakey v. Cook,* 41 N. J. Eq. 350, 7 Atl. 495), and a good title means a marketable or merchantable title (*Irving v. Campbell,* 121 N. Y. 353, 8 L. R. A. 620, 24 N. E. 821). A contract to convey in fee simple, clear of all incumbrances, implies a marketable title (*Bell v. Stadler,* 31 Idaho, 568,

174 Pac. 129), and a marketable title is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property and one which is free from incumbrances (*Barnard v. Brown,* 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038)." *Ogg v. Herman,* 71 Mont. 10.

It has been held that a merchantable title need not be free from every technical defect, but the test is whether a man of reasonable prudence, familiar with the facts and the questions of law involved, would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser. *Cappel v. Potts,* 192 Ia. 661.

The terms "marketable" and "merchantable" title are practically synonymous, and mean a title in which there is no doubt involved, either as to matter of law or fact, and a purchaser who contracts for a marketable title will not be required to take it if there be color of outstanding title and he may encounter the hazards of litigation. *Hess v. Bowen,* 237 Fed. 510; *Eaton v. Blackburn,* 49 Or. 22; *Dalzell v. Crawford,* 1 Pars. Eq. Cas. (Pa.) 37, 45; *Herman v. Somers,* 158 Pa. St. 424, 38 Am. St. Rep. 851; *Ormsby v. Graham,* 123 Ia. 202.

The appellants point out another defect in this title. It is shown by exhibit C, attached to the abstract, that Moses P. Hatch died June 23, 1927, an inmate of State Hospital at Ingleside. It is shown by exhibit A, attached, that the alias execution under the judgment against him was issued after his death, and that upon September 17, 1927, the sheriff levied upon the land as the property of M. P. Hatch, the land was advertised and sold, and the sale confirmed, without any revivor of the judgment in the name of the heirs of M. P. Hatch. In view of the holding of this court in *Dougherty v. White,* 112 Neb. 675, "After the death of a judgment debtor, an execution cannot be lawfully issued and levied on the real estate, of which he died seised, until the judgment has been revived against the persons who took title to the real estate either by operation of law or as devisees." It clearly appears that in the case at bar there was no such revivor.

As to the rents and profits received by the appellants before vacating the premises, it is claimed that they would about equal the $500 advance payment made by appellants upon the purchase of the land.

In the opinion of the court, the title submitted by the vendor was not a merchantable title and the district court erred in requiring the appellants to accept the deed thereto. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

IN RE EQUALIZATION OF ASSESSMENT OF NATURAL GAS PIPE LINES.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF IN ERROR, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, DEFENDANT IN ERROR.

FILED MAY 18, 1932. No. 28085.

1. Taxation: ASSESSMENT: REVIEW: ATTORNEY GENERAL: POWERS. The attorney general is the principal law officer of the state. He has the right of invoking the judgment of this court by writ of error to the state board of equalization and assessment upon an order reducing assessments entered by such board.
2. ———: ———: STATE BOARD OF EQUALIZATION AND ASSESSMENT: DUTIES. One of the duties of the state board of equalization is that of equalizing assessments, that is, changing assessments by increasing or decreasing the same, to the end that all the property in the state shall bear its just proportion of the burdens of taxation. The board having failed to follow certain requirements of the statute, its action in reducing pipe line valuations 17 per cent. is set aside, and cause remanded to said board to act therein in conformity to statute.

ERROR to the State Board of Equalization and Assessment. *Reversed.*

C. A. Sorensen, Attorney General, Hugh La Master and *Loren H. Laughlin,* for plaintiff in error.

Clark Jeary, F. C. Radke and *Barlow Nye, contra.*

N. M. Sommerville, pro se.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

PAINE, J.

Upon August 4, 1931, a petition for writ of error to the state board of equalization was filed in this court by C. A. Sorensen, as attorney general of the state, and as attorney for Gage, Dakota and Saline counties. Writ of error was allowed on the same day by two associate justices of this court, and service was accepted by William H. Smith, state tax commissioner. Upon September 1, 1931, a transcript was filed in this court, and upon the same day a demurrer was filed by the state board of equalization by F. C. Radke, its acting attorney, which set out among the grounds therefor:

1. That the attorney general has not the legal capacity to institute or prosecute a writ of error to the supreme court from a decision of the state board of equalization, for the reason that our statute, section 77-1004, Comp. St. 1929, gives the legal right to appeal only to "any person, county or municipality affected thereby;" that the counties of Gage, Saline and Dakota have not the legal capacity to sue by and through the attorney general, for the reason that such capacity is given to counties only through their county attorneys; and finally, that the attorney general has not legal capacity to institute suit or to appear for parties adverse to the state board of equalization.

This demurrer was argued to this court upon September 21, 1931, by F. C. Radke and Clark Jeary, acting as attorneys for the state board of equalization, and by the attorney general in person, who cited section 84-204, Comp. St. 1929, which reads: "The attorney general and the department of justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties."

The attorney general also defended his action by relying upon the decision of this court in the case of *State*

v. Pacific Express Co., 80 Neb. 823, in which is cited a New Jersey case, holding:

"In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment."

We find that a late case, which is in line with the weight of authority, is *State v. Finch*, 128 Kan. 665, 66 A. L. R. 1369, which traces the powers and duties of the office of attorney general at common law from the earliest times to the present time, and holds: "Ordinarily the attorney general, both under the common law and by statute, is empowered to make any disposition of the state's litigation which he deems for its best interest."

Throop on Public Officers, section 542, says: "The rule respecting such powers is that, in addition to the powers expressly given by statute, * * * he has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be implied from the statute granting the express powers."

The attorney general is given executive powers in regard to various matters committed to his care. *Follmer v. State*, 94 Neb. 217, Ann. Cas. 1914D, 151.

By the great weight of authority, it is now held that the attorney general is clothed and charged with all the common-law powers and duties except in so far as they have been limited by statute. The duties of his office are so numerous and varied that it has not been the policy of different state legislatures to enumerate them. As the chief law officer of the state, he may, in the ab-

sence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. 2 R. C. L. 916.

The attorney general is the principal law officer of the state. As it was held by this court, in passing on the demurrer, that he had the right of invoking the judgment of this court by writ of error to the state board of equalization and assessment upon an order reducing assessments entered by that board, that ruling has become the law of this case.

2. After an answer and a reply were filed, trial was had to this court upon the briefs and arguments, including those of N. M. Sommerville *pro se*, an intervening taxpayer, who joined in the contentions of the attorney general.

It is insisted that the notice given upon July 20, 1931, fixing a hearing for July 25 following, was an insufficient notice, and we are cited to the following cases: *Howard v. Jensen*, 117 Neb. 102; *Garrett v. State*, 118 Neb. 373; *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, 119 Neb. 138; and also the case of *Gurske v. Britt*, 86 Neb. 312. However, in the case at bar the parties objecting to the notice had actual notice of the meeting, and attended the meeting, had an opportunity to be heard, and were not prejudiced by the notice served in this case.

It is next contended that the statute, section 77-1004, Comp. St. 1929, requires that "a full hearing" be had, and we are cited to the case of *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, 119 Neb. 138, in which an order was entered without affording sufficient opportunity for a hearing, and setting out that the board did not call any witnesses or take any testimony prior to the making of the order increasing the valuation of the telephone property, for which reason the order was vacated and set aside in this court. However, in the case at bar the transcript shows that a number of exhibits were before the court in relation to assessments of various counties of the natural gas

pipe lines and the cost per mile, as reported by the company, with the valuations asked by the companies and the valuations recommended by the county assessors, as well as the valuations fixed by the county boards of equalization, together with an affidavit of a purchasing agent of a gas engineering company in relation to prices for which the Republic Iron & Steel Company would furnish said pipe on July 17, 1931, or any day *after* April 1, 1931, and it is contended this affidavit would not cover the price *on* April 1, 1931, being the date on which assessment values were to be fixed.

Section 77-1004 provides that the state board of equalization and assessment may increase or decrease the assessed valuation in any county by making a per centum increase or decrease of the values already fixed and certifying the same to the county clerk of the proper county.

In the case of *Hacker v. Howe,* 72 Neb. 385, this court has discussed fully the requirements of the statute in raising valuations, and the same care must be followed in lowering valuations. *Grant v. Bartholomew,* 58 Neb. 839.

However, the action taken by the state board in the case at bar did not comply with the plain requirements of this statute in several particulars. The order entered by the state board upon July 25, 1931, first struck a general average of the assessed valuations of the various sizes of pipe lines in some 30 counties reporting pipe lines, and from that general average of the assessed valuations which had been entered in these different counties the board then made a general deduction of 17 per cent., and then fixed the assessed value in dollars per mile; the action taken being set out in the following entry made at the time, and including an amendment made at a later date: "In the matter of the equalization of the natural gas pipe lines in the various counties, it was moved by Secretary of State Marsh and seconded by Auditor Marsh that said equalization be effected by striking an average of the assessed valuation of the various sizes of pipe lines in the various counties, and that from this average

there be a deduction of 17 per cent., in consideration of the decrease in the assessed valuation of the state in 1931 as compared to 1930, and in further consideration of the depreciation in the cost of construction of pipe lines in 1931 and 1930. Motion carried."

It appears from the transcript of the evidence before the board that the total tangible valuation of the state in 1930 was $3,091,019,372 and for 1931 it was $3,045,793,706, which was a decrease of approximately .014 in percentage in the total assessed valuation of the whole state, which is cited by the board as one of its reasons for making a decrease of 17 per cent. in the value of all pipe lines in the state.

Notice of this action was sent by a letter of the tax commissioner, not by a certificate, as required by the statute, which letter was mailed to each of the 30 counties having pipe lines within their limits, stating that the equalized valuation of pipe lines was arbitrarily fixed by the board at $958 per mile for two-inch pipe lines, and giving the valuation in dollars per mile for each two-inch increase up to 24-inch pipe line, which should be fixed at $13,232 per mile.

It may be argued that the action of this board is final, and that such board is the supreme body to fix such assessments. But if this board failed to follow the plain provisions of our statute, and thus acted without authority, proper evidence, or due investigation, or for any other reason rendered a decision which was not based upon the facts, or according to law, and was unjust to the taxpayers, such action of the board may properly be brought to this court on a writ of error.

It is hereby ordered that the action of the board in fixing such valuations of pipe lines be and the same is hereby set aside, and the cause remanded to the state board of equalization and assessment, to take action therein as provided by law.

REVERSED.

DAY, J., dissenting.

A dissent to the majority opinion is respectfully registered with the following observations:

1. The supreme executive power shall be vested in the governor. Const. art. IV, sec. 6. As commander-in-chief of the military forces of the state he may call out the same to execute the law. Const. art. IV, sec. 14. The civil administration of the law of the state is vested in the governor. Comp. St. 1929, sec. 81-101. Sections 84-201 to 84-210, Comp. St. 1929, fix the duties of the attorney general of the state. The duties and powers conferred upon him by these sections do not include the right to appeal from an order of the state board of equalization and assessment.

2. The right to bring error proceedings from an order of the state board of equalization and assessment is statutory. It is provided for by section 77-1004, Comp. St. 1929, and is limited to any person, county or municipality affected thereby. This section does not confer upon the attorney general in an official capacity the right of taking such an appeal. Section 77-509, Comp. St. 1929, provides for error proceedings from the board of equalization and assessment in the case of railroad property and specifically provides that the attorney general in such a case shall have the right to bring the proceedings. It may be fairly inferred that, where the legislature does not confer this right, the right does not exist. In *Reimers v. Merrick County,* 82 Neb. 639, this court held: "Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power."

3. One of the duties of the attorney general is to represent the state and the executive officers. The statutes give him some discretion in this matter. However, this ought not to be held to give him authority to appear in an action adverse to the state or the executive officers in the absence of corruption or criminal acts of the executives. Mere irregularity in the performance of exec-

utive duties does not confer upon him the power to appear adversely.

4. Furthermore, the tax commissioner is a constitutional officer of the state. Const. art. IV, sec. 28. He has jurisdiction over the administration of the revenue laws of the state and together with the governor, secretary of state, state auditor and state treasurer shall have power to review and equalize assessments of property for taxation within the state. This delegation of power by the Constitution is exclusive and must therefore make untenable any theory of implied delegation of power. For a discussion of this provision of the Constitution see *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141.

5. The state board of equalization is an administrative board and is not required to conduct hearings with the formality and technical perfection of a trial court. *Hacker v. Howe*, 72 Neb. 385; *Chicago & N. W. R. Co. v. State Board of Equalization and Assessment*, 121 Neb. 592. In the last cited case this court held: "It is to be presumed that a board of equalization and assessment is composed of members who are familar with and have a knowledge of the details connected with the assessment of properties, and, in the absence of unlawful procedure, or apparent misjudgment or omission of vital facts, this court will not interfere with the board's jurisdiction of the subject-matter."

The writer is of the opinion that the proceeding in error should be dismissed.

JOHN E. SCHRAGE, APPELLEE, V. JOHN A. MILLER, APPELLANT.

FILED MAY 18, 1932. No. 27858.

1. **Automobiles: COLLISION: TRIAL: INSTRUCTIONS.** It is not error for the trial court to instruct the jury in the language of the statute on the duty of an automobile driver entering or crossing a state highway intersection on which stop signs

are erected, and omitting that portion of the statute in reference to the maintaining of such stop signs on roads intersecting such state highway, when the same is not an issue in the case.

2. ———: ———: ———: ———. The reciprocal rights and duties of motorists, one traveling on a state highway and the other on an intersecting road, may be covered by separate instructions, and instructions proper and pertinent to the reciprocal rights and duties of said motorists may be in clear and concise language, and said instructions must be considered in their entirety to determine such reciprocal rights and duties.

3. ———: ———: ———: ———. It is the duty of a motorist, on entering or crossing a state highway from an intersecting road, to come to a full stop as near the right of way line as possible before driving onto such highway, and, regardless of direction, shall give the right of way to vehicles traveling on said highway, and where the evidence shows that the motorist did not stop at the stop sign placed at the intersection, it is not error to instruct in the language of the statute.

4. ———: ———: RIGHTS OF MOTORISTS AT HIGHWAY INTERSECTIONS. The reciprocal right or duty of a motorist on a state highway, on approaching an intersection, is that the driver, upon reaching the intersection, has the right of way over vehicles aproaching on his left and may ordinarily proceed to cross, but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right.

5. ———: ———: ORDINARY CARE: QUESTION FOR JURY. Ordinary care may be defined as such degree of care as an ordinarily prudent and reasonable man would exercise under the existing circumstances and conditions; whether or not ordinary care is used by the driver of an automobile is a question of fact under this instruction.

6. Trial: INSTRUCTIONS: CONTRIBUTORY NEGLIGENCE. "Instructions given to the jury by the court must be considered as a whole, and the mere fact that a separate paragraph of the instructions (which states the elements necessary to allow plaintiff to recover) does not inform the jury that the defense of the contributory negligence of plaintiff was made by the defendant, nor state the law governing such defense, is not prejudicially erroneous, where the fact of such defense and the rules of law applicable thereto are stated in other paragraphs of the charge." *Cornforth v. Graham Ice Cream Co.*, 109 Neb. 426.

7. Negligence: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. Contributory negligence is an affirmative defense, the burden of proving which is on the party pleading it.
8. ———: ———: ———: INSTRUCTIONS. An instruction setting forth that the burden of proving contributory negligence on the part of plaintiff sufficient to defeat a recovery is upon the defendant, unless the evidence offered by the plaintiff discloses that the plaintiff was guilty of more than slight negligence as compared with the negligence of defendant, is not prejudicially erroneous when considered with all the other instructions in the case and when the court has given the defendant's requested instruction on the comparative negligence rule, although the trial court tried to clarify such rule in such instruction.
9. ———: ———: ———. Comparative negligence statute merely changed the legal effect of contributory negligence. It did not change the rule placing the burden of proving such negligence upon defendant. *Gerish v. Hinchey*, 120 Neb. 51, and *Killion v. Dinklage*, 121 Neb. 322, in so far as they are in conflict, overruled.
10. Appeal: REFUSAL OF INSTRUCTIONS. It is not error for the trial court to refuse instructions tendered by the defendant, where the law applicable to the case has been given by the court in its instructions and where instructions requested by the defendant assume facts as proved upon which there is a material controversy and assume some facts as proved which are not proved conclusively.
11. Trial: ARGUMENT OF COUNSEL. Ordinarily, in a civil action, statements made by plaintiff's counsel in an argument to the jury will not justify a reversal of the judgment where it appears that an exception was made to the statement at the time it was made, the exception sustained, and the jury duly admonished by the court.

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

Baylor & Tou Velle, for appellant.

E. T. Hayes and *Gray & Brumbaugh, contra.*

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

MESSMORE, District Judge.

This is an appeal from a judgment based upon a jury's

verdict rendered in the district court for Buffalo county, where appellee, plaintiff below, recovered a verdict in the sum of $7,500 against appellant, defendant below. Motion for a new trial was overruled and defendant appeals to this court to reverse said judgment.

Plaintiff's petition alleges the residence of the parties, details the happening of the accident, sets forth certain injuries received by plaintiff, and alleges that the accident and injuries were the direct and proximate result of the negligence of defendant, setting forth certain acts of negligence of defendant, proximately causing said injuries, as follows: Entering a primary highway from a section line road without stopping, as required by law, and in violation of the stop sign stationed at the intersection of said primary highway and said section line road; entering said primary highway from said road at an approximate speed of 40 miles an hour; failing to blow his horn or give plaintiff notice of his intention to so proceed; failing to apply his brakes and to stop his car when the presence of plaintiff's car on said highway became known or should have become known to defendant; failing to keep a proper lookout, and in turning his car to the east and south and directly into and against plaintiff's car, when, by proceeding straight ahead or by turning to the right and west, he could have avoided colliding with plaintiff. The alleged injuries received by plaintiff in said accident are detailed at some length in his petition. Judgment is prayed in the sum of $15,198.50.

Defendant's answer admits the occurrence of the collision, generally denying each and every other allegation of the petition, and alleging affirmatively in part as follows: That plaintiff at said time and place committed careless and negligent acts of omission and commission which constituted the proximate cause of said collision and of the injuries and loss, if any, sustained by plaintiff, and that said plaintiff by his careless and negligent acts of omission and commission was guilty of contributory negligence and contributed to the cause of said collision

and of the injuries and loss, if any, sustained by the plaintiff; further charging various specific acts of carelessness on the part of plaintiff. Plaintiff's reply was a general denial.

The record discloses that plaintiff, a farmer, 40 years of age, living a mile north of St. Libory was proceeding eastward in his Pontiac coupé with one John Evers from Kearney to his home at about 7:30 on the evening of April 10, 1930, on highway number 30, an arterial highway known as the Lincoln Highway, which parallels the Union Pacific right of way to the north thereof, said highway running in an almost straight east and west direction at the point of collision, which was some 6 miles east of Kearney; that at about the point of collision a road running from the north, known as the Buda school road, and also referred to as the Poole road, intersects with said highway; that as plaintiff approached the intersection he saw a car coming from the north towards the intersection at an estimated rate of speed of 45 miles an hour; that his car at the time was some 125 feet west of the intersection and defendant's car was at an estimated distance of 250 feet north of said intersection; that plaintiff did not continue to look at the other car coming from the north, but continued on his way, looking east; that he noticed a stop sign at the northwest corner of the intersection off the highway on which he was traveling and on the intersecting road; that when plaintiff next saw the approaching car he was on the south side of the highway, the front end of his car over into the intersection in question about 20 feet; that when he next saw the lights of defendant's car they were pointing in a southeasterly direction at the rear of his car; that defendant's car was about 30 feet from his car to the north at that time; that plaintiff did not hear a horn sounded, but was in a position to have heard it had one been blown; that at the time of the collision and immediately prior thereto he was driving at a rate of speed of about 25 miles an hour; that the rear part of his car was struck by the front right side and right bumper of

defendant's car; that defendant's car was locked into plaintiff's car, the bumper of defendant's car being caught between the front and rear wheels of plaintiff's car on the west side thereof.

The testimony of defendant, a lawyer practicing in Kearney, was to the effect that he was driving a Studebaker Commander sedan at the time of the collision, accompanied by Mr. Blackledge, his law partner; that just prior to the accident he was proceeding south to the intersection in question, intending to turn west there to Kearney; that there was some considerable dust and it was rising quite a bit; that it was getting dark and he was unable to determine how far objects were on account of the dust; that it was sprinkling a trifle, not sufficient to settle the dust, but enough to impair the vision through the windshield; that it was somewhere near 8:20 p. m.; that immediately prior to coming to the Lincoln Highway and when about 10 rods north of the intersection, he was driving at a rate of speed of about 15 miles an hour and had been driving prior to that time at a rate of speed of about 30 miles an hour after he had left the town of Poole; that on arriving at the point some 10 rods north of the intersection he felt he was approaching it, but was not sure, but did reduce the speed of his car at that time; that he continued to look in the direction in which his car was going; that he could see both ways and did see dust flying both ways and saw the lights of cars going east on the highway, but was not sure whether he saw one or more cars; saw lights of a car to his right; that he first discovered he had reached the north line of the intersection when he felt his car wheels touch a ridge of gravel; that without stopping at the stop sign he applied his brakes and went into the intersection a distance of 15 or 20 feet when the collision occurred; that immediately on stopping plaintiff's car was right on him and hit his car and jerked it sideways towards the east, the right end of the front bumper being struck by plaintiff's car; the front end of his car faced towards the east when it was jerked, in fact,

it was facing more of an east than a south direction, but was not facing northeast like the highway runs at that point; that plaintiff's car was right in front of his car right after the collision and after the cars came to a stop, headed a little bit north of east.

Mr. Blackledge corroborated the testimony of defendant; told of the rate of speed at which defendant was driving and what he observed.

There was considerable medical testimony offered relative to the injuries plaintiff received and also testimony of restlessness on his part and the pain that he endured. This testimony was controverted by that of witnesses for defendant. There was some testimony concerning the amount of loss that accrued to plaintiff by reason of his loss of time and his inability to carry on the work he had formerly done.

The testimony of several witnesses was offered who were at the scene of the collision immediately after its occurrence and who testified to the positions of the cars in behalf of plaintiff and also to certain admissions made by defendant at that time in reference to requesting plaintiff to go to a hospital and agreeing to have his car fixed. There was some dispute as to the language used in the admissions, but all the witnesses testified to their versions of what was said by both plaintiff and defendant.

The bill of exceptions contains some 430 pages, but the above statement is an abstract of the most important features of the evidence adduced.

Defendant complains of instruction No. 10, given by the court on its own motion, which is as follows "The jury is instructed that the statutes of the state of Nebraska provide that no person shall operate a motor vehicle on a public street or highway at a rate of speed greater than is reasonable and proper, having regard for the traffic and the use of the road and the condition of the road, nor at a speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding forty-five miles per hour.

"The statutes of Nebraska further provide that a motor vehicle traveling upon a public highway shall give the right of way to vehicles approaching from the right, and shall have the right of way over those approaching from the left when said vehicles reach the intersection at approximately the same time, but the vehicle entering the intersection first shall have the right of way.

"The statutes of Nebraska further provide that all motor vehicles entering or crossing state highways on which stop signs are erected shall come to a full stop as near the right of way line as possible, before driving onto such state highway, and, regardless of direction, shall give the right of way to vehicles upon said highway.

"These statutes are for your information as to the law in the case, but if you find from the evidence in the trial that these statutes or either of them have been violated by either plaintiff or defendant, you are instructed that such violation is not in and of itself negligence, but you are instructed that it is a circumstance which you may take into consideration in determining whether or not the party so violating was guilty of negligence."

In conjunction with this instruction it may be well to set out instructions Nos. 6 and 11. Instruction No. 6 is as follows: "The court instructs the jury that the care which may be termed ordinary is such a degree of care as a prudent and reasonable man would exercise under the existing circumstances and conditions." Instruction No. 11 is as follows: "The jury is instructed that the road intersection is that part of the road bounded by lines drawn across the road from one property line to the other, and what is known as the intersection is the square or oblong included in such line. Upon approaching a highway intersection, it is the duty of the driver of a motor vehicle to look to the right or left for approaching vehicles; and it is for you to determine whether either of the parties failed to exercise due care in this regard. The driver of an automobile upon reaching an intersection has the right of way over a vehicle approaching on his left, and may ordinarily proceed to

cross, but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right."

The principal contention of defendant in reference to instruction No. 10 is that the court committed error in failing to place a judicial interpretation on section 39-1116, Comp. St. 1929, for the instruction of the jury, but used language which permitted the jury to infer that a violation of the statutory provision, even in the absence of any other facts of negligence or any other circumstances or conditions, might be considered negligence; that defendant was entitled to have the jury instructed concerning the reciprocal rights and duties of plaintiff and defendant, both with regard to the statute pertaining to arterial highways and without regard to such statute; that said rights and duties vitally affected the question of proximate cause. *McCulley v. Anderson*, 119 Neb. 105.

In instruction No. 10 it will be noted that the court used the language of the statute. At the conclusion of the instruction it admonished the jury that a violation of the statutory provisions, as previously set forth therein, by either plaintiff or defendant is not in and of itself negligence, but instructed that it was a circumstance for the jury to take into consideration in determining whether or not the party so violating was guilty of negligence. Reciprocal means mutual; alternating; mutually interchangeable. This instruction defined the duties of both parties as to the rate of speed a party may travel on the highways of Nebraska, the duty of defendant on coming to a stop sign in the state of Nebraska, and the right of way of the parties. Instruction No. 11 sets out the duties of drivers of motor vehicles upon reaching an intersection, the right of way, and the degree of care to be used, which is ordinary care. This would seem to cover the reciprocal rights and duties of the parties in the situation that confronted them at the time of the collision and prior thereto.

The record discloses that defendant was acquainted with the intersection in question and had known the Poole road on which he was driving for a period of 40 years or more; had been over the same road 6 weeks previous to the time of the collision; at the time of the collision did not stop at the stop sign on the side of the intersection, but struck a ridge of gravel on the north line of said intersection, applied his brakes, and proceeded a distance of 15 feet or more into the intersection, and by admissions in his own testimony conceded that plaintiff had the right of way. We believe the court fully and properly instructed under the facts adduced at the trial on this feature of the case.

In the case of *Thrapp v. Meyers,* 114 Neb. 689, this court held: "The driver of an automobile, upon reaching an intersection, has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right." This is the very language used in instruction No. 11, above, and which fully sets forth the duties of motorists on approaching an intersection.

In the case of *McCulley v. Anderson, supra,* on which defendant relies, the facts and circumstances of that case are not analogous to the facts in the instant case, there being charged therein a violation of a city ordinance. We believe that the trial court did not err, and that defendant had the full advantage of all his substantive rights under the statute and the court's instructions.

Defendant assigns as error the giving of instruction No. 12, which instruction sets out in detail the elements of proof required of plaintiff and which elements of proof plaintiff was required to prove by a preponderance of the evidence, the objection being that the same instruction does not apprise the jury of the defense of contributory negligence which defendant had pleaded in his answer.

We believe that the holding of this court in the case of *Cornforth v. Graham Ice Cream Co.*, 109 Neb. 426, is controlling, wherein it is stated: "Instructions given to the jury by the court must be considered as a whole, and the mere fact that a separate paragraph of the instructions (which states the elements necessary to allow plaintiff to recover) does not inform the jury that the defense of the contributory negligence of plaintiff was made by the defendant, nor state the law governing such defense, is not prejudicially erroneous, where the fact of such defense and the rules of law applicable thereto are stated in other paragraphs of the charge." We believe that the court did not err in giving instruction No. 12.

Defendant complains of instruction No. 13, given by the court, which instruction is as follows: "You are instructed that the burden of proving contributory negligence on the part of the plaintiff sufficient to defeat a recovery is upon the defendant, unless the evidence offered by plaintiff discloses that plaintiff was guilty of more than slight negligence as compared with the negligence of the defendant." The objection made to this instruction is that it places the burden of proof upon the wrong party and misstates the law as to contributory negligence, citing *Gerish v. Hinchey*, 120 Neb. 51. This court has heretofore held that the contributory negligence of plaintiff, pleaded in the answer, is an affirmative defense which the defendant pleads and must prove by a preponderance of the evidence. If defendant pleads that plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and the burden does not shift during the trial of the case, but he should receive the benefit of plaintiff's evidence tending to prove those issues. *McGahey v. Citizens R. Co.*, 88 Neb. 218.

"Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury." *Cook v.*

Chicago, R. I. & P. R. Co., 78 Neb. 64. See *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617.

"Contributory negligence is an affirmative defense, the burden of proving which is upon the party pleading it, and must be established, if at all, by a preponderance of the evidence pertinent to that issue contained in the whole record." *Vertrees v. Gage County*, 81 Neb. 213.

"Contributory negligence is an affirmative defense, and cannot be proved unless alleged in the pleadings." *Reed v. Chicago, B. & Q. R. Co.*, 98 Neb. 19. See *Knies v. Lang*, 116 Neb. 387; *McCulley v. Anderson*, 119 Neb. 105.

In the case of *Gerish v. Hinchey, supra*, the instruction complained of and held to be erroneous by the writer of the opinion in that case is stated as follows: "As heretofore stated, defendant not only denies that he was negligent in any respect whatsoever, but alleges that it was the fault and negligence of plaintiff herself that was the direct cause of the accident and the injury to her and her car. The defendant having thus alleged negligence on the part of plaintiff, the burden of proof is upon him to establish the same by a preponderance of the evidence before he can prevail in said defense." The instruction so quoted must have been misconceived by the writer of the opinion. No distinction can be drawn between the rule as announced in the case of *Gerish v. Hinchey, supra*, and the other cases cited in support of the proposition that contributory negligence, if pleaded in the answer, is an affirmative defense and must be proved by a preponderance of the evidence. We are convinced that the rule of law should be that, where the defendant alleges in his answer contributory negligence on the part of the plaintiff, he must prove the same by a preponderance of the evidence, the burden being upon defendant to do so. Without going into detail with reference to the cases cited in support of the rule as laid down in the case of *Gerish v. Hinchey, supra*, to wit, *Davenport v. Intermountain R., L. & P. Co.*, 108 Neb. 387, and *Gibson v. Kelkenny*, 112 Neb. 524, a careful reading of these cases will clearly show that the error complained of was in

fixing a standard of comparison of the respective negligence of defendant and plaintiff, violative of the standard fixed by statute, and not by improperly fixing the burden of proving contributory negligence. The erroneous rule in the opinion in *Gerish v. Hinchey, supra,* although not appearing in the syllabus, was followed in *Killion v. Dinklage,* 121 Neb. 322. In so far as these cases are in conflict with the rule announced herein they are overruled.

We have examined instruction No. 5, requested by defendant and given by the trial court in the instant case, on the comparative negligence rule, which states the provisions of the statute, and find that the defendant had his theory of such rule presented to the jury. Assignments of error 4 and 5 have been covered in the discussion of the assignments of error heretofore stated and need not be further discussed in this opinion. Assignments of error 7, 8, and 9 have to do with instructions tendered by the defendant which were refused by the trial court. We have examined these instructions and find that the subject-matter pertinent to this case has been given by the court in its instructions, and when the same are considered in their entirety, they properly reflect the law of the case. Some of the instructions requested by defendant assume facts which are not proved conclusively and therefore were properly rejected by the trial court. *Buck v. Hogeboom,* 2 Neb. (Unof.) 853; 14 R. C. L. 800, sec. 60.

Defendant complains of instruction No. 20½ wherein the court instructed the jury: "If you believe from all the evidence in the case offered by both parties that both plaintiff and defendant were negligent in and about the matters complained of in the petition and as shown by the evidence, and that they were equally negligent or that plaintiff's contributory negligence, if any, was more than slight in comparison with that of the defendant, if any, then you cannot allow plaintiff any damages against the defendant." This instruction is similar to that given by the trial court in the case of *Emel v. Standard Oil Co.,*

117 Neb. 418, and which met with the approval of this court. Under the facts and circumstances this instruction is not erroneous, because the comparative negligence rule had been previously stated in two instructions given by the court, although the instruction might well be criticized as not being a full statement of the law of comparative negligence which the defendant was entitled to have submitted to the jury, but in view of the instructions given and the fact that the court gave instruction No. 5 requested by defendant, we do not feel that this instruction is prejudicially erroneous.

Defendant complains that the verdict of the jury is excessive. There is a marked conflict in the testimony of the medical experts, those for plaintiff testifying to the severity and permanency of his injuries, the physician testifying contra declaring that his injuries were slight. The amount of damages for personal injuries is for the determination of the jury. The rule has been long established in this jurisdiction that, even though the evidence conflicts, the verdict will not be disturbed if there is sufficient competent evidence to sustain such verdict. *Pricer v. Lincoln Gas & Electric Light Co.*, 111 Neb. 209. There is sufficient evidence to sustain the verdict in this case.

Appellant complains of misconduct of counsel in his argument to the jury, a part of which is before this court for its consideration. Counsel for defendant objected to the statements of counsel for plaintiff to the jury; the court sustained such objection and admonished the jury not to consider such statements. We do not believe that such conduct on the part of plaintiff's counsel in this respect was prejudicial to the rights of defendant. "Ordinarily, in a civil action, statements made by plaintiff's counsel in his closing argument will not justify a reversal of the judgment, where it appears that exception was taken to the statement at the time it was made, the exception sustained, and the jury duly admonished by the court." *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18.

Complaint is made with reference to the admissibility

of testimony and the rulings of the trial court thereon as being adverse to defendant's rights in several instances. We have carefully analyzed the questions objected to by defendant and the answers given and find there was no prejudicial error on the part of the trial court.

The verdict is sustained by the evidence, is not contrary to and against its clear weight, and is not the result of passion and prejudice, and for the reasons given in this opinion, we believe the judgment of the district court should be affirmed.

AFFIRMED.

CHARLES P. HALL, APPELLANT, V. LYMAN S. HALL ET AL., APPELLEES.

FILED MAY 20, 1932. No. 27943.

Insane Persons: APPLICATION FOR GUARDIANSHIP: DECREE: VACATION. "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." *Hall v. Hall*, 122 Neb. 228.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Former judgment of reversal adhered to, and rehearing denied.*

Crossman, Munger & Barton, for appellant.

Charles E. Matson, John J. Ledwith, C. E. Sanden and *Bernard S. Gradwohl, contra.*

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

PER CURIAM.

This is a suit in equity to redress a wrong growing out of an abuse of an attorney's confidential relation to his

client. In the county court of Lancaster county Charles P. Hall, on petition of his nine adult children, was adjudged an incompetent person, for whom his attorney, John J. Ledwith, was appointed guardian to manage his estate. There was no appeal from the decision at the term during which it was rendered, and Hall brought an independent suit in equity in the county court to set aside the order adjudging him incompetent and appointing a guardian for him, on the grounds, among others, that he was competent to manage his property and affairs and that the original order to the contrary was the result of constructive fraud on the part of his attorney who, without fully respecting his confidential relation as such, failed to defend the charge of incompetency. Hall was plaintiff in equity and his attorney and guardian and the ward's nine adult children were named defendants. The alleged facts upon which equitable relief was sought were put in issue by the pleadings. In the county court a trial of the proceeding in equity resulted in a nonsuit, from which Hall appealed to the district court with a like result. This is an appeal from the district court to the supreme court. Upon a trial *de novo* Ledwith was exonerated from implications of intentional fraud. The conclusion reached in the appellate court was indicated by the following excerpt from the adopted opinion of Redick, district judge:

"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." *Hall v. Hall,* 122 Neb. 228.

The former opinion contains a more extended statement of the facts. Upon a motion by defendants for a rehearing the cause was reargued and the record considered anew. In a courteous and an illuminating argument at the bar and in an additional brief, counsel for Hall's children challenge as unsound and as contrary to former decisions the following principle of law stated in the syllabus and discussed in the former opinion:

"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." *Hall v. Hall,* 122 Neb. 228.

Petitioners for the appointment of a guardian on the ground of their father's incompetency insist that there is no evidence of fraud on their part and that the ruling "they have no rights entitled to protection under the decree" is a departure from former holdings in *Tierney v. Tierney,* 81 Neb. 193, and *Prante v. Lompe,* 77 Neb. 377. In those cases it was held in effect that petitioners for the appointment of a guardian for a person on the ground that the latter is incompetent are proper parties in the sense that they may appeal from an adverse decision. In so far as the syllabus quoted and the former opinion in the case at bar conflict with the opinions in the two former cases cited, they are withdrawn. It does not follow, however, that the county and district courts were without power to redress the wrong growing out of the failure of counsel to fully respect the confidential relation of the attorney to his client. This question was not presented or decided in the *Tierney* and *Prante* cases, but is the determining factor in the controversy under consideration. The children of Hall, without any present interest in his property, set in motion the judicial machinery that deprived him of the power to manage his own business affairs. If the decree of incompetency and

the appointment of a guardian amounted to a wrongful judgment resulting from the failure of counsel to make a proper defense to the charge of incompetency, absence of fraud on the part of petitioners did not necessarily prevent the court of equity from redressing the wrong which grew out of the unintentional abuse of the confidential relation of attorney to client—an issue between them in the suit for equitable relief. The statute providing that a judgment may be set aside at a subsequent term of court "for fraud practiced by the successful party" in obtaining it is not always the measure of equitable relief. Comp. St. 1929, sec. 20-2001. It was not the purpose of that enactment to provide for the perpetuation of a wrong resulting from an abuse of the confidential relation in a case like the present, where general powers of a court of equity are invoked. Equity jurisdiction exists independently of statute and comes from the Constitution, a higher source than a legislative enactment. *Abbott v. Johnston,* 93 Neb. 726; *Burnham v. Bennison,* 121 Neb. 291; *Matteson v. Creighton University,* 105 Neb. 219; *Lacey v. Zeigler,* 98 Neb. 380. A mistake of the clerk, an officer of the court, is a statutory ground for setting aside a judgment without proof of fraud on the part of any litigant. Comp. St. 1929, sec. 20-2001; *Crete Mills v. Stevens,* 120 Neb. 794. A practicing attorney is also an officer of the court and his conduct in that capacity is also open to judicial scrutiny. The jurisdiction of equity to deal with this subject is broad as the power granted by statute in respect to the mistake of a clerk of court. Relief from misconduct in the office of attorney is cognizable in a court of equity. Litigants who receive any benefit of his fraud, though not his employers and not actively participating therein, are not always, on that ground, entitled to perpetuate the wrong by closing the door to judicial inquiry. In the present controversy the conduct of Hall's attorney in his official capacity is challenged. The question involves private rights, public policy, the good name of the legal profession and the standing of the courts.

The confidential relation of attorney and client and the former's resulting duty to resist the charge of incompetency under his employment are conclusively established by the evidence. The following principle relating to equity jurisdiction is in force in Nebraska:

"The rules of equity which determine the consequences of acts performed by a fiduciary extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from the fiduciary relation." *Nebraska Power Co. v. Koenig,* 93 Neb. 68.

This principle applies in full force to the relation of attorney and client. *Hamilton v. Allen,* 86 Neb. 401. The judgment of the district court in the present case was properly reversed on the following ground:

"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." *Hall v. Hall,* 122 Neb. 228.

On this feature of the present case there does not seem to be any tenable ground for a rehearing.

Misunderstanding of the evidence as indicated by misstatements thereof in the opinion is also urged as a ground for a rehearing. In this connection attention is called to inaccuracies in stating that John Fowler was an officer of the Federal Trust Company, with whom plaintiff had done business exclusively for more than ten years, and in stating that Ledwith, as attorney for the Federal Trust Company and guardian for Hall, advised Hall to make a will naming the Federal Trust Company as executor, anticipating probable employment later on as attorney for the trust company. These and other inadvertent

statements do not affect the result on the merits of the controversy and are withdrawn from the former opinion. The motion for a rehearing is overruled and the judgment of reversal upheld as pronounced.

REVERSED.

LEILLA M. AYRES, APPELLEE, V. ATLAS INSURANCE COMPANY, APPELLANT.

FILED MAY 20, 1932. No. 28110.

Appeal: TRIAL TO COURT: FINDINGS. In an action at law tried to the court without a jury, where there is sufficient evidence in support thereof, the finding of the court has the same effect as the verdict of a jury and will not be disturbed on appeal unless clearly wrong.

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

Hamer & Tye, Jack W. Marer, Monsky, Katleman & Grodzinsky and *Brome, Thomas & McGuire,* for appellant.

Dryden & Dryden, contra.

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

DEAN, J.

Leilla M. Ayres began this action in the district court for Buffalo county against the Atlas Insurance Company to recover $1,000, pursuant to the terms of an accident insurance policy issued October 27, 1930, by the company to her brother, Walter Hugo Ayres, and wherein the plaintiff is named as the beneficiary. The plaintiff's brother died from the effects of injuries sustained in an automobile accident December 7, 1930. A jury was waived and the court, upon submission of the facts, entered a judgment in favor of the plaintiff and against the defendant company for $1,023, with interest at 7 per cent. per annum, and $200 as attorney's fees. The company has appealed.

The policy in suit is designated as the "Sterling Penny a Day Accident Policy," and by its terms insured a holder against death from bodily injuries occasioned by "external, violent, and accidental means, subject, however, to all the terms, provisions and limitations" contained in such policy. In the event of the death of the insured, the policy provided for the payment of $1,000 to the beneficiary named therein if the death was caused "by the wrecking or disablement of any automobile of the pleasure car type in which the insured is riding or driving, or is accidentally thrown from within such wrecked or disabled automobile."

The company contends, however, that the insured was driving the automobile in question at a speed of more than 45 miles an hour, in violation of the law, and that the plaintiff is therefore precluded from recovering under the policy. In respect of this feature, the policy provides that the "insurance does not cover any injury sustained by the insured * * * while violating the law," nor does it cover "any loss contributed to or caused by * * * exposure to unnecessary danger."

The plaintiff's argument on this feature, however, is that the insurance company is estopped from maintaining the defense here submitted, from the fact that the benefits outlined in the policy are printed in prominent type, while the exceptions are printed in ordinary type not easily discernible. Upon this feature, the court found and decreed that the policy was not printed in accordance with section 44-604, Comp. St. 1929, which provides that the exceptions in a policy must be given the same prominence as the benefits therein.

We have examined the policy in suit and, while it appears that the payments provided therein are paragraphed with prominent headings, and the exceptions not covered by the policy are printed in a single paragraph under the heading of "General Provisions," the same type appears to have been used practically throughout except in the headings. The form of the policy was approved

by the department of trade and commerce and it appears to be in substantial compliance with the statute.

In respect of the facts attending the accident, it appears that the plaintiff's brother rented a Chevrolet roadster, and that he was accompanied on the day in question by Elton and Dorman Bass, aged 17 and 19 years, respectively. These three boys left Kearney and drove to Gibbon, and it was upon the return trip to Kearney that the fatal accident occurred. Elton testified that he could not say how fast they were going, but he thought they were going about 50 miles an hour at the time, although he did not look at the speedometer. Elton also testified that the plaintiff's brother, upon the request of Dorman, "slowed down" because the car was weaving, and that they passed another car on the road, and he "brought it back in the road a little too quick and that made the back end go around of the car, and that started us going back and forth in the road and that was what tipped us over."

Elton several times testified that he did not look at the speedometer, and in response to a question as to whether it was difficult to tell the speed of a car without looking at the speedometer he conceded that such was the case. And he also testified that while the car in question was capable of going more than 45 miles an hour he did not know how fast they were going. Dorman Bass observed the speedometer and found that it indicated a speed of 60 or 65 miles an hour. But he also testified that a Chevrolet speedometer registers at a higher rate of speed than the car is actually making.

One, by whom the accident was witnessed as he was driving on the highway with his wife, testified that the car in question appeared to be going at about 50 or 60 miles an hour, and that it was weaving from side to side and that there was then a great deal of dust in the highway.

After the accident the plaintiff's brother was found lying near the car and blood was then coming from his mouth and nose and he was unable to speak and he died

shortly thereafter. The evidence clearly establishes the fact that his death was caused as a direct result of the accident.

An automobile mechanic testified on the part of the plaintiff that a Chevrolet is a light car, and that, the "heavier the car, naturally the less slippage it has under its wheels, and consequently the speedometer would be more accurate at higher rates of speed." His evidence tends to prove that the highway in question was not in good condition for a graveled road and that it was full of "chuck holes" at the place where the accident occurred. And he also testified that the condition of the road at the time in question here was such that it had a tendency to cause the car to jump, thereby causing the speedometer to register at a higher rate of speed than the car was actually making at the time.

The county attorney testified that he interviewed the Bass brothers shortly after the accident, and that Elton stated to him that they had been driving at the rate of about 45 miles an hour at the time. And Elton, upon being recalled, admitted that he made this statement to the county attorney. Another, with whom the Bass boys returned to Gibbon after the accident, testified that Dorman Bass said they had been driving at the rate of 40 or 45 miles an hour at the time in question.

From the evidence it is disclosed that one of the tires on the car was deflated after the accident. Whether this occurred before the accident, thereby causing the weaving of the car and the subsequent results, or after the car turned over is not disclosed by the evidence. But it is clear that, had the deflation occurred during the time they were on the highway, this would have caused the weaving of the car and thereby caused the driver to lose control thereof. And as noted herein, the speedometer was inaccurate and registered at a higher rate of speed than the car actually was making. The evidence is conflicting, but the trial court observed the witnesses and their demeanor while testifying, and in an action at law

tried to the court without a jury, where there is sufficient evidence in support thereof, the finding of the court has the same effect as the verdict of a jury and will not be disturbed on appeal unless clearly wrong. *Nebraska Nat. Bank v. Parsons*, 115 Neb. 770; *Bodge v. Skinner Packing Co.*, 118 Neb. 179.

We conclude that the judgment is right and it is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEBRASKA STATE BANK OF O'NEILL ET AL., APPELLEES: S. S. WELPTON, TRUSTEE, APPELLANT.

FILED MAY 20, 1932. No. 28155.

1. **Corporations:** DIVIDENDS. Earnings and profits in the possession of a corporation belong to the corporation the same as the property generally, and for this reason there is nothing due and owing a stockholder from the profits as a matter of debt, until a dividend is declared in some appropriate manner.
2. ———: "DIVIDEND." The word "dividend" is properly defined as that portion of the profits and surplus funds of a corporation which has been actually set apart, by a valid act of the corporation, for distribution among the stockholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the stockholders distributively.
3. **Banks and Banking:** TRUST FUND A CORPORATE ASSET. Resolutions adopted by the board of directors, pursuant to which the "trust fund" in suit was established and administered, examined and construed and *held*, (1) to expressly designate the corporation itself as the sole beneficiary thereof, and to continue its board of directors as the responsible and exclusive agents for its control, use and expenditure; and (2) to in no manner effect a severance of any of the accumulated earnings of the corporation thus transferred to this "trust fund" so established from the corpus of the corporation's property, or to constitute the same the individual property of the stockholders, or in any degree to impair the right of the corporation thereto.

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

Arthur F. Mullen and *James A. Donohoe,* for appellant.

F. C. Radke, Barlow Nye, G. E. Price and *Julius D. Cronin, contra.*

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

EBERLY, J.

This action arises out of the receivership and liquidation of the Nebraska State Bank of O'Neill, Nebraska, an insolvent institution. S. S. Welpton, as trustee, and a stockholder therein, for and on behalf of himself and stockholders like situated, by a petition in intervention, set forth the creation out of the earnings of this institution of a fund which was commenced in 1912 and thereafter from time to time was added to until such contributions aggregated $42,743.91, and which fund from the time of its inception was carried as a general deposit in said bank under the name of S. S. Welpton, Trustee. As to the contributions thus made, it is further alleged that the Nebraska State Bank had no interest, right, or title therein; that they were the property of the stockholders thereof, for whose benefit the trust was created. It alleges the misapplication of this trust fund by the bank and its officers and the expenditure thereof by them for the bank's own use and benefit, in violation of the terms of the trust. It prays for an accounting and an order requiring the receiver to deliver to the petitioner all property in his possession which represented the fruits of this fund thus unlawfully disposed of, including a certain promissory note in the sum of $7,524.86. It further asks for judgment for so much of such fund as is not otherwise accounted for.

To this pleading the receiver filed his answer containing, in addition to a general denial, an admission of the deposit of the various amounts in the Nebraska State Bank in the name of S. S. Welpton, Trustee, substantially as alleged by intervener, but further alleges that said

moneys so deposited belonged to said bank, were a part of the assets thereof, and were at all times under the control of its officers, and, except for $222.93, which was the present balance, had been lawfully paid out for its use and benefit.

The intervener's reply in effect denied generally all new matter alleged in the answer. A trial to the court resulted in a finding that the intervener "is not entitled to a trust fund or a claim, either general or preferred, against said bank or the assets thereof," and a judgment dismissing his petition. Thereafter the intervener presented his motion for a new trial, and from the judgment overruling the same appeals.

The controlling question in this case is whether this fund in suit, and the benefits proceeding therefrom, is the property of the stockholders represented by the trustee, or constitutes assets of the bank to which the depositors thereof, represented by the receiver, have prior claims under the provision of statutory liens in their behalf. There is no question in the record as to the source of $40,351.98 of the moneys in dispute. Each of seventeen annual deposits to the credit of the account of S. S. Welpton, Trustee, in this bank, which together make up this sum, were wholly derived from the earnings and profits of this institution preceding the dates of such deposits.

It is not denied that at least one of the purposes sought to be provided for by the creation of the fund carried on the books of this institution in the name of S. S. Welpton, Trustee, was the erection of a new brick building for the Nebraska State Bank of O'Neill. It also appears that this account was first opened on March 31, 1912, and that annual credits were thereafter regularly made therein to and including March 1, 1928, inclusive; that the aggregate of the funds thus entered in said account is $40,351.98. Each one of these entries evidencing such transfers, it appears, was authorized and made pursuant to resolutions duly adopted at the annual meeting of the

board of directors of said bank for the year in which each of such credits was entered. The first resolution adopted by the board of directors was passed in March, 1912, in the following form: "Resolution offered and adopted that the sum of $3,250 be and the same is hereby appropriated from the profits and loss account and declared to be a dividend to the stockholders and shall be distributed as follows: $2,500 in cash to be paid out *pro rata* upon the paid-up capital stock of the bank to stockholders of record of this date, and $750 to be placed on deposit in the name of S. S. Welpton as trustee, to be utilized and expended in the interest of the bank or for contemplated improvements in real estate in such manner and at such times as the board of directors at any regular meeting may determine." Each of the annual resolutions as subsequently adopted by this board vary somewhat in phraseology, but each and all, either directly or by reference or necessary implication, express the thought that the deposit by it directed to be made to the credit of the trustee account was to be disposed of "in the interest of the bank * * * in such manner and at such times as the board of directors at any regular meeting may determine." It also appears that at the annual meeting of 1913 an additional resolution was duly adopted in the following terms: "Resolution offered and adopted that the cashier be authorized to loan the trust fund standing in the name of S. S. Welpton, Trustee, in such manner and under such terms as he may deem advisable, the interest and accumulations to be carried as a part of such fund." Thus it is plain that in terms the so-called "trustee" was vested with no power over, or control of, the fund in suit, save and except such as may be implied from his title, necessarily of course modified by the express powers conferred on the board of directors of the bank and interest as beneficiary expressly vested in that institution. *Hill v. Hill,* 90 Neb. 43.

While it is not entirely clear, it is assumed to be established, for the purpose of this case, that the three ad-

ditional items totaling $2,391.93, which also appear as credits in this account, were the proceeds of investments of this fund pursuant to the resolution last referred to, and constituted accumulations thereof, and were thus wholly derived from the earnings and profits of the bank that had been transferred or credited to this trustee account.

There is no evidence in the record that the stockholders of this bank, as such, were ever notified of the creation of the trust fund in suit by the board of directors, or ever approved that action, or, as a body, in any manner assented to its continued maintenance.

It also appears that by regular and continued course of dealing, which was begun not later than 1919 and continued substantially without interruption at least until May 9, 1928, said fund, excepting the sum of $222.93, was wholly disbursed by O'Donnell while serving as cashier and president, and being then the executive officer in immediate charge of the business of the bank. As to the method employed, it appears that it was paid out on checks executed in the name of S. S. Welpton, Trustee, or upon debit slips, all of which were either executed and actually signed by O'Donnell, or the signatures thereto authorized by him.

It must be said, however, that the proceeds thus withdrawn from this fund were employed in removing "bad" or "dead" paper from the bank; in aiding it to carry its excess loans; in paying and discharging its indebtedness, its guaranty fund assessments, and other like charges; and in general providing for the payment of the bank's obligations. It may be said that, excepting the sum of $1,100, all moneys thus distributed may fairly be said to have been actually "utilized and expended in the interest of the bank." Indeed, intervener alleges "that all of said funds were appropriated by the Nebraska State Bank and expended for its use and benefit." It must be further noted that no concealment of what had occurred appears to have been practiced, and that the several transactions

were entered in the records of the bank in due and regular course, and were actually inspected at the semiannual meetings of the board of directors (which appear to have been regularly held), who, it must be said, had at all times full knowledge of what had transpired. Though it must also be said that there is no record of any formal preauthorization of the acts of the executive officers with reference to this account, still it affirmatively appears that during said time S. S. Welpton, the trustee, served continuously as a director of this institution, was a regular attendant at the board meetings, and thus obtained and actually had full knowledge of these transactions within a comparatively short time after their occurrence. 7 C. J. 783; *Cox v. Robinson*, 82 Fed. 277.

It is to be remembered that earnings and profits in the possession of a corporation "belong to the corporation the same as the property generally, and for this reason there is nothing due and owing a stockholder from the profits as a matter of debt, until a dividend is declared in some appropriate manner. Until the time the dividend is declared it is only a potentiality, something that may possibly come into existence; * * * It accordingly follows that a stockholder has no legal title to the profits of the corporate business until dividends have been sufficiently declared; until such time a stockholder has only the right to receive his proportionate share of all profits. * * * The dividend before declaration and the right thereto is an incident of the stock and passes with it on sale of the stock." 7 Thompson, Corporations (3d ed.) sec. 5307. "When a dividend is declared by an appropriate and sufficient resolution there is then a severance of so much of the accumulated earnings from the corpus of the corporation's property or funds and it then becomes the individual property of the stockholders." 7 Thompson, Corporations (3d ed.) sec. 5308.

It is also true as a general rule that, after the dividend is declared, "it is no longer the profits of the corporation or undivided surplus; and while the distribution is based

on the number of shares held by each person, yet it is entirely severed both from the property of the corporation and from the stock as held by the owner and is individual property; consequently it does not pass with any subsequent transfer of the stock except by express agreement." 7 Thompson, Corporations (3d ed.) sec. 5317. See, also, *Cook v. Monroe,* 45 Neb. 349.

It is also obvious that the essential nature of the fund in suit must be determined by consideration of the language of the several resolutions, each considered as an entirety, and interpreted in the light of the surrounding circumstances. The fairly expressed intent of the board of directors, if not unlawful, must control. It may be conceded that, when considered as a technical term without regard to context in which it may be found, the word "dividend" is properly defined, as already indicated, as "that portion of the profits and surplus funds of a corporation which has been actually set apart, by a valid act of the corporation, for distribution among the stockholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the stockholders distributively." 14 C. J. 798. However, as well expressed by one of the distinguished English Judges: "The word 'dividend' carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring, and of course, where there is a context, it is liable to be affected by that context." *Henry v. Great Northern R. Co.,* 1 De Gex & Jones, 605, 641.

Here we have not only "a context" associated with the term "dividend," as employed in each of the resolutions adopted by this board of directors, but, in addition, a practical, uninterrupted, harmonious, and consistent interpretation of the language employed by the users thereof, as carried out in the actual business transacted by the bank extending over a period of more than nine years. During that time, and indeed prior thereto, all interests

treated the accumulations from time to time added to the so-called trust fund as intended solely "to be utilized and expended in the interest of the bank or for contemplated improvements in real estate in such manner and at such times as the board of directors at any regular meeting may determine." The fair import of the language quoted, especially in the light of the practical construction given it by the bank officers continuously down to the year 1928, not only expressly, but necessarily, negatives the thought that the effect of the corporate action in the transfer of funds to the "trustee account" was to require the profits and earnings placed in the trust fund to be distributed "among the stockholders according to their respective interests." On the contrary the corporation itself, as distinguished from the stockholders that composed it, in express terms was made the beneficiary of the fund, and its duly constituted officers, the board of directors, were expressly continued as the responsible and exclusive agents for its control, its use and expenditure. It follows that these so-called "dividends" which, as a matter of bookkeeping, were transferred on the books of this corporation and credited to the "trustee fund" in suit, not having been "sufficiently declared," and payment thereof to the stockholders in accordance with their stock ownership being expressly negatived by the terms of the resolutions creating the same, there has been in fact and in law no severance of so much of the accumulated earnings and profits of the bank embraced and covered by such resolutions from the corpus of the bank property or funds, and no part thereof has become the individual property of the stockholders. This trustee fund, as well as the property in which it has been invested, therefore, in law and in fact, has at all times constituted an asset of the bank, and is expressly subject to the bank's control.

It follows that the judgment of the trial court is correct, and is

AFFIRMED.

G. E. BURKE, APPELLANT, V. T. W. BASS, STATE TREASURER, ET AL., APPELLEES.

FILED MAY 20, 1932. No. 28213.

1. **Commerce:** GASOLINE: EXCISE TAX. Motor vehicle fuel, unloaded from a tank car into the shipper's storage tank, has lost its interstate character and may be subjected to an excise tax upon its use and distribution.
2. **Licenses:** GASOLINE: EXCISE TAX. Tax imposed by section 66-405, Comp. St. 1929, is an exeise tax upon the use and distribution of gasoline within the state.
3. **Constitutional Law:** GASOLINE: EXCISE TAX. An excise tax may be imposed upon the use and distribution of motor vehicle fuel without violation of the commerce clause (section 8, art. I) of the federal Constitution.
4. ———: ———: ———. An excise tax upon the use and distribution of motor vehicle fuel is consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

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

Good, Good & Kirkpatrick and *Paul F. Good,* for appellant.

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

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

DAY, J.

This is a suit in equity brought by plaintiff in his own behalf and on behalf of others in a similar situation to enjoin the state treasurer and the attorney general of the state of Nebraska from collecting the tax on gasoline, as provided by article IV, ch. 66, Comp. St. 1929. The petition alleges that he and his associates have purchased a carload of gasoline, to be shipped from Tyler, Texas, to Gurley, Nebraska, where it was to be unloaded and held in plaintiff's storage tank, from which gasoline would be drawn as needed by the plaintiff and his associates. The

gasoline was for the use of each of the parties, individually, in their tractor farming operations, and not for sale and not for motor vehicle use upon the highways. It is also alleged that, unless enjoined, officers of the state will collect the said tax from the plaintiff and his associates. It is alleged that this gasoline comes within the provisions of section 66-409, Comp. St. 1929, excepting from the tax interstate commerce; that this taxation constitutes a burden on interstate commerce prohibited by the provisions of section 8, art. I of the Constitution of the United States; and that the tax is in violation of the Fourteenth Amendment of the Constitution of the United States, and of section 3, art. I of the Constitution of Nebraska. A general demurrer to the petition was sustained by the trial court, whereupon the plaintiff elected to stand on his petition and the cause was dismissed. From this order an appeal is taken to this court.

The gasoline involved herein does not come within the exemption of the law, section 66-409, Comp. St. 1929, excepting interstate commerce, for that it had ceased to be interstate commerce. It had been unloaded from the tank car and placed in the plaintiff's container. It had become mingled with other property of the state and had lost its character as an article of interstate commerce and was taxable as other property. *New York v. Wells*, 208 U. S. 14; *Brown v. Houston*, 114 U. S. 622; *Bowman v. Continental Oil Co.*, 256 U. S. 642.

The gasoline tax is imposed by sections 66-401 to 66-415, Comp. St. 1929. Dealers are required to pay the tax. Under the statute, the term "dealers" includes any person who brings into or produces in the state motor vehicle fuel, which is for use, distribution or delivery in the state. The tax is an excise tax upon the use and distribution of gasoline within the state. *Pantorium v. McLaughlin*, 116 Neb. 61. It is not an impost tax. It applies to all motor vehicle fuels used and distributed within the state. For convenience, it is collected as nearly as possible to the source of production, from him who has it in his posses-

sion for use, distribution, sale or delivery in the state. The plaintiff in this case comes well within the term "dealers" as defined by the act. He was in possession of gasoline in a storage tank, for use, distribution and delivery in the state. It was to be delivered and distributed to the plaintiff and his associates, who had an interest in it for use within the state.

The construction of such a statute must be judged by its necessary effect. *Standard Oil Co. v. Graves,* 249 U. S. 389. The effect of this statute is to tax the use and sale within the state. Section 66-405, Comp. St. 1929, gives the state treasurer authority to refund tax paid on motor vehicle fuel destroyed by fire or act of God, or on which sales are taxed in another state. There is also an allowance for shrinkage. The tax is in effect an excise tax imposed upon the sale and use of motor vehicle fuels within the state.

Such a tax is not violative of section 8, art. I of the Constitution of the United States. It is only imposed when the motor vehicle fuel has lost its identity as interstate commerce. It is only sought to be imposed in this case when the gasoline has been unloaded, becomes mingled with and a part of the property of the state and ready for distribution and use within the state. *Bowman v. Continental Oil Co.,* 256 U. S. 642; *Askren v. Continental Oil Co.,* 252 U. S. 444.

It is argued that this gasoline was imported from another state in an original package, and that a tax upon its importation and sale as such is void as a burden upon interstate commerce. To support this contention, the appellant cites *Western Oil Refining Co. v. Lipscomb,* 244 U. S. 346, *Askren v. Continental Oil Co., supra,* and other cases, which are not applicable to the facts of this case, for that the tax involved in those cases is a property tax, and different from the tax here imposed upon the distribution and use of the gasoline, after it has ceased to be an article of interstate commerce.

The excise tax, as applied to local sale and use of gasoline by a dealer, is consistent with the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. *Bowman v. Continental Oil Co.*, 256 U. S. 642. Appellant has not argued either orally or in his brief that the excise tax on motor vehicle fuel is violative of section 3, art. I of the Constitution of Nebraska. We do not find that the tax contravenes the limitation of the due process clause of the state Constitution.

AFFIRMED.

PETER ROTH, APPELLEE, V. EMPLOYERS FIRE INSURANCE COMPANY, APPELLANT.

FILED MAY 20, 1932. No. 28262.

Insurance: APPLICATION. An agent, in making out an application for insurance, acts as the agent of the insurer, and not of the insured. If the insured makes full and honest answers to all questions asked him by the agent who is typewriting the application, the insurance company cannot take advantage of a false answer inserted by its agent, contrary to the facts as stated to such agent by the applicant.

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

Wear, Moriarty, Garrotto & Boland, for appellant.

John A. McKenzie, contra.

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

PAINE, J.

This is a suit for $1,807.50 upon a fire insurance policy covering personal property. The verdict returned was for $1,702.50. Motion for new trial being overruled, appellant prosecutes appeal, setting out 17 errors in its amended motion for new trial.

The evidence discloses that Peter Roth, a farmer about 70 years of age, brought action upon a three-year fire in-

surance policy, dated April 4, 1929, which had been written by his local banker, R. K. C. Brown, in the appellant company. The policy covered horses, cattle, harness, hay, farm machinery, grain, etc. The fire occurred January 19, 1931, and the loss sustained by Mr. Roth was much greater than the amount of insurance carried upon the property. A few years prior to the time that Roth took out this insurance policy, he had been sued for the sum of $7,000 upon a forged note. He had placed a mortgage upon his personal property on October 7, 1926, in favor of his brother, Alfred Roth, to protect against the suit on the forged note. Roth and the banker agent of the insurance company each lived in Papillion, Sarpy county. After the fire the appellant company sought to avoid liability on the ground that there was a chattel mortgage upon the property at the time the insurance policy was written.

The policy contained the following provision: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss."

Appellant alleged in the amended answer that appellee concealed and misrepresented in writing that the property insured was not mortgaged, when in fact the appellee had, prior to the signing of said application, mortgaged said property.

The amended answer also set forth the following provision of the policy: "This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void—if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

It is strongly contended by the appellant that untrue representations made by the insured in his application for

insurance will void the policy where such representations related to matters material to the risk, and where, if a true answer had been made, no contract of insurance would have been entered into. *Goodell v. Union Automobile Ins. Co.*, 111 Neb. 228; *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146; *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329.

On the other hand, the appellee sets out the statute, section 44-322, Comp. St. 1929, which reads in part 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."

In the case of *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, it was held: "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."

To the same effect are the following cases: *Traynor v. Automobile Mutual Ins. Co.*, 105 Neb. 677; *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n*, 106 Neb. 80; *Mayfield v. North River Ins. Co.*, 122 Neb. 63; *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126.

When the application was taken for the fire insurance policy, Mr. Roth took in the old policy of insurance on the same property and asked Banker Brown to write a new policy. In filling out the application, Brown asked if the property was mortgaged, and Roth said, "Yes," and testified: "I told him that mortgage don't amount to nothing, it was to protect myself, because they had $7,000 forged notes against me." So the local agent knew all the facts relating to this alleged mortgage, and knew that Roth owed his brother nothing, and that in reality there was no obligation thereon.

In the case of *Fidelity Mutual Fire Ins. Co. v. Lowe*, 4 Neb. (Unof.) 159, a syllabus is as follows: "An agent for an insurance company, authorized to solicit insurance, and receive, fill out, and transmit applications for insurance, binds the company which he represents in all knowledge received by him in the filling out of the application; and where an applicant in good faith states the answers truthfully, and the agent, with knowledge of the facts, enters false answers, and the policy is issued thereon, the wrong of the agent will be imputed to his principal, and the company will be estopped by the statements of its agent."

To the same effect are *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554; *German Ins. Co. v. Frederick*, 57 Neb. 538; 14 R. C. L. 1174, sec. 351; *Busboom v. Capital Fire Ins. Co.*, 111 Neb. 855.

Appellant urges the case of *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329, as holding to the contrary. The following distinction may be drawn between that case and the one at bar: In that case, the application was made out by the insured, who made a false answer as to his eyesight, and this defective eyesight was a direct, contributing cause to his injury, which would doubtless have been avoided if his eyesight had been as represented by him in his application.

It may be stated as a general rule that an agent, in making out an application for insurance, acts as the agent of the insurer, and not of the insured, and if the insured makes honest answers to all questions propounded, the insurer cannot take advantage of a false answer inserted by its agent, contrary to the facts as stated to the agent by the applicant.

We have examined the other errors assigned, and finding no prejudicial error in the judgment, the same is

AFFIRMED.

FIRST NATIONAL BANK OF HASTINGS, APPELLEE, V. JOE M. DAVIS ET AL., APPELLANTS.

FILED MAY 24, 1932. No. 28101.

1. Contract: AMBIGUITY: QUESTION FOR JURY. When the terms of a contract are in dispute and the real intention of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
2. ———: ———: INSTRUCTIONS. When an issue of ambiguity in a contract is to be solved by a jury, the instructions should clearly state the alternative claims of the parties and the alternative findings necessary to determine such issue.
3. Trial: INSTRUCTIONS. Practice of copying involved pleadings in stating issues in instructions disapproved.
4. Instructions examined and *held* to be prejudicially erroneous.
5. Evidence examined and *held* not to warrant application of principle of estoppel.

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

Peterson & Devoe, Charles E. Bruckman and *Tibbetts & Hewitt,* for appellants.

R. O. Canaday, Stiner & Boslaugh and *Edmund P. Nuss, contra.*

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

THOMSEN, District Judge.

This action is brought upon a guaranty signed by the defendants. The trial resulted in a verdict and judgment against all the defendants in the sum of $85,158.65, and all, except one, have appealed.

The guaranty is the last of a series of eight successive renewals extending over a period of almost three years, the first of which arose through the purchase of the assets of the Exchange National Bank of Hastings by the First National Bank of that city. In the contract of purchase the First National Bank assumed and agreed to pay the liabilities of the former bank, but apparently the safe

assets of the seller were insufficient to equal the liabilities assumed by the buyer and the guaranty arose by reason of this inadequacy.

A short time prior to December 6, 1926, the Exchange National Bank found itself with insufficient cash to meet demands. It had had a run which had just about depleted its available and procurable cash. Efforts toward assistance from local banks had been made. Finally, the government bank officials were called in, and the officers of the First National Bank of Hastings were induced to confer with a view toward consolidation. A long conference resulted in the plaintiff bank assuming all the liabilities of the Exchange National Bank and taking the latter's assets. Some of the assets were purchased outright. Those considered undesirable remained under control of the plaintiff, but with a liquidating agent, one of the officers of the Exchange National Bank, for liquidation, the proceeds to be turned over to the First National Bank. The difference between the total liabilities assumed and those assets purchased outright left a sum of $261,913.60. The guaranty of the defendants, a separate contract from the sale agreement, was in the sum of $161,913.60.

The contract of sale provided that the seller should execute and deliver to the buyer two notes, one for $735,511.12 and one for $100,000 payable in 90 days. This was done. This aggregate amount, $835,511.12, represented the seller's liabilities which the buyer assumed and agreed to pay. The buyer, in the contract, agreed to credit on the larger note the agreed value of assets purchased outright, $573,597.52, leaving a balance on the larger note of $161,913.60. The $100,000 note the parties expected to be paid by the stockholders of the selling bank, that being the aggregate amount of such stockholders' double liability. The defendants were the directors of the selling bank. In their guaranty contract with the buyer the defendants assured the payment of "part of said notes and * * * part of the indebtedness represented thereby," limiting their liability, however, to the sum of $161,913.60.

The liquidating agent of the Exchange National Bank ultimately collected, in successive stages, and remitted to the First National Bank sufficient to reduce the total debt to the sum of $103,500. In the meantime renewal notes in decreasingly smaller amounts representing the total indebtedness were given by the Exchange National Bank to the First National Bank. Upon the first renewal and thereafter the total indebtedness was represented by but one note instead of two. As each successive renewal note was signed by the Exchange National Bank, a new guaranty, a separate contract, each assuring payment to the extent of $161,913.60, was also signed by the defendants, the last of which was signed on September 15, 1929, when the total remaining indebtedness was but $103,500.

The dispute of the parties arises chiefly from the following: That the plaintiff, among other things, included in the first renewal note an unpaid balance on the $100,000 note; that the plaintiff also included in such note an item of $45,622.32, the aggregate face value of notes among those originally purchased outright but returned by the buyer to the seller.

The first item constituted a balance of approximately $36,300 and interest due from defendant, Charles G. Lane. Real estate of Lane had been conveyed by Lane to the buyer. The guarantors contend this conveyance to have been in satisfaction of this item and that their guaranty was never intended to extend to any part of the $100,000 note. The plaintiff says the conveyance was a mere additional security.

Of the second item, the one of notes returned, the buyer contended the notes to have been misrepresented, and added their face value to the renewal note. Later, approximately $30,000 of these returned notes was collected and the proceeds paid to the plaintiff. Each subsequent renewal note and renewal guaranty included the remainder of the indebtedness due from all these items.

The complaints presented by the defendants are mostly in claimed errors in the giving of instructions and in the refusal to give requested instructions.

Among the defenses pleaded, and upon which testimony was admitted, were the following: That the $100,000 note was to be paid by the stockholders in proportion to the amount of stock held by them and was ultimately so paid in either money or property; that, after crediting the property purchased outright, the difference between that sum and $735,511.12 (the larger note), $161,913.60, should be guaranteed by the defendants, and that the remaining property should be used in the payment of this guaranteed amount, the defendants to be liable only for the balance remaining, if any, after exhausting such property; that, if such property brought an amount in excess of the guaranteed sum, such excess should be applied on the $100,000 note; that the foregoing constituted the oral contract between the parties; that the written contract was intended to express these terms. The written contract used was in part a form submitted and requested to be used by the federal bank examiner. After the contract was drawn, and subsequently, defendants claim the assurance of the officers of plaintiff and plaintiff's attorney, upon which they relied, that the foregoing was the meaning and intent of the written contract. Defendants further claim the contract to be ambiguous, in that the several guaranties were interpreted by them, not as claimed by plaintiff as a guaranty of the whole indebtedness to the extent of the limited amount, but, as they claim to have understood, a guaranty of that portion only of the indebtedness represented by the difference between the larger note and the amount of property purchased outright; and that, though it could mean either, under all the facts and circumstances it meant the former; that the ambiguity is contained in the following portion of their guaranty: "And the First National Bank of Hastings has required further security and guaranty for the payment of a part of said notes and for the payment of the part of the indebtedness represented thereby." It is further claimed that the parties were mutually mistaken in believing the written contract represented the oral one.

In the court's instructions the first 19 pages are devoted to practically a copy of the pleadings. Though clear to a lawyer, it is hardly probable that the ordinary jury could intelligently digest the involved facts pleaded, or with any clarity comprehend the issues which the pleadings present. This form of stating the issues has several times been disapproved. "A clear, concise and terse statement of the issues is much to be preferred to the involved legal verbiage often found in formal pleadings, and is much more easily apprehended." *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439; *Forrest v. Koehn*, 99 Neb. 441.

Following the statement of the pleadings, the court briefly instructed the jury what the plaintiff was required to prove in order to recover, most of which was admitted by the pleadings; stated what the defendants were required to prove, as will hereinafter be noted; gave an instruction on the preponderance of evidence and credibility of witnesses; defined a mutual mistake as "one common to both parties to a written contract, each laboring under the same misconception;" defined a guaranty and briefly what constituted an ambiguous contract; and ended the instructions by the customary instruction on retirement of the jury, and the five-sixths verdict.

In instruction No. 3 the court submitted to the jury what the court stated to be three defenses to the plaintiff's petition, as follows: "(1) That there was a mutual mistake in drawing the contract of guaranty; (2) that the contract of guaranty is ambiguous; (3) that there were misrepresentations made by the agents and officers of plaintiff to the defendants, which caused the defendants to sign said guaranty." And further stated that, if the defendants had proved any one or more of the foregoing defenses by a preponderance of the evidence, the verdict should be for the defendants.

The attack of the defendants on the instructions, particularly this one, has merit. The plaintiff says that the defendants cannot complain, for since the jury were per-

mitted to speculate as to what these matters were, and had an unlimited field of speculation, the instruction was more favorable to the defendants than they deserved, and therefore not erroneous. Were the jury composed of men superior to the average, the plaintiff's conclusion might be justified. But the instruction lacks clarity and is disturbing in an attempt at application. If the instruction were taken literally, it might well be said that the jury were mistaken in returning a verdict for the plaintiff, in that at least the contract upon which suit was brought, the last of the series of renewal guaranties, could easily have been said to be, in a larger sense, ambiguous, in that the limit of liability stated in the guaranty exceeded the amount of the note which the guaranty was given to secure. Were it not for the explanation in the record that this guaranty had been copied by a stenographer in the bank's office, and that in copying the successive renewal contracts she had left the limit of ultimate liability the same, the guaranty would be unintelligible.

With no other guide than the three numbered clauses in the criticized instruction, the jury might very well reason from circumstances under which not one of the three matters as submitted ought to have any effect on the contract or ought to be a defense, to minimize the importance or pertinency of the defenses offered. How could the mere fact that a mutual mistake existed in drawing the contract, that the contract was ambiguous, that misrepresentations had been made by officers of the plaintiff, or any one of these, without more details, affect the defendants' rights? If the jury were permitted to speculate on these questions, they might as well require more serious matters to warrant a finding of mistake, ambiguity, or misrepresentation, than even those matters claimed by the defendants. If permitted to speculate, what assurance could be given that the speculation would not be to defendants' disadvantage rather than to their advantage; that the burden of proving facts would not be greater than their defense theory required? Furthermore,

at the close of this instruction the jurors were told that, if the defendants failed to establish one or more of these three propositions, the verdict should be for the plaintiff. However, the evidence should fail to establish *all* these defenses to have this result.

The case was one involving a large amount, the issues were complicated, a great mass of testimony (the record being over 1,000 pages) was presented, and it might well be assumed that more than usual attention would be paid by the jury to the court's instructions and that from these the jury would seek more than ordinary aid. The defendants were entitled to have the jury told clearly what the defenses were, to have the jury told of what the claimed "mutual mistake" consisted; the interpretation which the defendants had placed upon the contract, and in what respect the contract was claimed to be ambiguous; also of what the claimed misrepresentations consisted; and thus have the jury told the elements necessary for defendants to establish. If the court had directed the jury's attention to paragraphs in the answer in which these matters were set forth, or in any way centered the jury's attention upon the rights claimed to have been invaded and cast the burden upon defendants to prove such facts, the jury might have been assisted by such instruction.

Since the facts and circumstances were in dispute, and doubt existed as to the exact meanings of the words used and whether the contract properly expressed the real intention of the parties, the court properly admitted evidence to leave the problem to the jury for solution. *Coquillard v. Hovey,* 23 Neb. 622; *Rosenthal v. Ogden,* 50 Neb. 218; 2 Williston, Contracts, sec. 616; 4 Page, Contracts, sec. 2063. But the rule is: "In such cases the court should submit the question of fact to the jury under proper alternative instructions as to the construction to be given to the contract in the event of each possible finding of fact by the jury." 4 Page, Contracts, sec. 2063. See *Coquillard v. Hovey, supra.* This the court failed to

do. The court was not without aid. A number of appropriate instructions were offered by the defendants. Instructions Nos. 2, 5, 6, and 7 of those requested by the defendants related to details of defendants' theory of the case, would have proved helpful and should, under the evidence, have been given. The substance of these appeared nowhere else in the instructions. Tendered instructions Nos. 1 and 3, although failing to include for the jury's consideration all other facts and circumstances, these, and the others mentioned, presented sufficient to have furnished some inspiration for appropriate instructions to direct the jury in their deliberations. The defendants were entitled to have the instructions fairly and clearly submit the theory upon which the case was tried. This the instructions failed to do.

One other matter is to be noted. Plaintiff contends that defendants are estopped by reason of successive renewals of the guaranty to claim any of the defenses pleaded. Waiver and estoppel *in pais* are closely akin. Either would defeat defendants' claims. However, in both the facts must actually be known by defendants to have this result. 27 R. C. L. 904, 908, 909; 10 R. C. L. 692; *Cech v. Costello,* 117 Neb. 224. A strong analogy may be found in negotiable instruments. There, without knowledge, no loss or waiver of rights follows renewal when the action is between the original parties. *Exeter Nat. Bank v. Orchard,* 39 Neb. 485; *Davis v. Thomas,* 66 Neb. 26; *Auld v. Walker,* 107 Neb. 676; *Shawnee State Bank v. Lydick,* 109 Neb. 76; *Shawnee State Bank v. Vansyckle,* 109 Neb. 86; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *Nebraska State Bank v. Walker,* 111 Neb. 203. The evidence indicates a lack of knowledge on the part of defendants of the facts necessary to constitute an estoppel. No knowledge of facts is shown by the answer. Although the fact of repeated renewals may, under circumstances, prove strongly persuasive to a jury, as a matter of law we do not find that the defendants have either waived their defenses or are estopped to raise them.

We have devoted days to a careful consideration of all the testimony and the briefs of counsel. The case may have been rightly decided, but we have reached the conclusion that the defendants have not had a fair and impartial trial due to the failure of the court properly to instruct the jury. Therefore, the judgment is reversed and the cause remanded.

REVERSED.

PEOPLES BANK OF WAUNETA, APPELLEE, V. NOBLE A. TROWBRIDGE ET AL., APPELLEES: MADESSA M. WOLFE, SPECIAL ADMINISTRATRIX, APPELLANT.

FILED MAY 26, 1932. No. 28259.

Mortgages: PRIORITIES. Where the release of a former mortgage on certain land was filed on the same day as a subsequent mortgage thereon, and the mortgagee at all times was unaware of the existence of an intervening second mortgage, such second mortgage will not be given priority over the subsequent new mortgage, where it appears that it was the intention of the parties thereto that such new mortgage was not a discharge of the former mortgage lien but a continuation thereof.

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

Clyde Anderson and *Coufal & Shaw,* for appellant.

F. C. Radke, Barlow Nye, Meeker & Curtis and *Cordeal, Colfer & Russell, contra.*

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

DEAN, J.

The Peoples Bank of Wauneta began this action in the district court for Chase county to foreclose a mortgage executed in its favor by Noble A. Trowbridge, on or about April 5, 1921, on the following described real estate, namely, the northeast quarter of section 19 and the northwest quarter of section 20, all in township 7, range 36 west of the 6th principal meridian. Trowbridge executed and de-

livered the above mortgage to the plaintiff bank as security for his promissory note in the principal sum of $2,457.96, and the note, by its terms, became due eight months thereafter.

Madessa M. Wolfe, as special administratrix of the estate of her deceased husband, Thomas Wolfe, filed an answer and cross-petition wherein she admits the execution of the mortgage in suit by Trowbridge in favor of the plaintiff bank. But she alleges that, in July, 1917, Trowbridge executed his promissory note for $3,200 in favor of Thomas Wolfe, with interest thereon at the rate of 8 per cent. per annum, and which became due July 1, 1922, and that, as security for such note, he executed a mortgage on the real estate above described. Trowbridge, on April 5, 1921, and before the $3,200 note to Wolfe became due, executed a second mortgage on the real estate herein in favor of the plaintiff bank. It appears that on or about March 1, 1924, approximately $4,000 was due and unpaid to Wolfe by Trowbridge on the $3,200 note. At that time Wolfe granted an extension to Trowbridge and released the $3,200 mortgage and took instead a mortgage for $4,000 on the real estate herein. The release of the $3,200 mortgage was filed March 11, 1924, that being the same day that the $4,000 mortgage was filed of record. The contention of the plaintiff bank is that the mortgage in suit became a first lien and superior to that of Wolfe's upon the release by him of the 1917 mortgage.

Upon submission the court found and decreed that the $4,000 Wolfe mortgage was a second lien and inferior to the mortgage lien held by the bank, and that Wolfe had knowledge of the mortgage in favor of the bank, but that he failed to have the release of the $3,200 mortgage canceled and he failed to have such mortgage reinstated. From the judgment so rendered Madessa M. Wolfe has appealed.

In respect of the mortgage held by the plaintiff bank, it appears that Trowbridge executed such mortgage as

security for the $2,457.96 note in favor of the bank, and that he signed the note as surety for his brother, the object of the note being to pay off and discharge certain debts owing by the brother to the bank. At the time it was executed, the mortgage to the bank contained the statement that it was "subject to a mortgage of $3,200," this being the 1917 mortgage executed by Trowbridge in favor of Wolfe.

Thomas Wolfe died in February, 1930, and he was then 84 years of age and was then the president of the First National Bank of David City. There is evidence tending to prove that Wolfe was easily prevailed upon to make loans of money that did not inure to his good, nor to that of the bank with which he was associated. And it appears that, shortly before his death, a committee was appointed by the David City bank to oversee all such loans as he may have made. It appears that a witness, who succeeded Wolfe as president of the David City bank, testified that the earliest knowledge he had in respect of the claim of the plaintiff bank was in 1926, when the bank officers informed him that, in their opinion, the mortgage in suit became a first lien against the property herein as soon as Wolfe filed the release of the $3,200 mortgage. And it likewise appears that the officers of the plaintiff bank did not become aware of the execution of the $4,000 mortgage and the release of the $3,200 mortgage, as between Trowbridge and Wolfe, for several months after such release and mortgage had been filed of record.

The evidence of Trowbridge and that of his wife discloses that they recognized the Wolfe mortgage as a first and superior lien on their land, but it appears that they did not inform Wolfe of the mortgage executed by Trowbridge in 1921 in favor of the plaintiff bank. The Trowbridges both testified that it was their intention that the $4,000 note and mortgage were to be a continuation of the $3,200 mortgage executed in 1917, and that it was to be a first lien against their property. And it is apparent from

the evidence that Wolfe believed that he still held a first mortgage lien upon the land in suit at the same time he renewed the loan and accepted the $4,000 mortgage in place of the $3,200 mortgage.

This elementary rule has been stated by a recognized authority: "Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage." 27 Cyc. 1222.

And in 2 Jones, Mortgages (7th ed.) sec. 873, the statement is made that "It is presumed, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security." In *Edney v. Jensen,* 116 Neb. 242, following the rule above announced, we held: "Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes and really intended to extinguish them."

In *American Savings Bank & Trust Co. v. Helgesen,* 67 Wash. 572, where an old mortgage was released and the mortgagee took a new mortgage in its place to secure the same debt, the court held: "The cancelation of the old mortgage and the substitution of the new were contemporaneous acts. The manifest intention of all parties interested and participating was not to discharge the lien of the mortgage but to continue it. The purpose was not to create a new incumbrance, but merely to change the form

of the old. A court of equity will look straight to the substance of the transaction, rather than give heed to the mere form which it may assume."

The evidence appears to disclose that Wolfe had no actual knowledge of the existence of the mortgage in favor of the plaintiff bank at the time he released the $3,200 mortgage and accepted the $4,000 mortgage in lieu thereof, and the presumption is that he would not have done so had he known of the mortgage in suit. But where the release of the former mortgage was filed on the same day as the subsequent mortgage on the same land, and the mortgagee was at all times unaware of the existence of an intervening second mortgage thereon, such second mortgage will not be given priority over the new mortgage, where it appears that it was the intention of the parties thereto that such new mortgage was not a discharge of the former mortgage lien but a continuation thereof.

The argument of the plaintiff bank is that Mrs. Wolfe is estopped to recover on the mortgage for $4,000, and that she is guilty of laches in failing to foreclose thereon long before she filed her cross-petition herein. And the bank argues that it would long ago have begun its suit had it been informed that Mrs. Wolfe maintained that her $4,000 mortgage was superior to the bank's mortgage. However, we do not think there is merit in this contention in view of the fact that we hold that the $4,000 mortgage is a continuation of the former $3,200 mortgage and that the plaintiff bank's mortgage is inferior thereto. And, besides, the bank failed to bring any action to recover on the mortgage in suit until after the death of Thomas Wolfe in 1930, and the defense of laches cannot be invoked in its favor.

In view of the record before us the judgment must be and it hereby is reversed, with directions that the mortgage executed by Trowbridge in favor of Wolfe be reinstated as a first lien against the property in suit.

REVERSED.

BALDWIN-HECKES COMPANY, APPELLEE, V. FRANK L. KAMMERLOHR: JAMES WALT CURL, APPELLANT.

FILED MAY 26, 1932. No. 28210.

Bills and Notes: INDORSEMENT. The change of a general indorsement of the payee of a note to a special indorsement, by the holder in due course writing above the indorser's signature on the back thereof, "I hereby assign the within note and mortgage to Baldwin-Heckes Company," does not render the indorsement qualified, but continues upon the indorser all the liabilities of a general indorsement in blank.

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

Cordeal, Colfer & Russell, for appellant.

Robins, Yost & Lamme and *Fred T. Hanson, contra.*

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

EBERLY, J.

This is an action at law by the holder and purchaser of a negotiable promissory note against the maker thereof and the payee named therein who indorsed the same. From a judgment in favor of the plaintiff the indorser only appeals.

The sole question presented for determination in this review is whether the words, "October 27, 1930, I hereby assign the within note and mortgage to Baldwin-Heckes Company. (Signed) J. W. Curl," constitutes a qualified indorsement, or do they impose on Curl the liability of a general indorser. The evidence of the appellant, uncontradicted, is that, when delivered by Curl to plaintiff's agent, this note bore only the general indorsement of the payee, "J. W. Curl," a blank indorsement; that thereafter at a time and place unknown to the indorser, and as an act not in any manner participated in by him, the transferee wrote above the indorser's signature on the back of the note, "I hereby assign the within note and mortgage to Baldwin-Heckes Company." This was expressly author-

ized by section 62-306, Comp. St. 1929, which provides: "The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement." In this connection, "A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument." 3 R. C. L. 971, sec. 180. On this state of facts appellant insists that he is an assignor only and not liable as a general indorser, and that the reasoning of the opinions in *Kane v. Eastman,* 110 Cal. App. 753, and in *Spencer v. Halpern,* 62 Ark. 595, is conclusive and should be accepted as the basis of the decision in this case. However, it is thought that neither the facts involved in these cases, nor the reasoning of the courts as applicable thereto, necessarily sustain appellant's contention.

In *Kane v. Eastman, supra,* the district court of appeals (an intermediate court in California) determined that a printed indorsement on a promissory note executed by the payee prior to the negotiation thereof in the following words, "For value received, we/I hereby transfer, assign and set over unto Charles H. Kane all my/our right, title, interest in and to the within contract/note," constituted a qualified indorsement, not it seems because of the use of the words "transfer, assign and set over," but because of the subject-matter thereof which is identified and described by the words "all my/our right, title, interest" of the payee. There is cited in this opinion in support of this conclusion the case upon which appellant relies, viz., *Spencer v. Halpern,* 62 Ark. 595, wherein the learned supreme court of Arkansas, in construing an indorsement on a promissory note by the payee thereof in the words, "For value received I hereby transfer my interest in the within note to Isaac Halpern. (Signed) Geo. Spencer," determined that the maxim, *Expressio corum quæ tacite insunt nihil operatur,* was inapplicable under the facts

of that case; that the words, "my interest in the within note," written as part of the indorsement thereon, by the hand of the indorser prior to delivery thereof, even though construed most strongly against the transferor, could not be deemed to mean anything more than "my interest," and were therefore clearly words of limitation.

Conceding arguendo the full force of the reasoning in *Spencer v. Halpern, supra,* in the statement that, "The declaration that the payee assigns or transfers all his right, title and interest in the paper would seem to limit in a most effective way the rights acquired by the transferee to those which the transferor had therein," and in the absence of statutory provision thus prevent the writing from operating as a general indorsement, still it would seem, in view of the statutory provisions having some bearing thereon, as well as the difference in the facts involved, that such statement is neither applicable nor controlling in the instant case.

In this jurisdiction the terms of the uniform negotiable instruments act, as adopted by our legislature, are mandatory, and it is to be observed that Arkansas did not adopt this legislation until seven years after *Spencer v. Halpern, supra,* was determined. So, also, in the instant case, the language descriptive of the matter transferred by the indorsement is not limited to the "right, title and interest" of the indorser, but is "the within note," thus manifestly purporting to transfer every right or benefit which the terms of this written instrument create or purport to create for and vest in the payee thereof. It would seem that the words "the within note" in themselves are wholly incompatible with the idea that a limitation is expressed thereby.

Then, too, the real interest of the payee or transferor of a negotiable instrument would naturally suggest the employment by him of words of limitation of his responsibilities in an indorsement thereof penned by his own hand. That situation is wholly absent in the instant case. Here, appellant's undisputed evidence is that the indorse-

ment in suit as he executed it, and as it existed when the note sued on was delivered, was an indorsement in blank, a general indorsement. It must be conceded that by his voluntary delivery of the instrument in suit thus indorsed, a fact which is not questioned, under the circumstances disclosed in the evidence, he became bound to the indorsee or transferee to perform all the obligations imposed by law upon an indorser who indorses without qualification. Comp. St. 1929, sec. 62-507. These facts thus created a new and definite contract, and the rights of the parties thereto became absolute and fixed upon the delivery of the writing obligatory in suit. It also appears that, after the rights of the parties to this litigation were thus vested and fixed, the transferee sought to take advantage of the provisions of the uniform negotiable instruments act. Comp. St. 1929, sec. 62-306. For this purpose, over the signature of the appellant on the back of the note, was written the words of the indorsement as it now appears.

Obviously what is contemplated by section 62-306, Comp. St. 1929, is the simple conversion for the convenience of the transferee of what was a general indorsement into a special indorsement. Indeed, the statute in terms expresses the limitation that the new agreement or indorsement so made shall be consistent with the character of the indorsement as originally made. "Consistent," as defined in Webster's New International Dictionary, includes, "Having agreement with itself or something else; * * * accordant; harmonious; congruous; compatible; not contradictory." Manifestly the terms of the statute last referred to contemplate that the special contract resulting from the change of the general indorsement in blank to a special indorsement shall be consistent with the obligations imposed by the original indorsement, not contradictory thereto, and shall not, in legal effect, be substantially changed thereby. The language of the indorsement in suit as changed by the transferee, under the terms of the statute quoted, certainly constitutes a special indorsement.

However, it does not expressly enumerate or express all obligations which the indorsement in blank imposed. It expresses nothing which is not fully implied thereby. Under these circumstances, to construe the mere omission by the transferee of a negotiable instrument to correctly declare or recite all the legal obligations implied in a "general indorsement in blank," when proceeding under section 62-306, Comp. St. 1929, to change it from a general to a special indorsement, as necessarily negativing the continued existence of that which was omitted, is not only unreasonable, but would amount to the creation by judicial construction of a new contract not contemplated by the parties, and inescapably inconsistent and incompatible with the original indorsement, as well as in contravention of the terms of the statutes involved.

The safe principle applicable to this situation seems to be "that it is often desirable to express what the law would imply, in order to remove all doubt as to intention. *Abundans cautela non nocet.*" Broom's Legal Maxims (9th ed.) 433. It therefore appears that the relation of the parties, as well as the facts of the transaction, indicate that the words of the indorsement in suit, under the circumstances of the case, would not justify, as a controlling canon of construction, the application of the maxim, *Expressio unius est exclusio alterius,* but suggest rather that the maxim, *Expressio eorum quæ tacite insunt nihil operatur,* expresses the correct rule. Broom's Legal Maxims (9th ed.) 431.

Without reference to the special circumstances of the instant case, but considering the language of the indorsement in suit as a general proposition only, this conclusion appears to accord with the views of the textwriters in the main. Thus, the learned author of 1 Daniel, Negotiable Instruments (6th ed.) sec. 688c, says: "The question arising in such cases is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee indorsed on the paper imports an executed contract of assignment, with its implications, and also an executory

contract of conditional liability with its implications. The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment, and the signature under it, which carries the legal title. And the question is: Does the writing over a signature on express assignment which the law imports from the signature *per se* exclude and negative the idea of conditional liability which the law also imports if such assignment were not expressed in full? We think not. It is from the fact that a payee assigns a bill or negotiable note by indorsement of his name on the back of it, that the law implies his liability as an indorser. His relation to the instrument creates the implication, and the circumstance that he sets forth that relation in express terms does not change it, for the maxim applies, *Expressio eorum quæ tacite insunt nihil operatur.* Did the payee intend merely to pass the title he should use the words 'without recourse' or some phrase of equal import. His liability is implied without words expressly creating it. To be negatived, words should be used which negate the implication. If the executed contract created implications of several executory contracts, then the expression of one of those implications might exclude others of the like class, by application of the maxim, *Expressio unius est exclusio alterius.* But when the thing done creates the implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequence when that consequence would follow if the expression were omitted. The executory contract of the indorser to pay in the event of dishonor and notice has never in any case that we are aware of been written in full. And if the language does not negate that universally accepted implication it should be remembered that the words are to be considered as strongly as their sense will allow against those using them; and the question resolved accordingly."

As applied to the facts in the instant case, we are in-

clined to the view thus expressed by Daniel. This doctrine is wholly consistent with the intent of our statute (Comp. St. 1929, sec. 62-309) declaring that "a qualified indorsement constitutes the indorser a mere assignor of the title to the instrument" and "may be made by adding to the indorser's signature the words 'without recourse,' or any words of similar import." And while this enactment in express terms provides (Comp. St. 1929, sec. 62-110) that "the instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof," it further provides (section 62-117): "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." These statutory provisions, it may be said, are declaratory rather than amendatory of the law merchant as it prevailed at the time of their adoption. Thus the learned author of Edwards, Bills and Notes (3d ed.) 284, in the discussion of the present subject, lays down the rule that "any form of words will answer the same purpose (as the words 'without recourse'), by which the party indorsing disclaims the responsibility of an indorser. But the words used must clearly express the intention not to incur liability as indorser."

It would seem obvious that, in view of the express terms of the Nebraska uniform negotiable instruments act, it cannot be said that the better reasoning supports the contention of the appellant. But an additional reason tending to sustain the action of the trial court in this case is to be found in the fact that the decisive majority of the courts of this nation have taken the view that the liability of an indorser is imposed upon one who makes an assignment upon the back of commercial paper, and that this conclusion, generally speaking, is in harmony with the provisions of the uniform negotiable instruments act as adopted in the various jurisdictions. *Leahy v. Haworth,* 141 Fed. 850; *Maine Trust & Banking Co. v.*

Butler, 45 Minn. 506; *Coddington Savings Bank v. Anderson*, 64 Neb. 205; 8 C. J. 370; *Smith v. Brooks*, 65 Ga. 356; *Henderson v. Ackelmire*, 59 Ind. 540; *Mayes Mercantile Co. v. Handley*, 6 Ind. T. 357; *Adams v. Blethen*, 66 Me. 19; *Markey v. Corey*, 108 Mich. 184; *Maddox v. Duncan*, 143 Mo. 613; *Davidson v. Powell*, 114 N. Car. 575; *Lenhart v. Ramey*, 3 Ohio C. C. 135; *Copeland v. Burk*, 59 Okla. 219; *Behrens v. Kirkgard*, 143 S. W. (Tex. Civ. App.) 698; *Prichard v. Strike*, 66 Utah, 394, 44 A. L. R. 1348; *Citizens Nat. Bank v. Walton*, 96 Va. 435.

In view of the unanimity which prevails among the courts of the states that have adopted substantially the provisions of the uniform negotiable instruments act, it is obvious that public policy, which demands uniformity in the rules on this subject, would necessarily require conformity with the majority holding. Indeed, we are committed to the doctrine that "The negotiable instruments act (Comp. St. 1929, secs. 62-101 to 62-1710), having been adopted by this state and others of the federal union for the purpose of securing uniformity and certainty in laws throughout the country, should be so construed as to give effect to this design." *Peter v. Finzer*, 116 Neb. 380.

It follows, therefore, that the judgment entered by the district court in this case is right, and is

AFFIRMED.

CITY OF WILBER, APPELLEE, V. ALBERT BEDNAR: ADOLPH B. SOBOTKA ET AL., APPELLANTS.

FILED MAY 26, 1932. No. 28118.

1. **Municipal Corporations: ANNEXATION OF TERRITORY.** When, in a suit brought under section 17-409, Comp. St. 1929, it appears that territory sought to be annexed to a city will be benefited from the annexation, or that justice and equity require its annexation, a decree annexing the same will be upheld.
2. **Appeal in Equity: TRIAL DE NOVO.** When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, sec. 20-1925. But in a case wherein the trial court has made a personal ex-

amination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *State v. Delaware-Hickman Ditch Co.*, 114 Neb. 806, followed.

3. Evidence examined and *held* sufficient to sustain the judgment.

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

George E. Hager, for appellants.

Bartos, Bartos & Placek, contra.

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

CARTER, District Judge.

This is an action brought by the city of Wilber against Albert Bednar and other defendants under section 17-409, Comp. St. 1929, for the purpose of annexing certain territory belonging to each of said defendants. From a decree of the trial court finding against the defendants and annexing the territory of each to the city, the defendants Adolph B. Sobotka, Edward H. Vosika, Anton Vit, Emil Fuchs, and Anna Bruha bring the case to this court on appeal.

The decree of the trial court is assailed as being wholly unsupported by the evidence. The testimony is to the effect that the several tracts of land belonging to the appellants lie adjacent to the corporate limits of the city of Wilber and have been subdivided into lots and blocks, streets and alleys, that a number of people have established their homes thereon and are now enjoying the benefits of city utilities, such as electric lights, city water, sanitary sewer and the ice and cold storage plant, all of which are owned and operated by the city of Wilber. The testimony, however, discloses that the ice and cold storage plant was used generally by farmers in the territory surrounding the city of Wilber and that these defendants re-

ceive no benefits from it that are not available to the community as a whole. All the residences on said tracts are furnished with electric lights by the city under special agreements. The sanitary sewers are close enough to each tract to make them available to the persons residing thereon. Sidewalks have been constructed to the corporate limits of the city adjoining the tracts sought to be annexed and are used continually by the defendants. The street lighting system of the city has been constructed up to the corporate limits adjoining these properties. The streets of the city have been paved to a point less than 75 feet from the tracts belonging to the defendants Sobotka, Vit, Fuchs and Bruha. Most of these defendants are connected with the water system of the city. Fire hydrants have been constructed in such close proximity as to furnish complete fire protection to all the residences and buildings on the tracts sought to be annexed. The properties within the corporate limits and adjacent to those sought to be annexed are platted and occupied and indicate that the city has grown until it has built up to the property of these defendants. The tracts owned by the defendants Sobotka, Vit, Fuchs and Bruha are used exclusively for residence purposes.

The evidence shows that the defendant Vosika is the owner of, and occupies and cultivates, 76 acres of land adjoining the city of Wilber on the north, less two tracts in the southeast corner 154 feet by 123 feet and 66 feet by 123 feet which had been sold by him prior to the commencement of this action for residence purposes. The amount of the land sought to be annexed belonging to this defendant is a strip 622 feet by 300 feet, less the two small subdivisions thereof above mentioned, both of which were annexed by the trial court and from which no appeal was taken. The part sought to be annexed to the city is claimed to be an integral part of the farm on which all his farm buildings and improvements, consisting of his barns, sheds, pens, etc., are located. The evidence shows that the defendant is engaged in farming and no

other business, and that he keeps and raises grains, forage crops, hogs, cattle and other stock on this land, and as his buildings and granaries are on the tract sought to be annexed, they are necessarily kept on that part of it. The evidence, however, shows that the utilities and improvements of the city are used and enjoyed by this defendant to the same extent as the other defendants here on appeal and which have been heretofore set out in this opinion.

The city of Wilber, according to the 1920 census, had a population of 1,255 persons and in 1930 a population of 1,352. All of said defendants get their mail at the post office in Wilber, attend the churches of the city, and are in the same school district as the inhabitants of the municipality. It is also disclosed by the testimony that the bonded indebtedness of the city is approximately $308,000 and that the mill levy within the city for the year 1930 was 19 mills. It is not disputed that the utilities and improvements of the city are of sufficient size and capacity to service all the properties sought to be annexed.

Section 17-409, Comp. St. 1929, is in part as follows: "If the court find the allegations of the petition to be true, and that such territory, or any part thereof, would receive material benefit by its annexation to such corporation, or that justice and equity require such annexation of said territory, or any part thereof, a decree shall be entered accordingly; and a copy of the decree of the court, duly certified under the seal thereof, * * * shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies." This statute has been before this court on numerous occasions, and while each case has been determined generally upon the facts of the particular case, it has repeatedly been held that to justify the annexation of territory it must appear that it would receive material benefit from the annexation, or that justice and equity require such annexation.

While it might be said that the tracts of real estate involved in this action do not receive benefits from the city of Wilber for the reason that they now receive, or have access to, the same benefits as if they were within the corporate limits of the city, yet it is the opinion of this court that the four tracts belonging to the defendants Sobotka, Vit, Fuchs and Bruha have that unity of interest with the city that is required by the law, and that in justice and equity they should be made a part thereof. There can scarcely be any question that they come squarely within the statute and that the trial court was right in annexing them to the city.

As to the defendant Edward H. Vosika, a closer question is involved, as his property is used primarily for agricultural purposes. The evidence discloses, however, that the improvements of the city of Wilber have been made close to his property so that he has access to practically all the utilities of the city; that he has sold off tracts of his land for residence purposes, and that he undoubtedly has the same unity of interest with the city of Wilber as the other defendants herein and which have been heretofore mentioned. He complains, however, that the ordinances of the city of Wilber will compel him to move his live stock outside of the city limits, which will make it necessary for him to remove his buildings and cause him considerable damage. This, however, cannot be an absolute defense, otherwise cities and villages would be seriously handicapped in taking in adjacent territory where necessary expansion would require it. In the case of *City of Wahoo v. Tharp*, 45 Neb. 563, the city of Wahoo commenced an action to take several tracts of real estate into the city, and for a defense it was alleged that at a prior date a like proceeding had been instituted for the city for the purpose of annexing the same territory, and that a judgment had been rendered in favor of the defendants. The reply admitted the former proceedings and judgment, but alleged that subsequent to the date of the judgment the city had constructed an extensive and complete system

of water-works ample for the supply and protection of the city and the territory sought to be annexed; that it had since said time extended its streets, sidewalks and cross-walks to and in the near proximity to said territory; that it had extended its street lights to the vicinity of said property at great expense, and that the population of the city had greatly increased since the former hearing. In examining the action of the trial court in annexing the territory to the city this court said: "The evidence adduced on the part of the city tends to prove that subsequent to the former judgment it has constructed a system of water-works including four or five miles of mains, with forty-seven fire hydrants; that it has the customary fire department which is supplied with carts, hose, etc., and that the buildings situated on said lots are, with few exceptions, within the protection afforded thereby; that there has been a considerable increase in the city's population, resulting in an extension of the streets and sidewalks, which are in constant use by the owners and residents of said tracts. Some of the foregoing propositions are controverted by the defendants, but the court evidently found that the former judgment was based upon conditions substantially different from those disclosed by the proofs, and that conclusion has ample support in the record. It was held in *State v. Dimond,* 44 Neb. 154, that lands adjacent to a town or village may be incorporated therewith, provided they are in such close proximity to the platted portions as to have some unity of interest in the maintenance of muncipal government, and such, judging by the record, is the rule which was recognized by the district court."

The defendant Edward H. Vosika is receiving practically all of the benefits that are mentioned in the above case, and the facts mentioned therein are almost identical with those in the case at bar. In the case of the *Village of Syracuse v. Mapes,* 55 Neb. 738, this court said: "This section authorizes the extension of the boundaries of a town or village so as to include adjacent lands, against

the consent of the owner or owners, whether such territory has been subdivided into tracts or parcels of ten acres or less, or has not been so subdivided, in case the same would receive material benefits or advantages by its annexation to the corporation, or justice and equity require such annexation to be made. There was evidence conducing to show the location of the territory proposed to be annexed, its close proximity to the platted portion of the village and to the streets and sidewalks therein; that between 100 and 200 persons reside on the lands sought to be annexed; also the population of the village, its improvements and surroundings, its advantages as a trading point, and for educational and church purposes; and that the lands in question represented the growth of the village beyond its limits, and would receive material benefits by extending the boundaries of the village so as to include the same. On the other hand, there was testimony of a very convincing character to the effect that annexation to the corporation of these lands would be a substantial detriment and damage to their respective owners, instead of a benefit to them. The writer is unable to discover how, in any way, the territory in question would be benefited by the annexation, as it now practically receives all the advantages and benefits as if the same was within the boundaries of the village. It has been held that under section 99 the corporate limits of a village may be extended to include adjacent lands in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. *State v. Dimond*, 44 Neb. 154; *City of Wahoo v. Tharp*, 45 Neb. 563. This case is within the rule just announced, and, while the adjacent lands may not be materially benefited by their annexation, justice and equity require that the corporate limits of the village be extended to include said territory. The section mentioned authorizes the annexation to a village of contiguous territory upon the ground of material benefits and advantages to flow from such annexation, or because justice and

equity require that the boundaries of the corporation be extended so as to include such territory. *Village of Hartington v. Luge,* 33 Neb. 623."

Certain testimony was produced indicating that the property of the defendant Vosika was used exclusively for agricultural purposes, and while this evidence is competent in a case of this character, it is not in all cases controlling. Where the evidence shows that the property involved would be materially benefited, or that justice and equity require its annexation, the fact that it is used for agricultural purposes will not of itself be a bar to its annexation. To so hold would practically defeat the purposes of the statute in a great many instances.

The record in this case discloses that the trial court viewed the premises after hearing all the evidence in the case and undoubtedly such examination was important in determining the equity of the parties. The rule in such cases has been laid down by the court in the case of *State v. Delaware-Hickman Ditch Co.,* 114 Neb. 806, as follows: "When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1922, sec. 9150. But in a case wherein the court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." After hearing the testimony of the witnesses, which was very conflicting as to the material issues of the case, and then making a personal examination of the physical facts, the trial court came to the conclusion that justice and equity required that the corporate limits of the city be extended to include said territory. This is a fact that we will consider in arriving at a decision in this case on appeal.

It is the opinion of this court therefore that the lands of all the defendants would be materially benefited by their annexation to the city, and that justice and right require that they be so annexed.

For the reasons above set forth, the decree of the trial court is in all respects

AFFIRMED.

BESSIE B. BLACKWELL, APPELLEE, V. OMAHA ATHLETIC CLUB, APPELLANT.

FILED MAY 26, 1932. No. 28054.

1. **Negligence**: BATHING RESORT: LIFE GUARD: CARE REQUIRED. A life guard at a bathing resort or pool who goes to the rescue of a patron or guest owes the duty of exercising ordinary care; that is, such care as would be exercised by an ordinarily cautious life guard under like circumstances; and for a failure in this respect, with resulting injury, an action for damages will lie.
2. **Trial**: EVIDENCE. Whenever there is evidence of so positive and significant a character as would support a verdict, if uncontradicted, it is the duty of the trial court to submit the case to the jury, under proper instructions. It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go. *Stohlman v. Davis*, 117 Neb. 178.
3. ———: INSTRUCTIONS. Instructions given the jury by the court on its own motion, and complained of by the defendant, and instructions to the jury requested by defendant and refused, examined, and rulings of court thereon, *held* without prejudicial error.
4. ———: NEW TRIAL: MISCONDUCT OF JUROR. When a new trial is asked on the ground of misconduct of a juror, the finding of the trial court in support of the verdict will not be set aside unless the evidence of misconduct is of a clear and convincing character. *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105.
5. **Damages**: REMITTITUR. Verdict and judgment of $7,500 appearing excessive, ordered, if appellee within 20 days file remittitur of $3,000 as of date of judgment, that judgment be affirmed; otherwise, reversed.

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

Kennedy, Holland & DeLacy, for appellant.

Daniel J. Gross, contra.

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

ELDRED, District Judge.

This is a personal injury action brought by Bessie B. Blackwell, plaintiff and appellee, against the Omaha Athletic Club, defendant and appellant, to recover damages for injuries claimed to have been sustained on account of negligence of the life guard of the defendant.

The petition alleges that on June 25, 1929, the plaintiff was swimming in the club pool with a Mrs. Kopperud. That Mrs. Kopperud went beyond her depth and called for help; that plaintiff went to her assistance; and while attempting to aid her, an attendant at the pool, believing plaintiff to be in difficulty, jerked her and pulled her out over the bank of the pool, injuring her left arm, side and back. From judgment in favor of plaintiff, the defendant appeals.

The first assignment of error raises the question of the sufficiency of the evidence to sustain the verdict; the point being that there can be no action against the proprietor of a swimming pool based on rough handling by a life guard while making a rescue; and, even if there could be, there was not, in this case, evidence of negligent rough handling.

Proprietors of bathing resorts or pools in discharging their duty toward their patrons and guests are not only under obligation to keep an attendant or life guard on hand to supervise and protect bathers in case of accident, but are liable for ordinary negligence of the attendant in the performance of his duties. A life guard who goes to the rescue of a patron or guest owes the duty of exercising ordinary care; that is, such care as would be used by an ordinarily cautious life guard under like circumstances; and for a failure in this respect, with resulting injury, an action for damages will lie. In this case there

is a direct conflict in the evidence offered on behalf of the plaintiff and that offered on behalf of the defendant as to the manner in which the plaintiff was removed from the pool by the attendant, and as to resulting injury.

On the part of the plaintiff there is evidence that, when Mrs. Kopperud called for help, the life guard being temporarily absent and not responding, plaintiff went to her assistance; that about that time the attendant returned, and considering that plaintiff was in need of assistance, undertook to get her out of the pool; that having pulled her to the brink of the pool he jumped up on the side thereof and attempted to pull her up, having hold of plaintiff's arm; he had difficulty on account of her weight, and to secure the aid of the buoyancy of the water, let her slide down in the water three or four times with her side scraping the edge of the pool before he finally got her out; and that the injuries complained of were due to the treatment so received. Testimony on the part of the defendant refutes that of the plaintiff; the life guard testifying he used what is referred to as the crossed hands method; that is, "You cross your hands. She was facing the wall of the pool. I crossed my hands, stooped, and let her body settle down in the water so as to take all of the slack in my arms and give me a good start to pull, then when I lowered her body in the water, I just straightened up and turned the hands and brought her into a sitting position on the bank." There is evidence that this was a proper method to have used.

If the jury found the facts to be as indicated by the testimony offered on behalf of the plaintiff, there was evidence from which a jury might find the defendant liable. It thus became a question for the jury. *Stohlman v. Davis,* 117 Neb. 178.

By requested instruction No. 10 the court was asked to advise the jury as to the extent of defendant's liability in a case of this kind; the instruction advising the jury that defendant was only liable for failing to use that degree of care and caution which an ordinarily careful and prudent

man would use under like circumstances. The gist of the entire instruction, while of considerable length, is that the defendant was only liable for the failure of its attendant to use ordinary care. While the instruction was more specific, and stated the issues more in detail, the jury were advised by instruction No. 1, given by the court on its own motion, upon what negligence the plaintiff was relying; and in instruction No. 2, that plaintiff must prove negligence before she could recover; and in instruction No. 3, negligence, ordinary care, and proximate cause were defined. We think the issues as stated to the jury by the instructions given were sufficiently definite and certain.

Assignments 10 and 11 are requests for instructions embodying parts of the requested instruction No. 10, and what has been said with reference to the refusal to give instruction No. 10 is applicable to these assignments.

The petition charges that the defendant was negligent in a number of particulars; and appellant urges that by the instructions of the court the jury were given a free hand; it being contended that the jury were not confined to any particular charge of negligence, upon which to base a verdict. The court, in stating plaintiff's claim, in the first instruction, omitted all reference to any act of claimed negligence other than negligence due to rough, careless and severe handling by the attendant; and by instruction No. 2, in stating what plaintiff must prove before she could recover, advised the jury: "She must further prove that her injuries were caused by negligence of the defendant." There is nothing in the record to indicate that the jury were ever advised that the plaintiff was making a claim that the defendant was negligent in any particular, other than as advised in instruction No. 1. The jury being advised of only one element of claimed negligence, and further informed that to recover plaintiff must prove negligence, we conclude the criticism made cannot be sustained.

Complaint is made of the failure of the court to give instructions Nos. 2, 3, 5, and 6, requested by defendant. These tendered instructions requested the court to advise the jury that the evidence was insufficient to warrant the finding of negligence in the particulars charged in the petition, but which were omitted by the trial court in the statement of the issues to the jury. There was nothing to withdraw with reference to them.

The court was requested to advise the jury that the mere fact that plaintiff sustained some injury in being lifted from the pool was not evidence that there was negligence on the part of the attendant, Greenlee, on the theory that the mere fact that an accident happened is not of itself evidence of negligence. While the proposition contended for, as a general statement, may be sound, it would seem that, if the plaintiff was injured in being lifted from the pool, then the nature, character and extent of her injuries would be evidence which might properly be considered by the jury in a case of this character, in determining the issue of negligence. The refusal to give the instruction was not error.

The court refused to give requested instruction No. 8, which admonished the jury that they should not be influenced or actuated by any degree of sympathy, or by the fact that the plaintiff was an individual and the defendant a corporation. While such an instruction is sometimes given upon request, and may have been appropriate in this action, yet the giving of such a cautionary instruction is discretionary with the trial court, and the failure to give the same cannot be successfully assigned as error.

Complaint is made of the refusal to charge the jury on contributory negligence. From the record it appears that the plaintiff, an experienced swimmer, during the temporary absence of the life guard, went to the assistance of Mrs. Kopperud, who was in trouble in deep water and calling for help. There was nothing shown indicating that her actions in attempting to render assistance were

negligent. The fact that her actions may have been attended by some hazard would not, of itself, make them negligent. From an examination of the evidence we conclude that there was no question of contributory negligence which should have been submitted to the jury in this case.

Misconduct is charged on the part of two jurors. It developed on the trial of the case that the defendant carried liability insurance, and that the Harry A. Koch Company was agent for the insurance company involved. From the evidence offered by affidavits in support of the motion for a new trial, it appears that on the *voir dire* examination inquiry was made by the attorney for the plaintiff, apparently of the jurors collectively, if any one of the jurors was acquainted with Harry A. Koch, or the Harry A. Koch Company; that one venireman, who was later accepted as a juror, remained silent and failed to disclose that he was acquainted with Harry A. Koch, and had been employed by the American Paving Corporation, of which Koch was one of the principal stockholders; that he was discharged by that corporation, and had endeavored to get Koch to secure his reinstatement, but that Koch did nothing to that end; and Koch alleges in his affidavit that he understands that such juror has borne a grudge against such affiant. Just how the veniremen were requested to express themselves, whether they were asked to rise, or to hold up their hands, or to speak out, if they had such acquaintance with Koch, does not appear; and it does not appear that any inquiry was made as to any connection or association with the American Paving Corporation, the alleged former employer of the juror. It is further set forth in the affidavit that the attorneys for the defendant on the *voir dire* examination specifically inquired of all jurors whether or not any of them had ever brought suit on account of a personal injury, or made claim based upon personal injury, and that another venireman remained silent and failed to disclose that he had been

injured in the employ of Armour & Company, and that proceedings were had under the workmen's compensation law, before the compensation commissioner, and subsequently on appeal to the district court. It may be that the venireman did not view the proceedings instituted before the compensation commissioner as a suit. But, however that may be, so far as the record shows, both of these veniremen were on the regular panel of jurors. The parties to the suit knew there was a possibility of their being called in this case. All of the facts referred to in the affidavits were either known by the parties interested, or could have been ascertained, before the trial began. Another affidavit filed by a party not directly connected with the case indicates that after the trial was over one of the jurors referred to made comments about the case and the verdict returned, indicating hostility or ill feeling toward the defendant and Koch. There is nothing, however, to indicate when the hostility developed, or its source. The affidavits further disclose that when the jurors were asked by the court and the counsel for both parties whether there was anything outside of the evidence that would influence any of the jurors in their verdict, the venireman referred to remained silent and failed to disclose his feeling toward Koch. No further showing is made as to the disqualification of these jurors, nor as to the manner or extent of their examination prior to being accepted as such. The *voir dire* examination was evidently not reported. The trial court necessarily heard the examination, and with the advantage of such knowledge overruled the motion for a new trial.

"Where a new trial is asked for on the ground of misconduct of a juror or of the prevailing party, the finding of the trial court in support of the verdict will not be set aside unless the evidence of misconduct is of a clear and convincing character." *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105; *Wessel v. Bishop*, 76 Neb. 74.

Finally, the defendant urges that the verdict is so excessive as to indicate bias and prejudice on the part of the jury. There seems to be some merit in the contention that the verdict is excessive. With reference to the injuries sustained, the plaintiff testified that she talked with Dr. Isacson, a friend of the family, but not a practicing physician, who suggested that she be strapped. Plaintiff did not like to be strapped with adhesive tape. She just got an old fashioned corset and wore it, and was in bed about two weeks, and gradually got over the trouble in her side. Her arm was stiff; could not get that back to her head. She got over that trouble and the trouble settled in her back and has been there ever since. On the morning following the night she was pulled out of the pool, she testified that her side was black and blue; arm looked as if the blood vessels had broken; black streaks all up her arm and prints of his fingers on her wrists, black prints. Black and blue spots stayed a week or so and finally disappeared. There was a sharp shooting pain in her side so that she could not turn over. Had not been able to do her housework since. Bothers her quite a lot in resting and sleeping. There is a throbbing shooting pain when she gets tired, and she goes to bed very tired, with sharp shooting pains. She consulted with three doctors at different times, one of whom was Dr. Schwertley. She first consulted him February 2, 1930; the injuries occurred June 25, 1929. The evidence does not disclose when she consulted other physicians, and they were not called as witnesses. According to Dr. Schwertley there were no broken bones. Plaintiff was a portly woman, about 60 years of age; the eyes, tonsils, neck, chest, lungs and heart normal. Blood pressure was within the normal limits for a woman of her age. Bony system was normal. She was considerably overweight for her height and age. Made a diagnosis of a traumatic condition of sprain of soft tissues, including the muscles and ligaments of that region in the back, also a sprain, traumatic in character, of the muscles and ligaments of

the right shoulder. Gave her infra red ray treatment. Her arm cleared a little under a massage treatment, but could notice no improvement in the back. Was of the opinion, from the history given him and the examination made, that pain found was due to laceration of the muscles and tender tissues, and that the condition will become chronic. In the summer of 1930, she made a trip by automobile to Madison, Wisconsin, and return, about 800 miles. As to the effect of that trip upon plaintiff her husband testified: "Well, Mrs. Blackwell, as I say, didn't suffer very much unless she was on her feet or working around. If she was sitting down or lying down comfortably, she was able to get along."

The verdict and judgment thereon were for the sum of $7,500. We believe that the damages awarded are excessive, and that the facts would not justify a verdict in excess of $4,500. If the plaintiff will file a remittitur in this court within twenty days for the sum of $3,000, as of the date of the judgment appealed from, the judgment will be affirmed for $4,500, with interest from date of judgment in district court; otherwise, it will be reversed and cause remanded for a new trial.

AFFIRMED ON CONDITION.

RODGER R. KAUFFMAN, ADMINISTRATOR, APPELLEE, V. GUY FUNDABURG ET AL., APPELLANTS.

FILED MAY 26, 1932. No. 28218.

1. Negligence: MOTORISTS: CARE REQUIRED. A person has a right in the absence of prohibition by statute or ordinance to cross a street at any point, and is not limited to regular crossings. The driver of a truck owes to one crossing a street at a point other than a regular crossing the duty of reasonable or ordinary care under the circumstances and must exercise more care toward a child of tender years crossing between blocks than toward an adult in same circumstances.
2. ———: INFANTS: CARE REQUIRED. The fact that a nine year old boy crossed a street at a place near but not at a regular crossing was not of itself negligence, and in so crossing was

required to exercise only such care as persons of his age, experience and intelligence ordinarily would exercise under like circumstances.

3. ———: QUESTION FOR JURY. Evidence respecting negligence of truck driver in failing to keep proper lookout shortly before striking a boy crossing a street near an intersection and to give timely warning or keep the truck under proper control, considering that there were school children on both sides of the street, *held* sufficient for submission to the jury.

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

Ziegler & Dunn and *G. W. Becker,* for appellants.

Willis G. Sears and *Max Fromkin, contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

LANDIS, District Judge.

On November 11, 1930, around noon, on a clear day, Rodger R. Kauffman, Jr., nine years of age, was struck by a truck, driven north, while crossing, in a diagonal direction, Fiftieth street in the city of Omaha. The administrator brought this action to recover damages for the death of the boy, resulting from the accident. The truck, weighing with the load about 5,000 pounds, was owned by Dold Packing Company and driven by its servant, Guy Fundaburg. The owner and driver of the truck are defendants. Verdict and judgment were in favor of the plaintiff and the defendants have brought the record here for review.

The defendants did not introduce any evidence in their behalf. Without conflict the record shows that Fiftieth street runs north and south, is paved, and has a street car track, with rails four feet apart, in the center. It is intersected by an east and west street known as Capitol avenue, which has a width of 23 feet from curb to curb. South of the intersection Fiftieth street is 36.8 feet between curbs and has an ascending grade of 0.5 per cent. North of the intersection it is 28.8 feet from

curb to curb with an upward grade north of 0.8 per cent.

About two blocks away, at Fifty-first and Davenport streets, is a public school, and on the day of the accident, about noon, school children were coming south on Fiftieth street near Capitol avenue on the east and west sides. Some boys had congregated on the east side, a short distance north of the intersection of Capitol avenue and Fiftieth street. These boys were about opposite the truck at the time of the impact with the deceased.

The Kauffman boy was on the west side, near the north regular crossing of the intersection. At more than a walk and less than running, he hastened in a diagonal direction across Fiftieth street. The driver saw him for the first time when he was directly in front of the truck, at the instant he was struck by its left front fender. Very shortly after the accident the boy died.

The accident occurred between the west rail of the street car track and the east curb of Fiftieth street, and north but near the north regular crossing of the intersection of Capitol avenue with Fiftieth street.

The truck driver testified as follows: "Q. As I understand it, after you had passed the intersection, your attention was attracted to some boys congregated on the east side of Fiftieth street? A. Yes, sir. Q. Why were you watching those boys at that particular time, if you know? A. Well, they was playing, and I thought maybe they might accidentally run into the street. Q. And while your attention was attracted to these boys, was that the time the boy, the Kauffman boy, came from the west in a southeasterly direction in front of your car? A. It was. * * * Q. In other words, you had looked to the west, you saw nothing, and then you looked and saw these boys on the east side and your attention was attracted to them and the time your attention was attracted to these boys, your truck came in contact with the Kauffman boy within a few seconds of that time? A. Yes."

This driver was 32 years of age, experienced, well acquainted with the vicinity of the accident, knew of the

presence of school children coming home from school on both sides of Fiftieth street. He says at the time of the impact he was going twelve to thirteen miles an hour. The truck was stopped after the impact within the length of the truck and a few feet. The witness Robert Hammond places the speed of the truck just shortly before the accident at fourteen or fifteen miles an hour. This witness also testifies: "Q. Now, detail what else you saw with reference to the boy and the truck. A. Well, when I noticed the boy when he was about, as I said, about midways of the pavement between the curb and the west rail, and he was running across the street and I seen this truck about midways of the intersection and as he run he was going across the street and must have saw the truck coming, and he tried to run, tried to cut north to pass it, but he couldn't get out of the way of it in time. Q. And then what happened? A. Well, the truck hit him and when I saw the truck hit him, I stopped my car and jumped out and went over and picked him up."

At no time, from the entering of the intersection to the time of the impact, did the truck driver blow his horn or give any warning.

The first error assigned consists in the overruling of defendants' motion for an instructed verdict in their behalf, or that the jury be discharged and a judgment entered in favor of the defendants. With this will be considered the assignments of error that the verdict is contrary to the evidence and the law.

Phrased in terms of requisites, the instant case seeks to comprehend a right to be protected against the particular hazard encountered, by some rule of law, which the defendants' conduct violated, thereby causing the death of the boy and resulting damages.

The motion for a directed verdict challenges whether there is an injured right which falls within the protection of the rule invoked by the plaintiff. It is for the court to say whether the conduct of the driver of the truck, which is complained of, subjected the right of the

deceased boy to a hazard against which the rule of law affords protection.

A person has a right in the absence of prohibition by statute or ordinance to cross a street at any point, and is not limited to the regular crossings. The driver of a truck owes to such a person the duty of reasonable or ordinary care in the circumstances.

It is not of itself negligence for a nine year old boy to cross a street at a place near but which is not at a regular crossing. In so crossing he is required to exercise only such care as persons of his age, experience and intelligence ordinarily exercise under like circumstances. The driver of the truck must exercise more care toward a child of tender years crossing the street between blocks than toward an adult in the same circumstances. See annotations 14 A. L. R. 1176, 67 A. L. R. 313, with cases cited on the duty and liability to persons struck by an automobile while crossing a street at an unusual place or diagonally. Section 39-1102, Comp. St. 1929, provides: "Within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." In the fifth paragraph of the syllabus of *Christoffersen v. Weir,* 110 Neb. 390, in considering this section, the court announces the general rule: "It is the duty of the driver of an automobile to exercise reasonable care in its operation, and when pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated." Section 39-1105, Comp. St. 1929, was considered in *Christoffersen v. Weir, supra,* and paragraph 6 of the syllabus thereto determines that this section "contemplates, not only the installation of warning devices on motor-propelled vehicles, but that they shall as well be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car."

It seems obvious, considering the entire record, that the court must decide that the conduct of the driver of the truck complained of subjected the rights of the Kauffman boy to hazards against which the rules of law invoked afford protection. There are rules of law forbidding the claimed conduct of the truck driver, and the plaintiff by his petition has invoked them, hence it becomes pertinent to determine whether the driver has in fact been guilty of such conduct.

It must next be determined, on the whole evidence relating to the issues, whether more than one reasonable inference can be drawn. In other words, say whether there are issues raised for the jury's determination. It appears to us from the evidence that more than one reasonable inference can be drawn as to whether the truck driver kept a proper lookout shortly before the impact, the necessity of giving timely warning and the effect of failure to do so, the rate of speed of the truck under the circumstances and conditions, whether the truck was under proper control considering that there were school children on both sides of the street, and the capacity of the Kauffman boy to exercise care to avoid the impact. It follows that the jury should determine whether the truck driver should have reasonably foreseen the impact as a probable result of his conduct. There were issues to be submitted to the jury, and the motion for a directed verdict by the defendants was properly overruled by the trial court. It follows, assignments in error that the verdict is contrary to the evidence and the law cannot be sustained.

The remaining assignments of error, except the one, are directed to the instructions given by the trial court.

Complaint is made as to instruction No. 2, because the court submitted as one of the elements of negligence "failing to have the truck under proper control," and as to instruction No. 5, because that element was included as one of the grounds of recovery. This element is supported by both the petition and proof. The trial court did not err in giving these two instructions.

Defendants assign the failure of the trial court to give instruction No. 1, requested by them, as error. The pertinent part of this instruction is: "You are instructed that if you find from the evidence that the driver of the defendant's truck did not see the deceased in a position of danger, or by the exercise of ordinary care could not have seen the deceased in a position of danger in time to have prevented the accident, then it was not negligence on his part for failure to have blown his horn or given warning."

The duty to sound a signal of the approach of a motor vehicle depends largely on the circumstances of the particular case. The offered instruction should have taken into consideration the circumstances other than seeing or not seeing the deceased, which the evidence reflects as peculiar to this case. The instruction as requested was properly refused.

The error assigned in the court's instruction No. 8 is directed to the portion which reads, "and whether such driver was guilty of negligence depends upon whether, in exercising ordinary or reasonable care, he should have anticipated that the boy would come across the street at the point where the accident occurred," and in the same instruction the further part, "and you will take into consideration whether, under all the facts, the appearance of any one at the point where the boy appeared was of sufficiently frequent occurrence to cause the driver to take particular care on that account." When the instruction is read as a whole and taken with all the other instructions, considering the issues and the evidence pertinent to the case, this assignment of error is not well taken.

It is assigned as error for the court in instruction No. 14, on the measure of damages, to include therein the following: "In estimating this, however, the consideration is not limited to the measure of benefits received prior to the death of the boy, but it would embrace all the probable benefit which would accrue to the plaintiff

from the life of the deceased, modified by all the chances of failure and misfortune, and considering the expense which the parents might reasonably be put to in maintaining the boy during his minor years." *Fisher v. Trester*, 119 Neb. 529, *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33, and *Draper v. Tucker*, 69 Neb. 434, sustain the part complained of by appellants.

The court in this instruction also stated: "The measure of the plaintiff's right of recovery is the pecuniary damage only; that is, the loss in money which the parents of the boy sustained by his death," and "the law provides no recovery on account of any loss of comfort and society on the part of the parents." At best, in actions of this nature, the jury have very meager and uncertain data from which to determine the damages. Necessarily, pecuniary damages are largely prospective and committed to the sound discretion of the jury. Absolute certainty is impossible.

According to the record, Rodger R. Kauffman, Jr., was mentally alert and physically normal, with a father earning a salary of $4,600 a year. Considering the whole evidence, there is sufficient to sustain the plaintiff's right of recovery as distinguished from the amount of recovery. In the instant case it cannot be said that the verdict of the jury for $3,000 is excessive.

The remaining assignment of error is directed to whether it was error for counsel for the plaintiff during the impaneling of the jury to ask counsel for the defendants if an insurance company was defending the action. The record shows that counsel for defendants objected to answering the question and the court sustained his objection. Considering the record, this assignment will not be sustained.

Failing to find prejudicial error, the judgment of the trial court is

AFFIRMED.

C. A. SORENSEN, APPELLANT, V. RICHARD F. WOOD ET AL., APPELLEES.

FILED JUNE 10, 1932. No. 28107.

1. **Libel and Slander.** The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances.
2. ———: JOINDER OF DEFENDANTS. When one writes libelous words concerning another and reads them before the microphone, with the consent of the owner of the broadcasting station, and such owner broadcasts those words, the reader and owner unite in the publication of a libel and may be joined as defendants in an action for damages.
3. ———. An action to recover damages for the broadcasting of a defamatory writing is based on libel and not on negligence.
4. ———: DEFENSE. That a licensee of a radio broadcasting station is a common carrier within the meaning of the interstate commerce act is not available as a defense under the issues and evidence in this cause.

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

Perry, Van Pelt & Marti, for appellant.

Max V. Beghtol, Glen H. Foe, J. Lee Rankin and *Fred C. Foster, contra.*

Lawrence Vold, amicus curiæ.

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

GOSS, C. J.

C. A. Sorensen, who was a candidate for reelection as attorney general, brough this action for $100,000 damages against Richard F. Wood, who was the speaker, and against KFAB Broadcasting Company, owner and operator of the station over which the speech was broadcast from Lincoln. The jury found in favor of plaintiff as against Wood, assessing damages at one dollar, and found in favor of defendant company. Judgment was entered on the verdict against Wood for one dollar, absolving the broadcasting company from liability and awarding it execution for its costs. Plaintiff appealed.

The petition charged that, about 6:30 p. m., on August 11, 1930, being the evening before the Nebraska primary election, certain false and libelous statements, concerning plaintiff, contained in an article composed and broadcast by Wood, were published and circulated to a large radio audience by means of machinery and equipment supplied by defendant company; that a copy of Wood's address was available for use of the company before its publication over the radio, that a representative of the company introduced and vouched for Wood, was present and heard him read the article and thereby adopted and published said statements; that in the course of reading and publishing said article and, with the intention of injuring plaintiff in his profession and reputation, and for the purpose of making his election to the office of attorney general more difficult, defendants did maliciously publish the following language:

"In his (the plaintiff's) acceptance of the attorney general's office he took an oath before God and man that he would uphold the law justly and honestly. His promises to man are for naught and his oath to God is sacrilege, for he is a nonbeliever, an irreligious libertine, a mad man and a fool."

To show other things contained in the article, together with their connection and innuendo, as alleged by plaintiff, we reproduce three other paragraphs of the petition:

"7th. That in the same article, the defendants, with the same intent and purpose, did maliciously write, read and publish of and concerning the plaintiff, the following language: 'If you see fit to reward me for my efforts for clean government, I will serve you and every section of this state as fearlessly as I have in my dealing with the Judas Iscariots of our state and party,' meaning and giving his hearers to understand that this plaintiff was guilty of treachery, unfairness, baseness, avarice and dishonesty, and that this plaintiff had the attributes of Judas Iscariot.

"8th. That this plaintiff as a part of his official duties as attorney general of the state of Nebraska had prepared, prior to August 11th, an opinion for the use of the secretary of state declaring that the purported filing of George W. Norris of Broken Bow, Nebraska, for nomination on the Republican ticket as United States senator from Nebraska was ineffective, out of time and unlawful; that the defendants, well knowing said facts, nevertheless in said article so composed, written and read after referring to the filing of the said George W. Norris of Broken Bow, and with the same aforesaid intent and purpose, did maliciously write, publish and read: 'It was the act of Sorensen,' meaning, inferring, and giving his listeners to understand that plaintiff had induced and secured the filing of the said George W. Norris of Broken Bow, and then had publicly attacked the validity of that filing, thus using his office and position for the dishonest purpose of deceiving and defrauding the people whom he was elected to serve.

"9th. That the plaintiff as attorney general of the state of Nebraska and as a part of his duties as such official had applied for and secured temporary injunctions against certain gambling places in Omaha, Nebraska, all of which was well known to the defendants and the electors of the state of Nebraska; that the defendants in the aforesaid article maliciously wrote, published and read the following language, with the aforesaid intent and purpose: 'Attorney General Sorensen made public appeal to you on his record of law enforcement. Let me tell you the inside story of his law enforcement in Omaha. You have heard of his injunctions in Omaha. You will remember that his assistant, Mr. Stalmaster, of Omaha, applied for temporary injunctions against gambling places, one of which was run by Gene Livingston, the alcohol baron. Well, these injunctions have not been called up for hearing. They are *"statu quo"* because of failure on the part of Stalmaster and Sorensen to prosecute them. This, then, explains the big gambling racket

of Mr. Sorensen, for while these applications for injunctions are pending, the police of Omaha are helpless in stopping the gambling in these places for they are under the supervision of the attorney general by his having an application on file asking temporary injunction against them. It would be interesting for you to know *how many* of these buildings harboring gambling houses affected by Sorensen's application for injunctions are owned by Mr. Lapidus of Omaha, the father-in-law of Mr. Stalmaster, who is Sorensen's assistant and who is handling the Omaha end of the Sorensen racket,' meaning, inferring, and giving the listeners to understand that the plaintiff, in violation of his duty and his oath as attorney general of the state of Nebraska, was protecting the gambling interests in Omaha, and was himself a grafter and engaged in the gambling 'racket' or business in said city, and was using his high office to secure temporary injunctions which he then failed to call up for hearing in order to prevent interference by Omaha police with plaintiff's graft and gambling business."

Plaintiff negatived the truth of the foregoing statements and inferences against him, alleging their damaging effect upon him and his reputation and praying judgment against defendants and each of them.

The defendants answered separately. Wood admitted the corporate existence and description of the equipment, functions and nature of service of the company and generally denied the rest of the petition. The company made like admissions and denial, alleged a misjoinder of defendants, pleaded that it was a common carrier of intelligence by wire and wireless under the interstate commerce act, duly licensed and subject to the regulation of the federal radio commission; pleaded general order No. 31 of the commission, dated May 11, 1928, providing that, in broadcasting material for candidates for public office, "such licensee shall have no power of censorship over the material," and that equal opportunities must be afforded legally qualified candidates for any public office in the use

of such broadcasting station; that Wood was a candidate for railway commissioner. George W. Norris (then and now United States senator) and W. M. Stebbins were candidates for the Republican nomination for the office of United States senator; that Senator George W. Norris had been permitted to use the broadcasting station to promote his candidacy, and so on August 11, 1930, this defendant permitted W. M. Stebbins to do likewise, and Richard F. Wood was presented by Stebbins to speak on his behalf and was permitted to do so; that this defendant had no knowledge in advance of its utterance as to what the speech was to be except that it was to be a political speech in favor of Stebbins against Senator Norris, nor did this defendant or its agents hear that part of the speech alleged as slanderous, libelous and defamatory, nor did it have any power to censor the speech; that plaintiff had been furnished a copy of the speech in advance, knew its context, was possessed of full knowledge of Wood's intention to utter its words over the radio, gave no notice to either Wood or this defendant of any objection and so is estopped to claim damages; that said words were privileged and invited by plaintiff; that this defendant's first knowledge of any objection by plaintiff was not had until about 11 a. m. the next day, whereupon it announced over its broadcasting station four times that afternoon a statement fully set out in the answer, describing the situation and advising its listeners that it was not in sympathy with and did not in any way ratify or sanction the statements made by Mr. Wood concerning the attorney general. Plaintiff's reply fixed the issues. The motion for new trial, which was overruled, and the errors assigned, contain certain issues which will be discussed.

In the reply of plaintiff, traversing the allegation of the defendant company that it had no knowledge in advance of Wood's speech as to what the speech was to be except that it was to be a political speech in favor of Stebbins as against Norris, plaintiff alleged that, while

the libelous statements were being broadcast, the defendant company "negligently failed to use the lever provided to prevent the publication of false and defamatory statements, and negligently failed to stop said broadcast, but maliciously assisted and enabled the defendant Wood to circulate and publish the false, libelous and defamatory statements set forth in plaintiff's petition." This suggestion by plaintiff of the idea of negligence afforded opportunity to defendants throughout the trial and in the argument to treat of the action as if one of damages for negligence. We do not think this phase of the reply amounted to a plea or confession that plaintiff's action was grounded on the theory of negligence. The underlying basis for liability is libel, and not negligent conduct.

The radio address was written and read by Wood. It was heard by witnesses in the studio and by radio listeners. It was taken down in shorthand by an expert reporter, who was listening in at Omaha and was read in evidence from her shorthand notes. A carbon copy of the address prepared by Wood was duly received in evidence. The address, as broadcast, contained the words set forth in the petition. The testimony of other witnesses proved the innuendo and connected the words with the facts alleged in the petition and heretofore quoted. It was shown that, while defendant company did not require and did not have a copy of the speech in advance of its utterance, yet its employees in charge of its station did not use or attempt to use means to stop or shut off the speech, though that could have been done instantly by mechanism which was a part of the equipment. The evidence shows that the announcer, who introduced the speaker, though present, did not pay any attention to the address and did not know the words used by the speaker.

The plea of defendant company that the words used by Wood were privileged appears to be based upon the theory that Wood's speech could not be censored because made on behalf of Stebbins, a candidate for senator, who had to be granted the right to speak or to have a speech

made favoring his candidacy; Senator Norris having previously spoken over the same station in promotion of his own candidacy. The argument on which this theory is based is sought to be derived from section 18 of the radio act of 1927 (44 U. S. St. at Large, 1170) and from order No. 31 of the federal radio commission, dated May 11, 1928, reproducing the section providing that, when equal opportunity is granted to legally qualified candidates for public office to use a broadcasting station, the "licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph." We do not think congress intended by this language in the radio act to authorize or sanction the publication of libel and thus to raise an issue with the federal constitutional provisions prohibiting the taking of property without due process or without payment of just compensation. Const. Fifth Amendment. This is particularly true where any argument for exercise of the police power and for any public benefit to be derived would seem to be against such an interpretation rather than to be served by it. So far as we can discover, no court has adjudicated this phase of the statute and order. We reject the theory. For the purposes of this case we adopt an interpretation that seems in accord with the intent of congress and of the radio commission. We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action. The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances.

Elaborate briefs, containing many citations, have been printed by the parties. One has been filed, as friend of the court, by Lawrence Vold, a professor of law in the state university, who has long taught the course on torts and whose brief concerns itself with a scholarly analysis

of the facts and of the law of libel as presented in this unusual case.

We think there is nothing fundamentally new in the applicable law and therefore shall content ourselves with few citations. There can be and is little dispute that the written words charged and published constitute libel rather than slander. The defendant Wood seems satisfied with the judgment. The defendant company having won is interested only in having the judgment sustained. The plaintiff assigns various errors, chiefly based on instructions given and refused by the court, and asks a reversal as to both defendants.

To quote the instructions complained of would unduly prolong this already extended opinion. We think they can be sufficiently abstracted to indicate the points to be decided. In No. 7 the court instructed the jury that the evidence failed to show any malice of the company toward the plaintiff and that only such parts of the statements made by Wood as are libelous *per se* could be considered against the company. The instruction thereupon told the jury that only two parts of the statement alleged are libelous *per se* and quoted them: First, the one consisting of the group of words describing plaintiff as a "libertine," and, second, the one describing his so-called "racket" in connection with law enforcement in Omaha. In instruction No. 8 the court told the jury that the other alleged libelous statements were to be considered by them in connection with the case against Wood only. By instruction No. 8½ the jury were told that a broadcasting company failing to "honestly and in good faith exercise due care and, on account of that failure," permitting matter libelous *per se* to be broadcast, is responsible for the natural and proximate results of that failure. Instruction No. 9 told the jury that, "in determining the question as to whether these statements last referred to are libelous," they were to consider the entire speech, giving it the natural interpretation of the average man or woman and "then determine under the facts shown in evidence and

the law as given you in these instructions whether these statements contained in the matter broadcast are libelous." (Note: It may be that the court intended No. 9 to refer back to the statements considered in No. 8 rather than in No. 8½, but the record does not so show.)

It is thus readily apparent that the instructions were contradictory and confusing. They first advised the jury that certain parts of the Wood's speech were "libelous *per se*," and then, by instruction No. 9, told them that, in determining whether the "matter broadcast is *libelous*," they were to consider the entire speech, applying the understanding of the average man. It is quite likely the jurors did not understand the language or the significance of the phrase "*per se*" and believed the court was leaving to them the duty of deciding whether *any* of the material broadcast was libelous; and even if they understood that some of the words were libelous *per se*, they were told in effect that, if the station owner honestly and in good faith exercised due care, he is absolved from liability for transmitting unprivileged defamatory words uttered by a speaker. It has often been held in newspaper publication, which is closely analagous to publication by radio, that due care and honest mistake do not relieve a publisher from liability for libel. In *Peck v. Tribune Co.*, 214 U. S. 185, Mr. Justice Holmes said: "If the publication was libelous the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril.'" In *Taylor v. Hearst*, 107 Cal. 262, where the published article was libelous *per se* but the publisher made a mistake in the initials and intended the article to apply to another person, it was held: "Whether such publication was by design, or was the result of carelessness in setting the type, is a matter of no consequence so far as the question of actual damages is involved." In the argument in *Walker v. Bee-News Publishing Co.*, 122 Neb. 511, are cases to the same effect. So the instructions were erroneous in not clearly and unequivocally defining the libelous *per se* statements

as such. The court also erred in submitting the case to the jury by instruction No. 8½, as if the law of negligence and not the law of defamation were the underlying basis for liability of radio broadcasting licensees for the publication of defamatory utterances by radio. These errors were prejudicial and require a reversal of the judgment.

The defendant company, like most radio broadcasters, is to a large extent engaged in the business of commercial advertising for pay. It may be assumed this is sufficient, not only to carry its necessarily large overhead, but to make at least a fair return on its investment. For it appears that the opportunities are so attractive to investments that the available airways would be greatly overcrowded by broadcasting stations were it not for restriction of the number of licensees under federal authority. Such commercial advertising is strongly competitive with newspaper advertising because it performs a similar office between those having wares to advertise and those who are potential users of those wares. Radio advertising is one of the most powerful agencies in promoting the principles of religion and of politics. It competes with newspapers, magazines and publications of every nature. The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another nor why a broadcasting station should be granted special favors as against one who may be a victim of a libelous publication.

The defendant company alleged a misjoinder of parties defendant. The publication of a libel by radio to listeners over the air requires the participation of both the speaker and the owner of the broadcasting station. The publication to such listeners is not completed until the material is broadcast. As they must cooperate to effect the publication of the libel there cannot be said to be a misjoinder when they are sued together for damages resulting from their acts.

The company also alleged that it was a common carrier of intelligence by wire and wireless within the meaning of the interstate commerce act. This has never been decided by any court. We know that licensees of broadcasting stations in their annual meetings and eminent counsel have taken the opposite view; and that in 1929 the American bar association adopted a resolution instructing its committee on radio law to oppose the enactment of any legislation declaring broadcasting stations to be common carriers or, as such, subject to a common carrier obligation with respect to the transmission of communications. 54 Am. Bar Ass'n Rep. (1929) 90. We are of the opinion that the defense of the company that it is a common carrier is not available here.

Other assigned errors are discussed in the briefs, but we do not think it necessary to discuss them, as under the principles announced here they are not likely to occur in another trial. The errors committed were prejudicial to the plaintiff and favorable to both defendants. The judgment of the district court is reversed and the cause is remanded.

REVERSED.

STATE, EX. REL. C. A. SORENSEN, ATTORNEY GENERAL, v. FARMERS & MERCHANTS BANK OF WESTON: E. H. LUIKART, RECEIVER, APPELLANT: FIRST NATIONAL BANK OF WAHOO, INTERVENER, APPELLEE.

FILED JUNE 10, 1932. No. 28231.

1. Assignments: BANK CHECKS. A check on a bank does not operate as an assignment of funds therein to the amount of the check, a former rule to the contrary having been changed by statute. Comp. St. 1929, sec. 62-1606.
2. Banks and Banking: PURCHASER OF CASHIER'S CHECK. By purchasing a cashier's check, bank draft or certified check, the purchaser usually becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust, in absence of special circumstances creating the relation of trustee and beneficiary.

3. ———: INSOLVENCY: HOLDER OF CASHIER'S CHECK. Holder of a cashier's check on a bank which went into the hands of a receiver and never paid the check, *held* not entitled, as claimant for a trust fund, to payment in full from bank assets in the hands of the receiver in preference to depositors.

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

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

E. S. Schiefelbein, contra.

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

ROSE, J.

In a proceeding in the district court for Saunders county to wind up the affairs of the Farmers & Merchants Bank of Weston, an insolvent banking corporation, the First National Bank of Wahoo as claimant and intervener presented a petition for the recovery of a trust fund of $100 payable in full out of bank assets in the hands of the receiver, in preference to claims of depositors and other creditors. The receiver had previously rejected the trust-fund theory of intervener, but had ranked and allowed its claim in the class with preferred depositors and holders of exchange. The claim arose in the following manner: April 14, 1930, A. H. Thege went into the Farmers & Merchants Bank of Weston, and, though not a depositor, legally turned over to it the equivalent of $100 in money and received therefor a cashier's check on that bank for $100. April 15, 1930, he presented the cashier's check to the First National Bank of Wahoo, now claimant and intervener, and received therefor $100. The Farmers & Merchants Bank of Weston went into the hands of the receiver and never paid the cashier's check. The plea of intervener is that the $100 represented by the cashier's check went into the Farmers & Merchants Bank, was never withdrawn, is now in the hands of the receiver

and belongs to intervener in the form of a trust fund. This position is assailed by an answer to the effect that Thege bought a cashier's check having in law for commercial purposes the status of a draft or certified check, that the holder of the paper is a holder of exchange within the meaning of the law, and that the title to the $100 paid by Thege passed to the bank receiving the payment and is now an asset thereof. On the issues thus raised the litigants went to trial. The district court ruled in favor of intervener, declared a trust in its favor and ordered the receiver to pay its claim in full. The receiver appealed.

The essential facts are not in dispute. There are now precedents for the following rules: A check on a bank does not operate as an assignment of funds therein to the amount of the check, a former rule to the contrary having been changed by statute. Comp. St. 1929, sec. 62-1606; *State v. State Bank of Belvidere,* 122 Neb. 797. By purchasing a cashier's check, bank draft or certified check, the purchaser usually becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust, in absence of special circumstances creating the relation of trustee and beneficiary. *State v. State Bank of Belvidere,* 122 Neb. 797; *State v. First State Bank of Alliance, ante,* p. 23. These rules, when applied to the undisputed facts, require a finding that intervener did not make a case entitling it to payment in full on the basis of a trust fund in the hands of a receiver. Intervener's claim was properly classified by the receiver. The judgment of the district court is reversed and the cause remanded for a decree conforming to this opinion.

REVERSED.

YANT CONSTRUCTION COMPANY, APPELLANT, V. VILLAGE OF CAMPBELL ET AL., APPELLEES.

FILED JUNE 10, 1932. No. 28022.

1. **Appeal:** FINDINGS. The findings of a jury, based on conflicting

evidence, in a law action, will not be disturbed unless clearly wrong.

2. Action. A litigant may not have an unjust recovery based on a wrong to which he assented.
3. Damages. If the damages arising from the breach of a contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages. On the other hand, if the damages may be easily and readily ascertained, and if the amount stipulated is more than sufficient to compensate for the breach, it will be regarded as a penalty.

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

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

Kennedy, Holland & DeLacy, Ralph E. Svoboda and *Leon Samuelson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS, District Judge.

GOOD, J.

This is an action to recover a balance alleged to be due on a contract for paving, curbing, guttering and graveling of certain streets in improvement district No. 1, in defendant village. Defendant admitted the making of the contract, part performance by plaintiff, and alleged payment of all the contract price except $1,800; further alleged that, by agreement between the parties, this amount was withheld by defendant until plaintiff should complete performance of the work contemplated by the contract, and that plaintiff never did complete the work it had contracted to perform. Defendant also alleged that the work was neither commenced nor completed within the time limit fixed by the contract, and that, by reason of a provision in the contract, defendant was entitled to withhold $200 a month for four months' delay in completing the work; also that defendant had been compelled to expend

more than $1,000 to complete the work which plaintiff should have performed. By way of reply, plaintiff alleged that the contract was completely performed, the work accepted by defendant, and that defendant, having accepted the work, is now estopped to deny that it was completed in accordance with the terms of the contract. The trial resulted in a verdict and judgment thereon for defendant. Plaintiff has appealed.

The total amount that defendant agreed to pay plaintiff for the completed work contemplated by the contract was $20,041.78. The contract was entered into in June, 1925, and contained this clause: "The contractor agrees to start this work on or before July 15, 1925, and to complete same on or before the 1st day of September, 1925, and to reimburse the Village of Campbell at the rate of $200 per month for any extra time that may be required to complete said work."

The evidence discloses that plaintiff did not commence the work until about the 1st of September, 1925, and performed none after the latter part of December, 1925. There seems to be no question that the work of paving, curbing and guttering was properly performed. The controversy as to the uncompleted work relates solely to the graveling of certain streets.

There are numerous assignments of error, but plaintiff states in its brief: "The only real questions in this case are—(1) whether the contract at the time Yant left the job was fully performed and completed (notwithstanding that Yant had a man do a little more dragging to satisfy the Board) as shown by the testimony; and (2) whether its certificate of completion and acceptance as is contended estops the defendant from claiming otherwise; and (3) was there any legal authority under the evidence justifying the deduction of $800 of the money due the plaintiff from the provisions of the contract with reference to reimbursement of the Village of Campbell at the rate of $200 per month for any extra time that may be required to complete the work."

The evidence on behalf of plaintiff tends to prove that the work was completed according to plans and specifications late in December, 1925. Evidence on behalf of defendant tends to prove that a considerable part of the graveling was not leveled and packed, as provided by the contract. The contract called for a completed packed gravel job; that 15 per cent. of clay should be thoroughly mixed with the gravel as a binder, and that it "shall be rolled with a multi wheel roller until thoroughly compacted and the roller makes no appreciable track thereon, and the rolled surface conforms to the proper cross section." Defendant's evidence tends very strongly to prove that the greater part of the gravel was not properly rolled until compacted; that the gravel was so loose that a person could put his foot through it to its full depth; that a proper multi wheel roller was not used. There was evidence, too, that plaintiff recognized the work as not meeting the requirements of the contract; that plaintiff agreed to complete the work the following spring; that in the meantime defendant should retain $1,800 of the contract price, until the work was fully completed; that the following spring plaintiff offered to return and complete the work on condition that defendant would discharge its engineers, but would not do so unless the engineering company was discharged. Defendant refused to comply with the demand, and plaintiff did not return to do any further work. This evidence presented an issue of fact for the jury.

It is a well-established principle that in a law action the finding of the jury, based on conflicting evidence, will not be disturbed unless clearly wrong. Upon consideration of the entire record, we are satisfied that the finding of the jury on this question was amply sustained by the evidence.

December 29, 1925, defendant accepted the work as completed and used the record of acceptance as a basis for the history of a bond issue. Plaintiff contends that this fact now estops the defendant from asserting that

the work was not completed according to the terms of the contract, and cites some cases tending to support this view. There is evidence that the acceptance of the work was conditional; that defendant was desirous of issuing bonds bearing 5½ per cent., to take up warrants previously issued for work done, and which were bearing 7 per cent.; that, in a conversation between an officer of plaintiff and the chief engineer of the defendant, it was agreed that a reasonable amount of the contract price be retained by the defendant until the work was completed at a later date; that acceptance would be made by the defendant for the purpose of using it as a history for the bond issue, but that, notwithstanding the acceptance, plaintiff was to return and finish the work in the spring of 1926.

If there was an irregularity or fraud in the acceptance of the work before it was completed, may plaintiff, who was a party thereto, take advantage of that irregularity or fraud to enable it to receive compensation for work which it had not performed? Were this an action by the holder of bonds that were issued, and who had purchased them, relying upon the history, it is probable that the defendant would be estopped from showing that the acceptance was conditional. We fail to perceive from the record how plaintiff was injured by this acceptance or that it had changed its position to its disadvantage by reason thereof. To permit plaintiff to recover in this action for work which it had not performed would be to permit it to profit by a wrong to which it was a party.

The law will not permit one to make a wrong, to which he is a party, the basis for an unjust recovery. The court submitted to the jury the question as to whether the acceptance was conditional for the purpose of issuing bonds, to which plaintiff assented, and, if so found, defendant would not be estopped from showing that the work was not completed, and would be entitled to retain from the contract price an amount sufficient to complete the work in accordance with the contract specifications.

The jury determined this question adversely to plaintiff. We think there was no error in the court's instruction in this respect.

It is next contended that the provision of the contract, requiring plaintiff to reimburse the defendant at the rate of $200 a month for any extra time consumed in the completion of the work, was not a provision for liquidated damages, as held by the trial court in its instructions. If defendant's contention, and the view taken by the court, is sound, it would follow that, if plaintiff had completed all of the work contemplated by the contract, except a single rod or a single yard of the paving or curbing, defendant would be entitled to retain from the contract price $200 a month for the extra time in which the insignificant part of the work remained uncompleted, although the uncompleted part of the work could be done at the cost of a few dollars. There is no evidence in the record to show what damage, if any, the defendant sustained by reason of the mere delay in completing the work within the time specified.

The amount stipulated in a contract to be recovered for a breach thereof may be either a penalty or a provision for liquidated damages. Frequently it is difficult to determine whether it is one or the other. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages. On the other hand, if the damages may be easily and readily ascertained, and if the amount stipulated is more than sufficient to compensate for the breach, it will be regarded as a penalty.

In *Brennan v. Clark,* 29 Neb. 385, it was held: "In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum in case of default by one of the parties is to be considered as a penalty or liquidated damages, the court will consider the

subject-matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts, which damages are certain or can be ascertained by evidence, the stipulated sum is considered as a penalty; but where the acts or omissions occasioning damages are not susceptible of measurement by a pecuniary standard, the sum stipulated ordinarily will be regarded as liquidated damages.

"A provision in a building contract that the contractor shall pay a stipulated sum per day after a certain date if he failed to complete the building at the time designated is in the nature of penalty and not liquidated damages."

In *Gillilan v. Rollins,* 41 Neb. 540, it was held: "When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the courts will take the sum so fixed as the innocent party's measure of damages only when it appears that to do so will no more than compensate his losses.

"But in such case if the taking as the measure of damages the sum fixed in the contract to be paid for its breach will more than compensate the innocent party, the court will regard such sum as a penalty.

"It is not the policy of the law to punish a party for violating his contract, but to compel him to make good to others the losses they have sustained by his default.

"The courts, in determining whether a sum fixed by a contract to be paid for its violation is liquidated damages or a penalty, will take into consideration the subject-matter of the contract, the consideration on which it is based, the intention of the parties, and the language of the contract; but these facts, nor any of them, nor all of them, will not necessarily control the court's construction."

It has been further held by this court that, in determining this question, the subject-matter of the contract,

the consideration, the intention of the parties, all the evidence, facts and surrounding circumstances, and the language and context of the contract must be carefully considered. *Gustin & Co. v. Nebraska Building & Investment Co.*, 110 Neb. 241.

The language in the contract is: To "reimburse" the defendant, which means to pay back, or repay. Evidently, the language used contemplated repayment of such sums as defendant may have been required to expend because of the delay. There is nothing in the record from which it can be inferred that it would be difficult to ascertain and admeasure any damage defendant would sustain by delay. Under the circumstances disclosed by the record in this case, we are constrained to hold that the language in the contract is a provision for a penalty, rather than for liquidated damages, and, as such, cannot be enforced. It follows that the trial court, in determining otherwise, committed error prejudicial to plaintiff.

While not presented for determination in this appeal, we call attention to the fact that a number of witnesses for defendant, who were nonexperts, testified that sufficient clay binder to make a compacted gravel job was not used, but they do not testify that 15 per cent., the amount required by the specifications, was not used. It is evident that if the amount of binder required by the specifications was used, but it was insufficient to make a properly compacted job, plaintiff would not be responsible therefor, but rather the fault would be that of defendant's engineer, who prepared the specifications. On a retrial of this cause, such evidence should be excluded.

Because of the court's error in instructing with respect to liquidated damages, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

ELISE BIELFELDT, APPELLEE, V. GRAND ISLAND TRANSIT COMPANY, APPELLANT.

FILED JUNE 10, 1932. No. 28267.

1. **Statutory Provision.** "Where, upon statements in the pleading, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Comp. St. 1929, sec. 20-1315.
2. **New Trial.** "In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground." *Manning v. City of Orleans*, 42 Neb. 712.

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

Story & Thomas and *Prince & Prince*, for appellant.

Mayer, Kroger & Mayer, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

DAY, J.

Plaintiff brings this action to recover damages from a fall while leaving a bus of defendant. The trial resulted in a verdict for plaintiff. The defendant filed a motion for judgment notwithstanding the verdict, which was overruled. From this order defendant appeals.

The sole error relied upon for reversal is that there is no evidence in the record supporting a finding of negligence.

"Where, upon statements in the pleading, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Comp. St. 1929, sec. 20-1315. "In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter

such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground." *Manning v. City of Orleans*, 42 Neb. 712; *Kenesaw Mill & Elevator Co. v. Aufdenkamp*, 106 Neb. 246. See, also, *Slocum v. New York Life Ins. Co.*, 228 U. S. 364. It is therefore apparent that the error relied upon by the appellant in its brief cannot be considered by this court.

The cases cited by appellant, *Netusil v. Novak*, 120 Neb. 751, and *First Nat. Bank v. Broyles*, 122 Neb. 414, do not support its position. These cases hold in substance that a trial court during the same term may correct its own errors.

AFFIRMED.

LEO B. STUHR, APPELLEE, V. CITY OF GRAND ISLAND, APPELLANT.

FILED JUNE 10, 1932. No. 28131.

1. **Eminent Domain**: DAMAGES. In a condemnation proceeding where a city seeks to appropriate land of a private owner for sewer purposes, the landowner is entitled to the present market value of the land actually taken and appropriated, and in addition thereto special damages to the remainder of the tract which might result from such improvement.
2. ———: ———. Only such special damages will be allowed as affect the present market value of the land. Contingent, speculative and remote damages which do not affect the present market value of the land are not allowable, and the reception of evidence tending to establish such is erroneous.
3. ———: ———. In a condemnation proceeding where private property is appropriated for a public utility, a claim for damages that the property affected might some day be used for municipal subdivision purposes, or that the same contains gravel deposits, without showing the quantity or quality or present commercial value thereof, are too remote and too speculative to be considered as elements of special damages.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Arthur G. Abbott, Arthur C. Mayer and *H. G. Wellensiek*, for appellant.

Cleary, Suhr & Davis, contra.

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

CHASE, District Judge.

This is a condemnation proceeding wherein the city of Grand Island has appropriated, under its power of eminent domain, a strip of land belonging to the plaintiff for sewer purposes. The case was tried in the district court to a jury, resulting in a verdict for the plaintiff in the sum of $1,000 for the four acres of land actually appropriated, and $7,500 as special damages to the remainder of the tract. From the judgment on the verdict and the overruling of the motion for new trial the city presents the case to this court for review, assigning numerous errors in support of its contention, among which is that the court erred in the admission of evidence offered by appellee over objections of the appellant. Our disposition of the case will be confined to a consideration of this proposition.

It appears that the plaintiff is the owner of the west half of the northwest quarter of section 14; the east half of the northeast quarter of section 15; also ten acres in the northeast corner of the northeast quarter of the southeast quarter of section 15; and one-half acre along the north line of the northwest quarter of the southwest quarter of section 14, all in township 11 north, range 9 west of the sixth principal meridian, being farm land located just northeast of the city of Grand Island. By these proceedings the city condemned a strip of land 66 feet in width, running east and west along the south line of the land, which might be termed plaintiff's quarter section, the south line of said strip being the south line of said quarter, and the whole 66 feet being taken off plaintiff's land; and ten and one-half acres belonging to plaintiff are on the south side of the ditch. The sewer is an

open ditch running across plaintiff's land, and other lands, east to the Platte river. It is 34 feet in width at the top, 7 feet in depth, and 6 feet in width at the bottom. Four acres of plaintiff's land is actually taken by the right of way of this ditch. The land thus described has for many years been used for agriculture and stock-feeding purposes. The improvements consist of a house, two barns, granary, poultry house, two feed houses, cattle shed, hog shed and other small outbuildings, together with corrals, fences, well and windmill. The house, two pumps, windmill, some fruit and ornamental trees are located upon the 66 foot strip actually appropriated by the city.

In awarding a property owner compensation and damages for real estate appropriated under condemnation proceedings, the rule seems to be that the damages are confined to the fair market value of the land actually appropriated, and in addition thereto the difference between the fair market value of the balance of the tract as it was at the time of said appropriation and what it is immediately after the improvement is made.

The evidence discloses that four acres of land have actually been appropriated by the appellant. The value of the land actually appropriated, the cost of removal of any buildings or improvements, the destruction or damage to trees or other immovable property, and any diminution in the present market value of the land are proper elements of damage.

It may be said at the outset that much testimony has been introduced by the appellee involving prospective, remote and speculative damages which cannot be regarded as true elements in cases of this character. A number of witnesses testified on behalf of appellee as to what, in their opinion, the difference in the value of the plaintiff's land was before and after the appropriation. It appears conclusively from the record that the land in question has never been used for anything but agricultural purposes. In the opinion of the witnesses the difference in the value of the land unappropriated before and after the taking

varies from $50 to $150 an acre. None of these witnesses are able to give a substantial reason why, in their opinion, this land would suffer a depreciation because of the sewer in the amount of $150 an acre. The cost of removing the buildings and relocating them is placed by one witness at $3,500 and by another at $1,200. Evidence is introduced over the objection of the appellant to the effect that the land generally in the Platte river valley is underlaid with gravel. We find no evidence where any tests have been made upon the land in question as to whether this particular land contains such deposits, with the possible exception of the testimony of plaintiff, who states that a test was made and gravel was found, but there is no evidence as to whether it was of a character or quantity suitable for commercial uses. There was also evidence permitted to go to the jury as to the availability of this land for railway trackage in reaching the gravel deposits generally in that vicinity in the event that the gravel should later be desired for commercial uses; the claim being that such facts and such conditions decreased the present market value of the tract generally. The court permitted witnesses to testify further of a potential value which this land might have in the future for municipal subdivision purposes. All of these things are entirely too remote, speculative and uncertain to be logically said to affect the present market value of the land unappropriated. To allow such testimony to go to the jury, as was permitted in this case, is erroneous.

A certain branch of the instant case seems to have been before this court on a prior occasion. The district court for Hall county, in an appropriate proceeding, entered an order of injunction against the appellant, before the prosecution of the work, perpetually enjoining appellant from using this land to construct an open sewer thereon until it had completed its disposal plant so that the effluvia from said plant would be clear and odorless, nonputrescible, and in no way becoming a nuisance. That case was appealed to this court and affirmed. *Stuhr v.*

City of Grand Island, 120 Neb. 491. Notwithstanding the question of committing a nuisance seems to have been foreclosed in that case, the trial court in this case permitted witnesses to testify that this sewer would exhale noxious and offensive odors to the extent of becoming a nuisance and endangering the health of persons living in that vicinity. In view of the present state of the record, any evidence offered at the trial of this case under a claim that the present improvement would diminish the value of the land unappropriated by making the same uninhabitable or unfit for habitation was incompetent and improper and the jury should not have been permitted to hear testimony in support of such an element of damage.

We think the consideration of the jury should have been confined to the value of the land actually appropriated and in addition thereto special damages to the remainder of the tract by reason of the appropriation, which would include damages caused by the removal of the buildings, fences, trees and other improvements, and also any additional damage occasioned by the segregation of certain parts of the land from other parts, and any other element that might affect its present market value. Damages that are too remote, contingent and speculative to affect the present market value of the land cannot and must not be considered.

This court held in *Maynard v. Nemaha Valley Drainage District,* 94 Neb. 610, that prospective damages which in the future may be derived from waterpower, or in the development of electricity, are entirely too remote and speculative to be taken into account as special damages, especially where there was no proof of a present and immediate intent and purpose to make such development. "Proof must be limited to showing the present condition of the property and the uses to which it is naturally adapted. It is not competent for the owner to show to what use he intended to put the property, nor what plans he had for its improvement, nor the probable future use of the property. Nothing can be allowed for

damages to an intended use." 2 Lewis, Eminent Domain (3d ed.) sec. 709. What real estate would be worth after costly and valuable improvements and additions had been made to it, or upon a use not contemplated by its owner in the near future, is so speculative and remote and depends so much on other factors and contingencies that it affords no present criterion of its present market value and cannot be considered as evidence affecting the same. *Illinois C. R. Co. v. City of Chicago*, 169 Ill. 329.

In a very early case *In the Matter of Furman Street*, 17 Wend. (N. Y.) 649, 669, the court made use of the following language: "However much the necessity for disarranging the plans of any individual may be regretted, the great principle upon which public improvements are to be effected must be substantially the same in all cases. All classes and conditions of men hold their property subject to the paramount claims of the state; and when it is taken for public purposes, and the question of compensation is presented, the only proper inquiry is, what is its value? The question is not, what estimate does the owner place upon it, but what is its real worth, in the judgment of honest, competent, and disinterested men? * * * What price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals, the owner may demand any price, however exorbitant, for his property; but when it is taken for public purposes he can only demand its real value."

Reason would dictate that a jury under circumstances such as are indicated by this record would have been misled in arriving at a proper estimate of the damages sustained. The trial court committed error in refusing to limit the jury to the proper field of inquiry in determining the issues of fact involved.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

E. A. EPP ET AL., APPELLEES, V. FEDERAL TRUST COMPANY ET AL., APPELLANTS.

FILED JUNE 10, 1932. No. 28009.

1. **Venue.** "The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether his interest in the action and the result thereof is adverse to that of the plaintiff." *Barry v. Wachosky*, 57 Neb. 534.
2. ———. In an action *in personam* brought to recover a money judgment only, where the local defendant has no interest in the action or the result of it adverse to the plaintiff, jurisdiction cannot be acquired over a nonresident codefendant by the service of summons upon him in a county other than that in which the action is begun.
3. **Injunction.** Numerous persons gave their individual notes for a membership fee in the Nebraska Wheat Growers Association. Separate actions at law thereon were instituted in a county other than the county of their residence by the holder thereof, and a local defendant was joined with the nonresident defendant; service was had upon the local defendant and by alias summons upon the nonresident defendants in another county, and it appears that the local defendant had no interest in said actions and the result thereof adverse to the plaintiff, but was joined with the nonresident defendant for the purpose of clothing the court with apparent jurisdiction over him. After many such actions were begun, some of the nonresident defendants, against whom suits were pending, and other nonresident makers of such notes threatened with similar actions, brought an action in equity to enjoin further prosecution of pending actions and the bringing of other similar actions. *Held*, under the facts indicated, equity will not assume jurisdiction to grant the injunction simply to prevent a mere procedural wrong, where there is no evidence proving or tending to prove a meritorious defense, common to all nonresident makers of the notes, to the actions at law.

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

Max V. Beghtol, Glen H. Foe and *J. Lee Rankin*, for appellants.

F. L. Bollen and *J. C. McReynolds, 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 E. A. Epp and others, nonresidents of Lancaster county, on their own behalf and for others similarly situated, to enjoin the Federal Trust Company, the Wheat Growers Finance Company, corporations with their principal places of business in said county, and others, from collecting default judgments, from prosecuting pending suits, and from commencing other threatened suits in the justice court of E. G. Maggi or any other court in said county.

There is no conflict in the evidence. It is established that the plaintiffs and the others in whose behalf the action is brought are members of the Nebraska Wheat Growers Association, which name was changed later to that of the Midwest Grain Marketing Association. The Nebraska Wheat Growers Association was organized as a nonstock cooperative association under chapter 80, Laws 1925, now sections 24-1401 to 24-1414, Comp. St. 1929, to "promote, foster and encourage the business of marketing wheat cooperatively; to minimize speculation and waste in the production and marketing of wheat and wheat products; to establish wheat markets; to handle cooperatively and collectively the problems of wheat growers." To become a member of the association it was necessary to sign what is known as a "Standard Marketing Agreement," consisting of two pages of finely printed matter wherein the members agreed to market their wheat through said association. Attached to said marketing agreement was an application for membership in the association, and a membership note, by the terms of which the member agreed to pay $10 to the order of the association on or before July 15, 1929. All the marketing agreements, the applications for membership, and notes were in the same form.

About fourteen thousand persons engaged in raising wheat in Nebraska signed said marketing agreements, applications for membership and notes. For the purpose of providing money to pay the debts which the association would be required to incur before the membership notes became due and payable, the Wheat Growers Finance Company was incorporated September 14, 1928, with a capital stock of $50,000, and under a written agreement entered into between the association and the Wheat Growers Finance Company said finance company agreed to purchase all the contract membership notes obtained by the association for $7.50 each, and the association under said agreement agreed to assign and guarantee the payment of all such membership notes. The finance company, not having sufficient resources of its own to purchase all the membership notes, entered into a trust agreement with the Federal Trust Company, whereby the finance company was to issue its collateral trust gold notes, which the trust company was to negotiate for the finance company, and as security therefor were to sign and indorse to the trust company all the contracts and membership notes purchased by them. The trust agreement further provided that the trust property for the security of outstanding collateral trust gold notes should consist of membership contract notes for the payment of the principal, amounting in the aggregate to at least 120 per cent. of all outstanding collateral trust gold notes, and if at any time a deficiency in the trust property should occur, the finance company, without demand or other action upon the part of the trustee, should forthwith deposit with the trustee, to be held as part of the trust property, additional moneys or like membership notes to an aggregate amount sufficient to make up any such deficiency. The contract membership notes were also pledged with the trust company to secure payment of the costs and expenses of collection of such contract notes and of any sale thereof, including reasonable compensation to the trustee, its agents, attorneys and counsel,

and all other expenses, liabilities and advances made or incurred by the trustee under the trust agreement.

The trust agreement further provided that as the money was collected on the membership notes it be used in retiring the collateral trust gold notes of the finance company. The finance company issued its collateral trust gold notes in the sum of $29,000, and these were sold to different parties by the trust company.

These marketing agreements and notes were grouped in lots of about one hundred and for each such lot an assignment on a separate instrument was made by the wheat growers association to the finance company. The finance company, below this assignment, assigned and indorsed said notes in said lots and all substitutions thereof to the Federal Trust Company. In this manner the Federal Trust Company received from the finance company contracts and notes to the number of 10,156, amounting to $101,560. Prior to November 10, 1930, and before the commencement of this action, the trust company had collected membership notes to the amount of $54,635 and out of the amount so collected had paid all of the collateral trust gold notes, paid itself the amount due to it of $1,040 for negotiating the collateral trust gold notes, a fee of $400 as trustee, and advanced therefrom to its and the finance company's attorney for attorney's fees and costs in connection with the collection of membership notes the sum of $1,000. In addition thereto expenses incurred by the trust company had been paid. Furthermore, there had been paid a 40 per cent. dividend to the stockholders of the finance company in liquidation of their stock. On the date mentioned the Federal Trust Company had in its possession in banks the sum of $3,467.73 of money of the finance company held under the trust agreement. From November 10, 1930, up to the time of the trial of this action, the attorney for the trust company and the finance company had collected other membership notes to the amount of $5,532.89.

Suits were commenced on membership notes in the justice court of E. G. Maggi in Lancaster county by the Federal Trust Company as plaintiff against the members signing the different notes and the Wheat Growers Finance Company as an alleged indorser thereof, summons was issued and served upon the Wheat Growers Finance Company in Lancaster county, and upon the summons being returned by the Lancaster county sheriff without service upon the maker of the membership note, an alias summons was issued to the county of his residence and served upon him in that county. All summons thus served upon the Wheat Growers Finance Company were sent to its attorney, who was also attorney for the trust company, and the matter of looking after its interests was left to him. Prior to the commencement of this action 375 such suits had been commenced in that court and like service obtained on the makers of the contract notes sued upon. Between the commencement of this action and the trial hereof (no temporary injunction having been granted) on April 15, 1931, 211 additional suits had been commenced, making in all 586 suits that had been commenced prior to the date of the trial. After this action was commenced some of those sued paid, default judgments were rendered in some cases, and in many others special appearances were filed, but no ruling had been had thereon. At the time of the trial there were in the hands of the attorney for the trust company and the finance company for collection nearly 3,000 membership notes upon which suit was being threatened.

Plaintiff's petition, in substance, set out the foregoing facts. The allegations of the petition, so far as necessary for a determination of the questions involved, are: That the action is one of common and general interest to many persons, and the parties plaintiff are numerous, and that it was impractical to bring all persons interested before the court as plaintiffs, and that the plaintiffs bring the action in their own behalf and all other persons similarly situated and interested; that the many

actions brought in the justice court of E. G. Maggi of Lancaster county on the membership notes, in which the Wheat Growers Finance Company was made a party defendant with the members signing said several notes, was for the sole purpose of giving the court the right to issue an alias summons to a foreign county to be served upon each of the signers of the membership notes, defendants in said actions; that the Wheat Growers Finance Company had no interest in said actions adverse to that of plaintiffs and was not a *bona fide* codefendant in said actions.

Several alleged defenses to said membership notes, common to all of the plaintiffs, are alleged. It was further alleged that plaintiffs had no adequate remedy at law and were about to suffer irreparable injury on account thereof. Plaintiffs prayed that the defendants, the Federal Trust Company and the Wheat Growers Finance Company, be permanently enjoined from prosecuting the actions pending on said membership notes in the justice court of Lancaster county and from further bringing any such actions against nonresident makers in that court or any other court in said county.

The defendant, Federal Trust Company, answered denying the allegations of plaintiff's petition, alleged that they had an adequate remedy at law; that there was no community of interest between plaintiffs; and that the notes sued upon were assigned and indorsed to it by the Wheat Growers Finance Company prior to July 1, 1929, for full consideration and without notice of any defect therein. The defendant, the Wheat Growers Finance Company, answered denying that it had any interest whatever in said membership notes.

The trial court found generally for plaintiffs except those who had allowed default judgments to be taken against them and as to such found for the defendants. The action was dismissed by the court as to all defendants except the Federal Trust Company and the Wheat Growers Finance Company. The court found that the

Federal Trust Company was a mere trustee of the Wheat Growers Finance Company, and that the finance company was not liable or indebted to the Federal Trust Company upon the written assignments of said standard marketing agreements or otherwise; that said Wheat Growers Finance Company was not a *bona fide* defendant and that said actions were not rightfully begun in Lancaster county and did not authorize an alias summons to be issued or served on the several signers of said membership notes in the county of their residence, and that said justice court obtained no jurisdiction over defendants so served by reason therof. A permanent injunction was granted against the defendants, Federal Trust Company and the Wheat Growers Finance Company, as prayed for in plaintiffs' petition.

Nowhere in their briefs do counsel for appellants contend or even suggest that the actions commenced by the Federal Trust Company on the membership notes by joining the Wheat Growers Finance Company as party defendant with appellees (defendants in such actions) were rightly brought in the justice court in Lancaster county so that an alias summons might be issued in each of said causes and served upon appellees in a foreign county. It is not contended that the findings of the trial court finding otherwise are erroneous. We have repeatedly held: "The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether his interest in the action and the result thereof is adverse to that of the plaintiff." *Barry v. Wachosky*, 57 Neb. 534. See *Dunn v. Haines*, 17 Neb. 560; *Cobbey v. Wright*, 23 Neb. 250; *Hanna v. Emerson*, 45 Neb. 708; *Miller v. Meeker*, 54 Neb. 452; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728; *Stewart v. Rosengren*, 66 Neb. 445; *Ayres v. West*, 86 Neb. 297; *Vian v. Hilberg*, 111

Neb. 232; *Smith v. Atlas Refining Corporation*, 112 Neb. 6; *First Bank of Ulysses v. Warren*, 113 Neb. 361. The facts in this case establish beyond controversy that the Wheat Growers Finance Company had no interest in the suits commenced in the justice court of Lancaster county adverse to that of the Federal Trust Company, plaintiff in such actions, and that it was not a *bona fide* defendant therein, but was joined as defendant in each of said causes for the sole purpose of furnishing a basis for the issuing of an alias summons in each of said actions to be served upon each of the other defendants in such actions in another county. By such service said court acquired no jurisdiction over the parties so served.

The actions at law not having been rightfully brought in Lancaster county, appellees base their right to the injunctive relief decreed by the trial court upon three grounds, to wit: To prevent abuse of process; no adequate remedy at law; and to prevent a multiplicity of suits. One of the main reasons urged by counsel for appellants why the decree of the trial court cannot be sustained is that there is no evidence showing that appellees have a meritorious defense, common to all, to the membership notes sued upon. While several defenses are alleged, common to all parties plaintiff, there is no evidence proving or tending to prove any such defenses. This is conceded by counsel for the appellees. If the appellees are required to prove a meritorious defense to the actions at law, then it follows that injunctive relief should not have been granted and makes unnecessary the consideration of any of the other questions involved. In regard to this contention counsel for appellees state in their brief: "We plead and proved a common defense to every pending and threatened suit, to wit: That the justice court of E. G. Maggi of Lancaster county had not obtained and could not obtain by alias summons jurisdiction over the persons of the plaintiffs. * * * We are not asking equity to relieve us from liability on the so-called applications for membership. We are merely

asking equity to relieve us from being sued in a county where we have never been lawfully summoned." We have uniformly held that, where a judgment at law has been rendered by default, which is void for want of jurisdiction over the person of the defendant, such defendant is not entitled to an injunction to restrain the enforcement of such judgment, unless he makes it appear both from his pleadings and proof that he has a meritorious defense to the cause of action on which the judgment is based. *Braun v. Quinn*, 112 Neb. 485; *Langley v. Ashe*, 38 Neb. 53; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44; *Cleland v. Hamilton Loan & Trust Co.*, 55 Neb. 13.

Appellees contend that the rule announced in those cases does not apply to the instant case. The argument made by able counsel for appellees is persuasive, but not convincing. We think the rule announced applies with equal or greater force to the present case. If appellees have no meritorious defense to the notes sued upon, then it is immaterial to them where such actions are brought. Without a meritorious defense they will not suffer any substantial injury therefrom. If appellees have no such defense, then the commencement of the actions in the justice court in Lancaster county would simply be an attempt to deprive them of the naked legal right to have the actions brought in the county of their residence or where they might be lawfully summoned. Such legal right becomes valuable only when there is a meritorious defense to an action. Then the litigant by being required to go from the county of his residence to another county to interpose a good defense may be put to inconvenience, unnecessary costs and expense for which he would have no redress and thereby suffer substantial injury. Where there is no defense to the cause of action, the wrongful bringing of such an action in a county other than the county of the residence of such defendant is a mere technical wrong which it is not the province of equity to correct. The party invoking its aid must show some sub-

stantial injury. If appellees have no meritorious defense or defenses common to all of them in all of said actions, then it would be useless for equity to assume jurisdiction and grant injunctive relief.

In the case of *Jones v. Harris,* 90 Ark. 51, it was held: "A defendant in numerous actions at law to enforce a primary liability created by statute who asserts no defense to the actions cannot sue in equity to enjoin the actions to prevent a multiplicity of suits." (117 S. W. 1077.) In the opinion it is said: "Appellees also invoke the principle announced by some authorities that a court of equity will enjoin the prosecution of numerous actions arising out of the same transaction in order to prevent a multiplicity of suits. Two cases of this sort have been brought to our attention. * * * In both of those cases the defendants in the actions at law asserted in their respective bills in equity valid defenses, and claimed the right to make defense without being subjected to the costs and expenses of a multiplicity of suits. In the present case, however, appellee Gibbs asserts no defense whatever to the actions at law. Without pausing to consider whether, under the state of facts set forth in the cases just cited, we would uphold the right to enjoin suits at law, we have no hesitancy in saying that in a case like the present one, where no defense at all is asserted, the principle cannot be invoked to call into action the jurisdiction of a court of equity."

We think that case correctly states the rule that should prevail. In that case no defense was alleged. In this case defenses were alleged, but no proof offered tending to sustain any of them.

If the appellees have no meritorious defense to the actions at law, then those who are litigiously inclined and desire to question, individually, the jurisdiction of the justice court have an adequate remedy at law by appearing specially and objecting to the jurisdiction of the court, although, if successful, the result may not be beneficial.

It is not likely, however, in view of this decision, that the justice court will continue to exercise jurisdiction in the pending cases, where jurisdiction is questioned, nor that said court or any other court in said county will in any action so wrongfully brought and on like service entertain jurisdiction when attacked; nor that the plaintiff in such actions will press for judgment therein or commence other similar actions or seek to obtain jurisdiction over nonresident defendants on like service.

There being no evidence proving or tending to prove a meritorious defense to the actions at law, common to all the appellees, equity will not assume jurisdiction to grant injunctive relief. The decree permitting such relief cannot be sustained for the reasons stated. To hold otherwise would be to disregard a well-established principle of equity jurisprudence. This we will not do, although the commencement of the actions at law in the justice court of Lancaster county, under the circumstances disclosed by the record, is disapproved. Whether appellees would have been entitled to such relief to avoid a multiplicity of suits, if there was proof of a common defense, we do not feel called upon to decide. To determine that question now we would be compelled to assume that appellees have evidence to establish such defense. A discussion thereof on the assumption a valid defense exists would be purely academic. We do not want to be understood as holding that on a retrial an injunction should not be granted if, in addition to the record before us, evidence is introduced proving or tending to prove a common defense to the actions at law.

The judgment is reversed and the cause remanded for a new trial.

REVERSED.

CITIZENS BANK OF OGALLALA, APPELLEE, V. JOHN T. LISTER ET AL., APPELLANTS: UNION STATE BANK OF NORTH PLATTE, APPELLEE.

FILED JUNE 10, 1932. No. 28216.

Mortgages: FORECLOSURE: DECREE: VACATION AFTER TERM. Evidence *held* insufficient to warrant vacation or modification of judgment after term under section 20-2001, Comp. St. 1929.

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

Hoagland, Carr & Hoagland, for appellants.

Halligan, Beatty & Halligan, Milton C. Murphy and *M. M. Maupin, contra.*

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

LANDIS, District Judge.

Mortgagors John T. Lister and Luella W. Lister made application to vacate and set aside a decree of foreclosure rendered against them. From the decree denying such relief they prosecute an appeal.

Appellants executed a mortgage upon which foreclosure proceedings were instituted July 19, 1930. After service of summons therein, they procured an attorney, who filed a general demurrer to the petition on August 19, 1930. September 2, 1930, this demurrer was heard and overruled. On October 27, 1930, a default decree was entered. The attorney for appellants moved for and obtained a nine months' stay of execution of the decree. Order of sale issued July 28, 1931; September 1, 1931, return of order of sale made, and on September 3, 1931, in the original action appellants filed their application to vacate the foreclosure decree of October 19, 1930. The appellee, Citizens Bank of Ogallala, the mortgagee, joined issue by answer. The foreclosure decree was entered at the October, 1930, term of the district court, which adjourned February 17, 1931. February term adjourned

April 13, 1931. Appellants filed their application to vacate the decree in the April, 1931, term, which adjourned September 14, 1931.

Under section 20-2001, Comp. St. 1929, a district court has power to vacate or modify its own judgments or orders after the term at which they are made on nine enumerated grounds. Appellants assert two of these, namely, "fraud practiced by the successful party in obtaining the judgment," and "unavoidable casualty or misfortune, preventing the party from prosecuting or defending." The evidence does not sustain either of the grounds claimed. There was no fraud, actual or constructive, practiced by the appellee in obtaining the judgment in foreclosure entered herein. There was no dishonesty of the attorney in his conduct of the appellants' case. While appellants were attempting to refinance their situation, Mr. E. E. Carr, a competent and reputable attorney, was consulted about a loan. This was in November or December, 1930, and then John T. Lister with Mr. Carr went to the courthouse to look over the papers in the foreclosure action. This was done and some time during these two months Mr. Lister admits he knew of the decree and the nine months' stay. The October, 1930, term of the court adjourned February 17, 1931, so that about two months before the close of the term at which the foreclosure decree was rendered, appellants admit having full knowledge of the proceedings. It follows there was no unavoidable casualty or misfortune preventing the appellants from prosecuting or defending.

Upon review of the record, we reach independent conclusions the same as the trial court. Hence, the decree appealed from is

AFFIRMED.

ANDREW CHRISTENSEN, APPELLEE, V. CHARLES D. SMITH ET AL., APPELLANTS.

FILED JUNE 16, 1932. No. 28247.

1. **Fraudulent Conveyances:** CONVEYANCE FROM PARENT TO CHILDREN: SUIT TO CANCEL: CREDITOR. In a suit to cancel a deed from a father to his children and to subject the land to the payment of a deficiency judgment, on the ground that the deed was fraudulent as to plaintiff, an existing creditor, evidence that, when it was executed, grantor owed plaintiff a debt partially secured by an unsatisfied mortgage on other land may be sufficient to show that plaintiff was then a creditor.
2. ———: ———: ———: BURDEN OF PROOF. A deed by a father to members of his family is presumptively fraudulent as to an existing creditor and in litigation between the creditor and grantees on that issue the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence.
3. **Creditors' Suit:** PROPERTY SUBJECT: RIGHTS OF CREDITORS. "Property conveyed by a debtor in consideration of an agreement for his future support may be subjected to the payment of a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support actually furnished by the grantee in good faith." *Cherry Co. v. Helm*, 98 Neb. 626.
4. **Homestead:** ABANDONMENT: PROOF. Abandonment of a homestead may be proved by evidence that the occupants thereof as such actually left it, never returned and, while absent, formed the intention not to return.

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

C. A. Kingsbury and *H. E. Siman*, for appellants.

McCarthy & McCarthy, contra.

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

ROSE, J.

This is a creditor's suit by Andrew Christensen, plaintiff, to set aside a deed to a 120-acre farm in Dixon county and to subject it to execution on a judgment in his

favor against Charles D. Smith, grantor, on the grounds that the deed was fraudulent as to creditors and that it was executed and delivered without consideration. Grantor and his son, George Edwin Smith, and his daughter, Elsie Rae Broeker, grantees, are defendants. In a former suit to foreclose a mortgage on a different tract of land, plaintiff had previously recovered a deficiency judgment against grantor for $9,878.08, upon which execution was issued and returned unsatisfied for want of property whereon to levy, except as to personalty seized by the sheriff and sold for $113.98. The purpose of the creditor's bill was to cancel the deed of grantor and to subject his 120-acre farm to the payment of the indebtedness evidenced by the deficiency judgment.

In substance the defenses interposed were as follows: Grantor was not a creditor of plaintiff when the deed was executed, the claim for a deficiency judgment being then contingent and unadjudicated; absence of fraud and of a purpose to delay creditors; oral promise by grantees of future aid to grantor and wife, if needed, as consideration for the deed; homestead interest of grantor and family; declaration of grantor's bankruptcy and substitution of the trustee in bankruptcy for plaintiff herein as bar to latter's claim.

Upon a trial of the cause the district court found the issues in favor of plaintiff, canceled grantor's deed, ordered a sale of the farm in controversy upon failure of grantor to satisfy the deficiency judgment and directed application of the proceeds of sale to plaintiff's claim. Defendants appealed.

The plea that grantor was not a creditor of plaintiff when the deed was executed and that he was therefore at liberty to transfer to his children the title to his land was not established as a defense. As early as 1920 grantor owed plaintiff approximately $21,000, a debt partially secured by an unsatisfied mortgage on a tract of land other than the farm involved herein. The deed was executed June 17, 1929. At that time grantor was under

obligation to pay the mortgage indebtedness in full but never did so. Under the circumstances the better view is that grantor was a debtor and plaintiff a creditor when the deed was executed.

Under the law and the evidence, good faith of grantor and grantee's oral promise of future support, if needed, as consideration for the deed, are likewise futile as a defense. A deed by a father to members of his family is presumptively fraudulent as to an existing creditor and in litigation between him and grantees on that issue the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Carson v. Stevens,* 40 Neb. 112; *Melick v. Varney,* 41 Neb. 105; *National Bank of Commerce v. Chapman,* 50 Neb. 484; *Kirchman v. Kratky,* 51 Neb. 191; *Schott v. Machamer,* 54 Neb. 514; *Jansen v. Lewis,* 52 Neb. 556; *Heffley v. Hunger,* 54 Neb. 776; *Blanchard v. McMillan,* 113 Neb. 275. The presumption of fraud arising from the transaction is not overcome by the evidence on behalf of grantees in the present instance. The oral promise was conditional upon the need of future support and is wholly unperformed. Grantor's insolvency is admitted in an answer to the petition and is also proved by the evidence. The controlling principle of law has been stated as follows:

"Property conveyed by a debtor in consideration of an agreement for his future support may be subjected to the payment of a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support actually furnished by the grantee in good faith." *Cherry Co. v. Helm,* 98 Neb. 626; *Blanchard v. McMillan,* 113 Neb. 275.

On this issue the finding on appeal is that grantor's deed was fraudulent as to plaintiff and properly canceled as to him.

The claim that the farm was the homestead of grantor when the deed was executed does not seem to be well founded. The homestead had been previously abandoned.

Abandonment of a homestead may be proved by evidence that the occupants thereof as such actually left it, never returned, and, while absent, formed the intention not to return. *Corey v. Schuster,* 44 Neb. 269; *Mallard v. First Nat. Bank of North Platte,* 40 Neb. 784; *Union Stock Yards Nat. Bank v. Smout,* 62 Neb. 227; *Blumer v. Albright,* 64 Neb. 249. Grantor and his wife left their homestead in the spring of 1928 and never returned to occupy it as such. The deed was executed June 17, 1929. The proper inference from grantor's testimony is that, while absent, he formed the intention not to return. The trial court so found in accordance with the preponderance of the evidence.

The alleged defense that plaintiff's claim was barred by the decree in bankruptcy is also unavailing.

AFFIRMED.

NEBRASKA NATIONAL BANK OF MINDEN, APPELLANT, V. JOSEPH S. BAYER ET AL., APPELLEES.

FILED JUNE 16, 1932. No. 28215.

1. Wills: CONSTRUCTION. It is the duty of the court to ascertain the true intent of the testator in the disposition of his estate as disclosed by the language of his will, and where such intent is consistent with the rules of law, it will be upheld.
2. ———: ———: RESTRICTIVE PROVISION. A testator devised certain described real estate to his son, subject to the life interest of the testator's wife, and the will provided that the son "shall not mortgage nor sell the same as long as he lives, and at his death it is my will that it be divided equally between his children." Thereafter the son executed a mortgage on the land so devised to him and upon which the plaintiff bank now seeks to recover. *Held,* that the testator had the right to limit the power of his son to mortgage the property and that such mortgage is void.
3. Mortgages: VALIDITY. A mortgage deed by a son conveying a "contingent or fee simple" interest in certain land then owned by his mother who was not divested of the title therein at the time such mortgage deed was executed is void.

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

C. P. Anderbery, for appellant.

J. L. McPheely, contra.

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

DEAN, J.

The Nebraska National Bank of Minden, hereinafter referred to as the plaintiff bank, began this action in the district court for Kearney county to foreclose two certain mortgages executed jointly by Joseph S. Bayer and Amelia C. Bayer, husband and wife, in favor of the Minden State Bank, and by such bank assigned to the plaintiff bank.

Thomas Bayer, the father of Joseph S. Bayer, one of the defendants herein, died testate April 20, 1924, and, among others, his will contains this provision, namely:

"I give, devise and bequeath to my son Joseph Bayer (subject to my wife's life interest) the southeast quarter of section 6, township 6 north, range 14 west, Kearney county, Nebraska, to have and to hold as long as he lives. He shall not mortgage nor sell the same as long as he lives, and at his death it is my will that it be divided equally between his children."

Mrs. Thomas Bayer, the mother of the defendant Joseph S. Bayer, died February 20, 1931, and, pursuant to the terms of her will, the defendant was bequeathed a one-third interest in and to certain property, including the north half of the southwest quarter of section 5, township 6, range 14, in Kearney county.

The record discloses that on May 1, 1925, after the death of his father, Joseph S. Bayer and his wife executed a note for $8,300, with interest coupons attached, payable to the Minden State Bank and, as security therefor, they executed a mortgage deed in favor of the bank whereby they conveyed their "right, title and interest" in and to the real estate bequeathed to Joseph S. Bayer by his father, and in which the defendant had a life interest only.

The record also discloses that on or about April 13, 1926, and before the death of Mrs. Thomas Bayer, the defendants were unable to pay certain interest coupons then due on the $8,300 note, and they therefore executed a real estate mortgage as additional security therefor, and, included therein, was the tract of land then owned by Mrs. Bayer, and in which the defendant is described as having a "contingent or fee simple interest." Both of the above mortgages were assigned May 8, 1929, to the plaintiff Nebraska National Bank by the Minden State Bank.

On February 28, 1931, and after the death of Mrs. Thomas Bayer, the defendants herein executed a warranty deed in favor of the First National Bank of Minden whereby they conveyed their interest in and to the land devised by Mrs. Bayer to the defendant.

Upon submission the court found and decreed that, under the terms of Thomas Bayer's will, the defendants herein were without power to alienate or incumber the life estate devised to Joseph S. Bayer, and that the mortgage executed by them in favor of the plaintiff bank was a void instrument. And in respect of the real estate mortgage executed as additional security by the defendants in favor of the plaintiff bank, the court found that Joseph S. Bayer did not own an interest in the land described therein at the time such mortgage was executed and that the mortgage was therefore void. But in respect of the deed executed by the defendants in favor of the First National Bank, the court decreed that such deed was valid, for the reason that it was executed after the death of Mrs. Thomas Bayer, and that it conveyed the fee simple title therein to the bank. The plaintiff, Nebraska National Bank, has appealed.

The first question which appears to demand our attention is whether the testator, Thomas Bayer, had the right to limit the power of his son Joseph S. Bayer to mortgage the life interest devised to him by his father. The argument of counsel for the plaintiff bank, in substance, is that the limitation clause contained in the will is invalid,

and that it is "so clearly contrary to public policy that no reasonable decision has ever been disclosed" in a like case.

Under section 76-109, Comp. St. 1929, provision is made that it shall be the duty of the courts to carry into effect the true interest and intent of the parties, so far as such intent can be ascertained from the whole instrument, and so far as such intent is consistent with the rules of law.

In putting into effect the provisions of section 76-109, above cited, we have held:

"No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." *Weller v. Noffsinger,* 57 Neb. 455. See, also, *Grant v. Hover,* 103 Neb. 730, and *Krause v. Krause,* 113 Neb. 22.

And in *Weller v. Noffsinger, supra,* we also held:

"A condition that the devised property shall not be aliened or incumbered by the beneficiary, or liable for his debts, during the existence of the trust estate, is valid and enforceable."

In *Hiles v. Benton,* 111 Neb. 557, where the life use of certain property was devised to his son by the testator, "without power and authority to sell, mortgage, or to in any manner alienate said use for any purpose," we held that such provision was effectual to prevent the devisee from voluntarily conveying or incumbering the property there in question. And in *Reuter v. Reuter,* 116 Neb. 428, where a deed was executed conveying certain land, but with the provision therein that the grantee shall not convey nor incumber such land, and that upon her death the land was to vest in her children, we likewise held that the deed conveyed only a life estate to the grantee, with the remainder in fee to her children. See, also, *Kluge v. Kluge,* 103 Neb. 534; *Peters v. Northwestern Mutual Life Ins. Co.,* 119 Neb. 161.

It is the duty of the court in a case of this nature to ascertain from the will the true intent of the testator in the disposition of his property, and where such intent is found to be consistent with the rules of law, it will be upheld. The will of Thomas Bayer clearly discloses that his intention was to convey to his son Joseph the use of the property in question so long as he lived, subject to Mrs. Thomas Bayer's interest, and that, upon the death of his son, the property should vest in Joseph's children share and share alike. In view of the facts, and of our former decisions in like cases, we adhere to the proposition that the senior Bayer had the right to limit the power of his son to mortgage the life interest in the property so devised to him by his father. It therefore follows that the court did not err in holding that the mortgage executed herein on the property devised to Joseph S. Bayer, and in which he had a life use only, is void.

The next question for determination is whether the mortgage executed as additional security on the note and covering the land then owned by Joseph S. Bayer's mother is valid.

As noted above, the mortgage contains the statement that it purports to convey all of the defendants' "contingent or fee simple interest" in the land in question. Mrs. Thomas Bayer was then living, and her son had a mere expectancy in the title. To permit the mortgaging of a future expectancy might be to set a dangerous precedent. It has been held:

"A naked possibility or contingency not founded upon a right or coupled with an interest cannot be assigned or sold. Therefore the expectancy of a son to inherit his father's estate is not the subject of assignment or sale, and a contract therefor is not enforceable either at law or in equity upon the father's death." *McCall's Admr. v. Hampton,* 98 Ky. 166. To substantially the same effect are *Alves v. Schlesinger,* 81 Ky. 290; *Hunt v. Smith,* 191 Ky. 443; *Bennett v. Harrison,* 115 Minn. 342; *In re*

Thompson's Estate, 26 S. Dak. 576; and *Avon State Bank v. Commercial & Savings Bank*, 49 S. Dak. 575.

We conclude that the mortgage executed in favor of the plaintiff bank wherein the defendants purport to convey all their "contingent or fee simple interest" in the land then owned by Mrs. Thomas Bayer, and who was not at that time divested of the title therein, is void.

The deed executed by the defendants in favor of the First National Bank, after the death of Mrs. Thomas Bayer, however, is a valid conveyance.

The judgment is right and it is in all things

AFFIRMED.

GEORGE R. BUCKNER ET AL., APPELLEES, V. WILLIAM B. MCHUGH ET AL., APPELLANTS: LANCASTER COUNTY BANK ET AL., APPELLEES.

FILED JUNE 16, 1932. No. 28156.

1. **Fraudulent Conveyances: CONVEYANCE FROM PARENT TO CHILD: PRESUMPTION.** A conveyance of property by a parent to his child is presumptively fraudulent as to the parent's creditors.
2. **Trusts: PAROL EVIDENCE.** "Parol evidence to establish a resulting trust must be clear, unequivocal and convincing." *Doane v. Dunham*, 64 Neb. 135.
3. **Fraudulent Conveyances: EQUITY.** A court of equity will enforce the application of the property of a judgment debtor to the payment of a judgment against him, notwithstanding his property is placed in possession and name of another to hold for him. In such case, it is immaterial when the creditor became the owner of the judgment which he seeks to enforce.
4. ———: **DEFENSE OF LACHES.** The defenses of the statute of limitations and laches are not applicable, under the facts disclosed by the record.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY and LINCOLN FROST, JUDGES. *Affirmed.*

George A. Adams and *Herman Ginsburg*, for appellants.

John J. Ledwith, H. N. Mattley, James L. Brown, T. F. A. Williams and *W. A. Selleck, contra.*

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

GOOD, J.

This is a creditor's suit in equity to compel the application of property, owned by the debtor but held for him in the name of another, to the satisfaction of judgments owned by the creditors. Plaintiff and interveners Dasenbrock seek to reach and apply to the satisfaction of judgments, held by them, a claim for $16,275, filed by William B. McHugh against the estate of George W. Stabler, deceased, on the ground that the claim was, in fact, the property of Bartley McHugh, the judgment debtor.

Defendants Bartley and William B. McHugh, as defenses, pleaded the statute of limitations, laches, and alleged that the claim against the estate of decedent was the property of William B. McHugh.

The trial court found for plaintiff and interveners Dasenbrock and enjoined the McHughs from selling, assigning or otherwise disposing of the claim, and ordered and directed the defendant Lincoln National Bank & Trust Company, as administrator of the estate of Stabler, not to pay any of the claim to the McHughs, but to pay the same to the plaintiff and interveners Dasenbrock, to the extent of their judgment claims. William B. and Bartley McHugh have appealed.

Defendants Bartley and William B. McHugh are father and son. In 1918 Bartley McHugh was the owner of 160 acres of land in Lancaster county, which he had contracted to sell for a consideration of $28,800; the contract to be closed and deed executed March 1, 1919. In the latter part of August, 1918, Bartley McHugh borrowed $2,700 from the bank of which the plaintiff was president. There is credible evidence that when he executed the note for the amount borrowed he deposited therewith the land contract as collateral security for his note, and stated that

the closing of the sale contract would occur at that bank; that when settlement was made for his land the note was to be paid out of the proceeds. About the same time he borrowed money from other banks, giving his notes therefor, and there is evidence tending to show that he agreed that these notes should be paid out of the purchase price of the farm which he had contracted to sell. Instead of closing the contract for the sale of his land at the banks from which he had secured these loans, he closed the deal at another bank and received a check for something over $19,000. This check he immediately converted into a bank draft for 17,000 and some odd dollars and some cash. On the same day he took the draft to a bank in Lincoln and obtained cash therefor.

Bartley McHugh testified that he took the $17,000 cash to his home and put it in a trunk, leaving it there for, perhaps, a week, or longer, when he turned over to his son $15,200. The son, William B. McHugh, testified that he kept the $15,200 in a dresser drawer in his home for a few days, when, as he and his father and sister testified, the three went to Omaha, the son taking with him $12,000 or $13,000 in cash; that the son contemplated buying government bonds; that when they reached Omaha the father left the son and daughter, the son being only a little more than 21 years of age, and the daughter still younger, and went to visit a relative, while the son and daughter went to the business section of the city to look for a bank; that a bank was found, but it was closed and they could not enter; that they found a safe deposit company in the basement of the bank building; that they went in and rented a safe deposit box and placed therein the $12,000 or $13,000 in currency. They were unable to tell the name of the bank or the name of the safe deposit company, on what street the building was located, or whether it faced east, west, north or south; were unable to name any officer or person connected with the company, and were unable to state for how long a time the box was rented or what rental was paid therefor. The

son testified that this money remained in the safe deposit box, and that he never returned to it until about two years later when he arranged for a loan of $12,000 to George W. Stabler, a close personal friend of his father; that on the day this loan was made he, with his father and Stabler, went to Omaha and there obtained the money from the safe deposit box. He and his father testified that the money was turned over to Stabler, who gave his note therefor at that time; that the same day they returned to Lincoln and went to Stabler's home where Mrs. Stabler also signed the note.

Mrs. Stabler testified that on the evening in question Bartley McHugh came home with her husband; that the former stayed overnight at their home, and that William B. McHugh was not there; that she was requested to sign the note. She made some inquiries and was informed in the presence of Bartley McHugh that it was his money which Mr. Stabler was borrowing, and she was admonished, in the presence of Bartley McHugh, "not to breathe a word" about the transaction. Interest was paid upon this note by Stabler from time to time until his death, which occurred in 1929, and credits were indorsed on the back of the note. It is significant that these credits are not in the handwriting of William B. McHugh, but appear to be in that of his sister. After Stabler's death it was necessary that a claim should be filed against his estate. It appears also that there was a second note for $1,000, given by Stabler to William B. McHugh, and that all the money that was loaned to Stabler came out of the proceeds of the sale of Bartley McHugh's land.

One of the banks that had made the loan to Bartley McHugh obtained a judgment thereon and was unable to find any property out of which to satisfy the judgment. In 1920 the bank obtained service on Bartley McHugh and caused him to submit to an examination, to disclose what had become of his property. At that time he used a written statement in which he claimed the manner of disposition of all the proceeds from the sale of the farm, and it

is significant that at that time no mention was made of the $15,200 which he claims was turned over to his son, but he did mention $600 which he claimed to have paid to his son either for wages or expenses. The evidence also shows that the son was consulted with reference to the preparation of this statement.

The record discloses that after Bartley McHugh had acquired title to the 160 acres in question he transferred the title to his wife, and that title remained in her for a number of years, but that when she was in ill health and nearing the end of life she reconveyed the land to Bartley McHugh. She died in 1908. Defendants McHugh claim that 80 acres of this land was originally paid for by money belonging to Mrs. Bartley McHugh; that when she reconveyed the land to her husband there was a parol agreement that the 80-acre tract of land was to be conveyed to William B. McHugh when he became of age or married. Bartley McHugh testified that he consulted with his son and that they agreed that it was better to sell the land and pay William B. the proceeds of the sale, rather than convey the land to him; that the $15,200 which was turned over to him represented the 80 acres of land that was intended to be conveyed to him, together with his half-interest in the personal property on the farm.

It is significant that when Bartley McHugh was examined in 1920 no statement was made relative to the $15,200 turned over, nor to the fact that William B. McHugh had any interest in the land or the proceeds thereof. It also appears that in July, 1918, William B. McHugh filled out a questionnaire, pursuant to an order of the war department, in which he stated that he was engaged in farming, renting land from his father for a share of the crop; that he paid two-thirds of the crop as rental, and he made a statement as to ownership of his property, being two horses; that he was then 21 years of age. There was no mention that he was the equitable owner of the land or any part thereof. Practically the only testimony with reference to the parol trust, claimed to

have been created when Mrs. McHugh reconveyed the land to her husband, Bartley McHugh, is furnished by the McHughs and their relatives.

There are many contradictions and discrepancies in the testimony which it is needless to set forth herein. Suffice it to say that the testimony of defendants McHugh did not impress the trial court; nor are we, after reading the record, impressed with the credibility of their testimony. On the contrary, the stories, as detailed by them, seem rather a belated attempt to further delay the creditors of Bartley McHugh in obtaining satisfaction of their just claims.

It is a rule of law that transactions between parent and child, by which property is transferred by one who is unable to pay his just debts, should be carefully scrutinized; such transactions are presumptively fraudulent, and the burden is on him who asserts the good faith thereof to prove it. *Light v. Kennard,* 11 Neb. 129.

In *Seeley v. Ritchey,* 76 Neb. 427, it was held: "The rule is well settled in this state that a conveyance made by a father to his son, or other near relative, is presumptively fraudulent as to existing creditors." On a rehearing of that case, reported in 76 Neb. 433, it was held: "A transfer of real estate by a debtor to a near relative is looked upon with suspicion, and the burden of proving the *bona fides* of the transaction is upon the grantee." And it is an equally well-established rule that parol evidence to establish a trust must be clear, unequivocal and convincing. In *Doane v. Dunham,* 64 Neb. 135, this court held: "Parol evidence to establish a resulting trust must be clear, unequivocal and convincing." The same rule was reaffirmed in *Columbia Nat. Bank of Lincoln v. Baldwin,* 64 Neb. 732. See, also, *Davis v. Davis,* 112 Neb. 178, and *Klamp v. Klamp,* 51 Neb. 17.

It is contended on behalf of the McHughs that plaintiff and interveners Dasenbrock cannot recover in this action because they were not, at the time the Stabler notes were made payable to William B. McHugh, the

owners of the judgments which they now seek to enforce. This contention cannot be upheld. From the record it is apparent that the Stabler notes are the property of Bartley McHugh, notwithstanding they were made payable to William B. McHugh. They were made so payable for the purpose of covering up and hiding their true ownership from the creditors of the actual owner.

A court of equity will enforce the application of a debtor's property to the payment of his just obligations which have been reduced to judgment, notwithstanding the property may be placed in possession or in the name of another to hold for him. It is immaterial that plaintiff and interveners did not become the owners of the judgments in question until after the notes were taken in the name of William B. McHugh. They are now the owners of the judgments, and Bartley McHugh, the judgment debtor, is now, and at all times has been, the owner of the notes which form the basis of the claim against the Stabler estate. That claim is the property of Bartley McHugh. It is subject, and a court of equity will enforce its application, to the payment of the judgments in question.

In *Pierstoff v. Jorges*, 86 Wis. 128, in substance it was said that the nature, purpose and scope of a creditor's bill is merely to bring into exercise the equitable powers of the court to enforce the satisfaction of a judgment by means of an equitable execution because execution at law cannot be had. To the same effect is *Hadden v. Spader*, 20 Johns. (N. Y.) 554. See, also, *Weed v. Pierce*, 9 Cow. (N. Y.) 722.

In *Waddingham's Exrs. v. Loker*, 44 Mo. 132, it was held: "The law will not permit a man to withdraw his property from his creditors. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret trans-

actions, and subjects the property or trust funds to the payment of just and legal demands."

In *Brundage v. Cheneworth*, 101 Ia. 256, it was held: "A conveyance of land to a grantor's wife, on the agreement that he was to remain the actual owner of the entire beneficial interest, and that his wife was to hold the property in trust for him, is fraudulent as to both existing and subsequent creditors." See, also, *Kelley v. Bell*, 172 Ind. 590.

The record discloses that plaintiff and interveners did not discover, or have any means of knowing, that Bartley McHugh had caused a part of the proceeds from the sale of his farm to be loaned to Stabler, and notes taken in the name of William B. McHugh, until such claim was filed against the Stabler estate in 1929. These actions were begun very shortly thereafter. It is apparent, therefore, that the plea of the statute of limitations is not applicable; nor have plaintiff and interveners been guilty of any laches in the bringing of these actions.

The judgment of the district court appears to be free from error and is therefore

AFFIRMED.

HARVEY SYPHERD V. STATE OF NEBRASKA.

FILED JUNE 16, 1932. No. 28254.

Larceny. Record examined and *held* to sustain the judgment and sentence of the district court on a verdict of guilty in a prosecution for grand larceny.

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

Carrico & Carrico, for plaintiff in error.

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

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

EBERLY, J.

In the district court for Kearney county, Harvey Sypherd was convicted of stealing a quantity of wheat of the value of $42, the property of Catherine Stanton. From the action of the trial court overruling his motion for a new trial, and the sentence imposed, he prosecutes error.

The record has been read with care. It is quite apparent that no error was committed in the denial of defendant's motion for a discharge, based upon the transcript of the examining magistrate; nor is the court order permitting the indorsement of the names of additional witnesses on the information properly the subject of complaint; nor did the district court err in overruling the motion of the defendant for a continuance for 48 hours based wholly on the fact of the indorsement of the additional names and without further showing to sustain the same; so, too, it appears that the instruction given by the court on its own motion on the question of the defendant's flight was warranted by the evidence then before it, and was not prejudicial to the defendant. However, the assignment of error most stressed by the defendant relates to the sufficiency of the evidence to sustain the conviction.

It must be said that, in the light of the testimony before us, the felonious stealing of 75 bushels of wheat, "machine measure," of a value in excess of $35, the property of Catherine Stanton, by some person on the night of October 18-19, 1930, is indisputably established. The corpus delicti is fully proved. A lawful jury heard the evidence adduced, observed the witnesses testifying (which included the defendant), and, after having been properly instructed as to the law of the case, determined that the defendant was a participator in the commission of the offense. After a careful consideration of the evidence, we arrive at the conclusion that the testimony before this jury, though conflicting in part, and largely circumstantial, justified their verdict.

At least it may be said that, notwithstanding the denials of the defendant, the following facts and circumstances are clearly established: That on Saturday, October 18, 1930, about suppertime, the defendant rented a garage in Hastings, Nebraska; defendant admits that this was provided by him, in part, for the storage of wheat which he expected to receive from a source in the country then unknown to him, and while he admits that the expected wheat later appeared in his rented garage, he still insists that he now has no knowledge of this source, or means by which the same may be identified; that during the night of the 18th-19th of October, an automobile or truck was heard approaching this rented garage about 5 o'clock in the early morning; that Sunday forenoon a quantity of wheat in sacks, substantially identical in amount with the wheat stolen from the Stanton farm, was discovered in this garage; that early Sunday morning following, the owner of a truck in the city of Hastings discovered that it was missing from the accustomed place of keeping; that later in the same morning it was found standing near a church in the city of Hastings, with all gasoline out of the tank, and with a quart or more of wheat scattered over the bottom of its bed; that fresh tire tracks left on the Stanton farm at the granary where the stolen wheat had been loaded into a truck, evidently engaged in its removal, indicate that that conveyance was equipped with tires having a diamond on the rim; that the truck found near the church with wheat in its box was similarly equipped with tires having a diamond on their rims; that this defendant had sometime previously rented this identical truck from its proprietor, and used the same, and was thus familiar with its operation; and the fair inference is suggested, if not proved, that he thereby knew where it was kept by its owner; that Sunday morning following the theft, a note, admitted to be in the defendant's handwriting, was found by his brother in the latter's car, informing him of the whereabouts of the stored wheat, and directing the sale of the wheat in

the rented garage, which, the evidence already referred to indicates, had been delivered during the previous night; that a letter in defendant's handwriting, dated Sunday the 19th, was received by the proprietor of a store where the defendant had on the Saturday previous cashed a "no-fund" check, requesting this merchant to take possession of some "45 sacks of wheat" that defendant then had stored in his rented garage, and sell it, and from the proceeds of the sale deduct the amount of the check and the necessary expenses, and to send the balance of the proceeds to the defendant.

True, the defendant claims to have himself delivered 15 bushels of the wheat and placed the same in this garage, but there is no evidence in the record which in any manner corroborates defendant's statement that this wheat was there delivered by him on the 17th or 18th of October. He also claims that a certain person who was indebted to him in the sum of $52 was expected to secure some $52 worth of wheat from a farmer in the country, whose identity is not disclosed, for which 65 cents a bushel (more than the market price) was to be paid. But this would make the total amount of the wheat to be received at the rented garage 95 bushels. The evidence, contrary to defendant's contention, sustains the conclusion that this wheat did not exceed 75 bushels. It is also admitted that the defendant was not storing this grain with a view to a raise in price. It was at all times his intention to make an early disposition or sale of it. In view of these facts, it is quite obvious that the ordinary, the natural, and the direct method of handling the transactions would have been for the defendant to have delivered the 15 bushels, which he claimed to have stored in the garage, to the market direct when he received it, and in like manner to have had the remaining wheat, if such there was, delivered to market when it was received. By so doing, not only would the cost of the rental of the garage have been unnecessary, but the handling of the wheat twice in the course of de-

livery would have likewise been avoided. It would indeed seem that the course of business as followed, in the light of the surrounding circumstances, suggests an attempt at concealment. But we do not attempt to detail all of the evidence in the record. Some of it is expressly denied by the defendant on the witness-stand. His denial was made before the trial jury, and they were the proper judges of the facts, and had the better opportunity for determining the correctness of the statements of the several witnesses testifying before them. Taking the evidence as an entirety, and giving due weight to that favorable to the defendant, we are still inclined to the view: First, that the commission of the crime by some one was indisputably established; second, that the evidence in the record, fairly considered, may be said, if believed, to connect the defendant as a participator in the transaction by proof establishing the fact beyond a reasonable doubt.

In view of this situation, we are of the opinion that the district court did not err in overruling the motion for a new trial, or in the sentence imposed, and its action is therefore

AFFIRMED.

DARRELL COBURN, APPELLEE, V. FRED LOETSCHER, APPELLANT.

FILED JUNE 16, 1932. No. 28208.

Automobiles: NEGLIGENCE. If a reasonably prudent man, approaching a state highway from a private road, believes that he has time and opportunity to cross the highway, he cannot be held so negligent, under the facts herein, as to defeat his recovery because he attempts to cross.

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

Fred S. Berry and *C. A. Kingsbury*, for appellant.

McCarthy & McCarthy and *Harry E. Siman, contra.*

Heard before GOSS, C. J., ROSE, DEAN, DAY and PAINE, JJ., and HORTH, District Judge.

PAINE, J.

This suit was brought for damages which resulted from a collision between two automobiles. The jury returned a verdict for $3,150. Twenty-five assignments of error are set out in the motion for new trial.

Darrell Coburn, plaintiff and appellee, brought suit against Fred Loetscher, defendant and appellant, for personal damages plaintiff sustained in an automobile accident, which occurred January 4, 1930, on the graveled state highway No. 9, two miles south of Allen, Dixon county, Nebraska.

For several years prior thereto, the plaintiff was affected with multiple sclerosis, an incurable progressive disease of the spinal cord and nervous system, which had so progressed in the case of the plaintiff as to interfere with the use of his arms and legs. He had been treated by doctors at Sioux City, Iowa, and Rochester, Minnesota. The plaintiff claims that, in addition to specific injuries suffered from being struck, the natural progress of this incurable disease was accelerated by reason of the accident.

The plaintiff contends that he approached this state highway from the west on a private road, driving a new 1930 model Ford sedan; that, upon reaching the west side of the state highway, he stopped, looked along the state highway to the north and south, saw no cars on the highway, and drove upon the highway for the purpose of crossing to the east side thereof; that the defendant came from the south at a rapid rate, and failed to stop or slacken speed, and collided with the plaintiff's atuomobile. As a result thereof, plaintiff was thrown from his automobile, rendered unconscious, seriously cut on the head, and his back and spine were injured so that he remained for a week in the hospital in Sioux City, Iowa, and was then confined to his home for a period of five

or six weeks by his injuries, and that ever since said accident he has suffered great pain and anguish, been unable to sleep, and unable to give the attention he formerly gave to his business of running a Ford garage, and that his condition due to multiple sclerosis after the accident became worse, which continued down to the time of the trial. The defendant's car, a Standard Buick, with wheels locked by the brakes, stopped some 50 feet away. Both cars could run on their power after the accident.

The defendant charges that his view of the plaintiff was obscured as he came out of the private driveway, which he did without stopping, and that after plaintiff came upon the highway he negligently brought his car nearly to a stop near the center of the road, leaving insufficient room for the plaintiff to pass, and that the accident was caused solely as the direct result of plaintiff's negligence and want of ordinary care. Defendant further charges that, because of plaintiff's bodily ailments and infirmities due to the disease which he had suffered for a long time, the plaintiff was not able to operate an automobile with ordinary skill and care.

It is insisted by the defendant that, where it appears beyond reasonable dispute that plaintiff's negligence was more than slight as compared with that of the defendant, there can be no recovery, but we do not believe such contention is supported by the evidence. This court has held: "Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so." *McCulley v. Anderson,* 119 Neb. 105. And this is supported by *Pline v. Parsons,* 231 Mich. 466, in which it is held: "If the circumstances are such as to induce in the mind of a driver of an automobile approaching a state trunk line highway intersection, acting as a reason-

ably prudent man, the belief that he had time and opportunity to cross before a vehicle approaching on said trunk line would reach the intersection, he cannot be said to be negligent because he makes the attempt to cross." See, also, *Kemmish v. McCoid,* 193 Ia. 958.

Complaint is made of references to the fact that defendant was protected by indemnity insurance. In *Lewis v. Beckard,* 118 Neb. 533, a reversal was granted where counsel repeatedly enlarged upon this fact. However, in the case at bar, we do not believe the record justifies a reversal, and we adhere to the rule as stated in *Jennings v. Biurvall,* 122 Neb. 551.

When a person who is somewhat disabled by a progressive, incurable disease, which has made him less active, although he can still take care of the office end of his garage business and run a car as well as many other persons, and, while he is driving his car in a careful manner and within the rules of the road, he is struck by another car, a verdict of a jury, founded upon facts showing negligence upon the part of the driver of a car which hits him, will stand. There can be no question, from the evidence in this case, that the plaintiff suffered pain and anguish, and his former disabilities have been increased by this accident because the shock has made him more susceptible to the course of the disease by breaking down his power of resistance thereto. The jury had ample opportunity to see the plaintiff's condition while he was in the courtroom, and, after hearing the medical testimony, they returned a verdict for a portion of the amount sued for. We have examined all the assignments of error and the instructions to which complaint is made, and find no reversible error in the record, and the judgment is

AFFIRMED.

ARNOLD WINEBERG, APPELLEE, V. JAMES O. BAKER, APPELLANT.

FILED JUNE 16, 1932. No. 28154.

1. **Vendor and Purchaser**: FALSE REPRESENTATIONS: RESCISSION. Positive representations by the vendor as to the acreage of a tract of land offered for sale and the number of acres of cultivated land therein are statements of fact, and if false and there is a material deficiency in the quantity of the land and of the cultivated land, the vendee may rescind where he has relied and acted thereon in ignorance of the falsity thereof. In such cases it is immaterial whether the sale was by the acre or in gross.
2. ———: ———: ———. No fixed rule is established as to what deficiency in quantity of land sold may be regarded as material, but each case must be governed by its own particular circumstances. Where, as in this case, the vendor represented a tract contained 100 acres of cultivated land and 120 acres in all, and there was a deficiency of 8.59 acres in the cultivated land and in the entire tract, the cultivated land being the more valuable, *held*, there was a material deficiency in the acreage concerning which the representation was materially false.
3. ———: ———: ———: CAVEAT EMPTOR. Under the facts set out in the opinion, *held*, that the doctrine of *caveat emptor* does not apply, and that the vendee was entitled to rely on the positive statement of the vendor as to the quantity of cultivated land contained in the tract purchased.
4. ———: ———: ———. "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Perry v. Rogers*, 62 Neb. 898.
5. **Contracts**: RESCISSION: MOTIVE. If one has a legally sufficient ground to rescind a contract and acts upon it, the motive which impelled him to take that course is entirely immaterial.
6. **Specific Performance**. "Specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust." *Edmiston v. Hupp*, 98 Neb. 84.
7. ———: MISLEADING STATEMENTS. "A court of equity may refuse to decree specific performance of a contract for the sale of land at the instance of the vendor, where he has misled the

vendee as to the quantity to be conveyed, even though he acted innocently in so doing." *Bentley v. Space*, 100 Neb. 486.

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

Neighbors & Coulter, for appellant.

Morrow & Morrow, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

HASTINGS, District Judge.

The plaintiff, appellee, brought this action to recover from the defendant, appellant, the down payment on land purchased by him at an auction sale on the 23d day of November, 1927. The appellant answered and denied plaintiff's right to rescind and recover, and by cross-petition prayed for the specific performance of the contract entered into at the time of the sale. On the trial defendant's cross-petition was dismissed and judgment entered in favor of the plaintiff for the amount claimed. The defendant prosecutes an appeal therefrom.

The admissions in the pleadings and the evidence establish that prior to the 23d day of November, 1927, the appellant caused to be printed, published and circulated folders stating that on the 23d day of November, 1927, he would sell at public auction the following real estate, described therein as follows: "Lots 4 and 5 and the SW¼ of SE¼ of section 2, township 22, range 56, contains 120 acres and located 3 miles south and 1½ miles east of Mitchell. Unimproved except for a few small buildings for beet workers. 100 acres under cultivation, 20 acres river pasture. Here is a nice little farm located in the famous Mitchell Valley country." Nine other tracts owned by appellant were advertised in said folders for sale and sold at public auction on November 22 and 23. The terms of said sale, as stated in said folders, were 15 per cent. cash on the day of the sale, 25 per cent. on March 1, 1928, and the balance to be paid in five years with in-

terest at 6 per cent. to be secured by a mortgage upon the real estate. The appellee read the advertisement, including the description of the tract of land purchased by him as contained in said folders, on and prior to the date of the sale. Before bids were received for said tract of land, it was announced by the auctioneer that he would receive bids by the acre, and that while the purchaser would be paying for 120 acres there were accretions to the tract so that he would get nearer 140 acres. The appellee bid $130 an acre for 120 acres, amounting to the sum of $15,600, made a payment thereon in the sum of $2,340, as required under the terms of the sale.

Some time after the sale appellee became suspicious that the land did not contain 120 acres, and from an investigation of the records found that the tract of land did not purport to contain that number of acres. As soon thereafter as he could he caused the land to be surveyed, the survey showed 90.423 acres of cultivated land and 23.455 acres of pasture land, or a total of 113.878 acres. Promptly thereafter, and before the 1st day of March, 1928, the time he was to settle for said land, appellee had his attorneys write to the appellant, who was then in Phoenix, Arizona, rescinding the sale and making demand that appellant refund him the down payment. Appellee assigned as grounds for the rescission the shortage in the acreage in the tract and in the acreage of the cultivated land within the tract. Appellant refused to comply with the demand and stated he was demanding the performance of the contract on March 1, 1928. In April, 1931, the appellant had the land surveyed, said survey showing the acreage of the cultivated land to be 91.41 acres and the acreage of the entire tract to be 114.41 acres.

There is a conflict in the evidence as to what occurred at the time of the sale. It is claimed by the appellant that before receiving any bids an explanation was made as to the acreage in the tract and also that of the cultivated land. It appears from the evidence offered on be-

half of the appellant that before receiving bids it was explained by the auctioneer that, while the land had been advertised as containing 120 acres, the title would call for two or three acres less; that some person, unknown, asked as to the acreage of the cultivated land, and appellant was called upon by the auctioneer to give information in that regard and stated that the cultivated land had always been called 100 acres by him and his tenants but that he had never measured it. The appellant then asked the tenant on the land as to the amount of cultivated land and he stated that he had always called it 100 acres but had never measured it. The appellee and two others, who were present at the time where they would have heard such statements had they been made, testified same were not made.

The trial court found that the land was sold as 120 acres at $130 an acre; that the appellant represented that said tract of land contained 100 acres of cultivated land; that both parties believed and understood that said tract of land contained 100 acres of cultivated land at the time said tract was offered for sale, and that appellee submitted his bid of $130 an acre therefor upon that understanding, and that the value of the cultivated land in said tract was $140 an acre.

This being a case which we are required to try *de novo* and reach an independent conclusion without reference to the findings of the trial court, we have made a careful examination of the evidence upon the question as to whether the explanation was made, as claimed by appellant, at the time of the sale, in regard to the number of acres in the tract and the number of acres of cultivated land, and we are unable to reconcile the same. Under this situation, the witnesses having been examined orally, we will give consideration to the fact that the trial court observed the witnesses and their manner of testifying and accepted the version of facts testified to by the witnesses for the appellee rather than those for the appellant. Taking this into consideration, we have no hesitancy in

adopting the version of facts accepted by the trial court as indicated by its findings. The character of the representations therefore depends upon the statements made in the folders or circulars.

Appellant contends that the decree of the trial court is contrary to law and the evidence and that he is entitled to a decree of specific performance. The principal grounds urged in support thereof are: (1) That the statements contained in the folders were an estimate of the acreage in the tract and of the cultivated land therein and not a warranty as to quantity; (2) that the deficiency is so slight as not to be material; (3) that appellee had no right to rely on the statements contained in the folders.

There are other grounds urged in appellant's brief which, owing to the view we take of the case, do not require discussion, although all have been given consideration.

The statements contained in the folders were positive statements of the total number of acres in the tract and of the number of acres of cultivated land therein. They were designed to serve as an inducement to prospective purchasers to purchase the tract.

"Positive statements as to the acreage of a piece of land offered for sale are statements of fact, and, being false and acted on, are actionable, though the vendee might have ascertained their falsity." *Lovejoy v. Isbell,* 47 Atl. 682 (73 Conn. 368). In 39 Cyc. 1267 it is stated: "Fraud or misrepresentation as to the quantity of land contracted for relates to a material fact and avoids the contract, unless the statement is a mere expression of opinion, or the circumstances are such that the purchaser has no right to rely on the statement. In such cases it is immaterial whether the sale was by the unit of area, such as the acre, or was in gross."

And the same rule applies where the misrepresentation is made as to the extent or proportion of lands of different character and value included within the entire

tract. 27 R. C. L. 373, sec. 74; *Jeffreys v. Weekly*, 81 Or. 140; *Best v. Offield*, 59 Wash. 466.

The representations were false both as to the number of acres in the entire tract and also as to the number of acres of cultivated land. It is immaterial whether the representations were known by appellant to be false, if material, and in ignorance of the falsity thereof were relied upon by the appellee.

As to what deficiency in quantity of land may be regarded as material no fixed rule can be established, but each case must be governed by its particular circumstances. In the case of *Kuhlman v. Shaw*, 91 Neb. 469, an action to recover damages alleged to have been sustained because a tract of land was represented to contain 86 or 87 acres, when in fact it contained 80.29 acres, we held "that the misrepresentations made were material and proper to be considered by the jury in determining whether damages should be allowed, and in what amount."

The tract of land in question was advertised and sold as a farm for farming purposes and purchased as such. The quantity of cultivated land materially affected its value as a farm. There was a material difference in value between the cultivated land and the land in pasture. The land other than the land in cultivation was not suitable for anything other than pasturage. The value of the cultivated land was considered by appellee in making his bid at $140 an acre. The trial court accepted the survey made by the surveyor for appellant which made the cultivated land short 8.59 acres. The entire deficiency in the acreage occurred in the cultivated land which at $140 an acre would amount to $1,202.60. Taking these facts into consideration we think the shortage in acreage of the cultivated land was material.

It appears from the evidence that the appellee had lived within a few miles of the land for many years but had never had anything to do with farming it; that he had been across it a number of times while hunting; that he had the opportunity to inspect the land prior to the sale

but that he relied upon the representation as to the acreage and made no inspection thereof. Counsel for appellant contends on this state of facts that appellee had no right to rely on the representations and invokes the doctrine of *caveat emptor*. The rule of *caveat emptor* applies only to defects that are open and patent to the senses. In 39 Cyc. 1283 (c), cited by appellant, it is stated:

"A positive statement by the vendor as to the quantity of land contained in the realty contracted for generally prevents the application of the doctrine of *caveat emptor* and may be relied on by the purchaser, except, according to some of the decisions, in cases where he has an opportunity to inspect such realty and to draw his own conclusions concerning the quantity."

A small but material deficiency in the quantity of land as compared to the acreage in an entire tract is not such as may be detected from observation without a survey and the vendee has a right to rely upon representations by the vendor as to the quantity of land in the tract. It is only where the deficiency is so great that it may be detected by observation, without a survey, by a person exercising ordinary care that the rule of *caveat emptor* applies. In *Quarg v. Scher*, 136 Cal. 406, that court in passing upon a like contention said:

"It is next insisted that the defendant saw the land and inspected it before making the contract, and having every opportunity to learn of the quantity of the land, he had no right to take the word of plaintiffs on the question of quantity; in other words, that the rule of *caveat emptor* applies to the case. This contention is not well founded; the defendant had a right to rely on plaintiffs' representation as to the quantity of land. The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and when a vendor states to a vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter

be heard to say in a court of equity, the vendee had no right to believe him. *Pringle v. Samuel,* 1 Litt. (Ky.) 43."

To the same effect see *Caughron v. Stinespring,* 132 Tenn. 636; *Jeffreys v. Weekly, supra; Roberts v. French,* 153 Mass. 60; 1 Black, Rescission and Cancelation, 356, sec. 115.

While appellee had seen the land and was familiar with it, yet the shortage in acreage in the cultivated land was so small, although material, as compared with the size of the tract that he could be deceived as to the number of acres therein. The cultivated land was an irregular tract and the acreage therein could not be determined from a mere inspection and could only be ascertained with accuracy by a survey. An investigation would be required, as distinguished from a mere inspection, to determine whether there was a deficiency in the acreage of the cultivated land. We have held in numerous cases: "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Perry v. Rogers,* 62 Neb. 898. See *Brucker v. Kairn,* 89 Neb. 274; *Martin v. Hutton,* 90 Neb. 34; *Latta v. Button Land Co.,* 91 Neb. 689; *Abts Co. v. Cunningham,* 95 Neb. 836. The evidence is that appellee relied upon the representations and would not have purchased the land had he known of the shortage in acreage in the cultivated land. Under the circumstances disclosed by the record, appellee had a right to rely upon the representations as to the quantity of cultivated land within the tract. He was not required to make a survey to ascertain the truth or falsity of the representations.

In this connection it is suggested by counsel for the appellant that the real motive for rescission was the closing of the bank in which appellee had his money, and that the shortage in acreage, used as a ground upon which to rescind, was merely a pretext, and that on account thereof appellee was not entitled to rescind. The

rule is otherwise. "If one has a legally sufficient ground to rescind a contract and acts upon it, the motive which impelled him to take that course is entirely immaterial." 3 Black, Rescission and Cancelation, 1375, sec. 559. Under any view of the evidence we are satisfied that appellee was led to believe and did believe that there were 100 acres of cultivated land in the tract and that he would not have purchased it had he known otherwise.

We have frequently held that specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement will be unjust. *Hoctor-Johnston Co. v. Billings,* 65 Neb. 214; *Edmiston v. Hupp,* 98 Neb. 84; *Simmons v. Baker,* 109 Neb. 853.

We have also held: "Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression, unless it would be unjust and inequitable to refuse to enforce it. *Morgan v. Hardy,* 16 Neb. 427." *Stanton v. Driffkorn,* 83 Neb. 36.

In the case of *Bentley v. Space,* 100 Neb. 486, a case similar to the instant case, we held: "A court of equity may refuse to decree specific performance of a contract for the sale of land at the instance of the vendor, where he has misled the vendee as to the quantity to be conveyed, even though he acted innocently in so doing."

Making application of these rules to the record before us, we are convinced that the trial court was fully warranted in refusing specific performance of the contract and that appellee was entitled to judgment for the payment he had made.

It is urged by appellant that if we find appellee was entitled to rescind we allow an abatement in the purchase price sufficient to compensate appellee for the shortage in acreage and then order specific performance. To do as suggested by appellant would be to make a new contract for the parties in place of the contract the appellee had been misled into making and which he did

not intend to make. This we are not permitted to do. Under circumstances similar to this case we have so held. *Bentley v. Space, supra,* and authorities cited therein. The case of *O'Shea v. Morris,* 112 Neb. 102, relied on by appellant in support of his proposition, is not an authority therefor, nor does it conflict with the view herein expressed.

The decree of the trial court is grounded in equity and good conscience and is

AFFIRMED.

THOMAS W. MOFFITT, APPELLEE, V. GERTRUDE D. REED, APPELLANT AND CROSS-APPELLEE: VERNETTA MARIE HANSEN ET AL., APPELLEES, CROSS-APPELLANTS AND CROSS-APPELLEES: CORA A. BERGE ET AL., CROSS-APPELLANTS.

FILED JUNE 22, 1932. No. 28318.

1. Appeal: PARTIES. The rule that appellant's transcript of the proceedings and judgment of the district court is available to cross-appellants in the supreme court does not extend to persons who are not parties to the appeal, where such transcript fails to show any litigable right or interest of theirs in the appellate proceeding.
2. ———: CROSS-APPEAL. Parties desiring to take cross-appeals from the district court to the supreme court are required to file their transcript within the statutory period of three months from the time the judgment of which they complain was entered, where they are not parties to the appeal of another party and where appellant's transcript fails to show any litigable right or interest of theirs in the appellate proceeding.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Motion to strike cross-appeals sustained.*

Gertrude D. Reed, pro se.

Walter L. Anderson, for appellee Moffitt.

Glen H. Foe, for cross-appellants Berge *et al.*

Herman N. Mattley and *Walton B. Roberts*, for cross-appellants Hansen *et al.*

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

ROSE, J.

Gertrude D. Reed, defendant and appellant, presented a motion to strike from the record purported cross-appeals by Cora A. Berge, Wendell Berge, Eleanor Berge and Herman N. Mattley on the grounds that they are not parties to the appeal and that the supreme court is without jurisdiction to hear their complaints.

In the district court for Lancaster county Thomas W. Moffitt, plaintiff, brought the action at bar to foreclose a tax lien on a tract of land claimed by Reed. The Berges named, as heirs of George W. Berge, deceased, filed in the foreclosure suit a cross-petition to establish and enforce a lien on the Reed land in the sum of $100 for attorney fees. For the same purpose Mattley filed a cross-petition for an attorney's fee of $40. December 3, 1931, the trial court rendered a decree against Reed for the foreclosure of plaintiff's tax lien and at the same time dismissed the cross-petitions of the Berges and Mattley. For a new trial Reed filed motions which were overruled December 12, 1931. She appealed and filed her transcript in the supreme court February 29, 1932, within the time allowed by law. In præcipes filed March 11, 1932, the Berges and Mattley directed the clerk of the supreme court to enter cross-appeals from the judgment rendered December 12, 1931. Should the motion to strike these cross-appeals from the record be sustained?

When the præcipes were filed the Berges and Mattley were not appellants or appellees. Reed did not make them parties to her appeal. In the controversy between her and them the judgment of the district court was in her favor and she had no occasion to appeal from it. Before filing their præcipes the Berges and Mattley had not appeared in the supreme court as appellants, though their

causes of action in the district court had been dismissed by a final decree. There is nothing in Reed's transcript to show that a valid judgment could have been entered in favor of the Berges or Mattley in either court or that they have any valid claim for relief. The pleadings on which they relied for relief in the lower court were not brought to the appellate court by Reed. It has long been a rule of practice that appellant's transcript is available to an appellee who has been made a party to the appeal. *Shickle v. Kent,* 34 Neb. 568; *McDonald v. Buckstaff,* 56 Neb. 88. This rule, however, does not extend to the case at bar, where the parties claiming to be cross-appellants were cross-petitioners in the trial court, were defeated there, did not appeal, were not made parties in the appellate court, and where appellant's transcript fails to show any pleadings upon which either court could grant them relief. While the filing of a transcript confers on the supreme court jurisdiction of the parties to the appeal, this jurisdiction does not extend to persons who are not parties to the appeal and who are not shown by appellant's transcript to have a litigable right or interest in the appellate proceeding.

In the situation outlined the Berges and Mattley have asked permission to file an additional transcript containing copies of their cross-petitions in the district court. The remedy suggested is unavailing, because the supreme court did not acquire jurisdiction of their cross-appeals by the filing of Reed's transcript and because their offer to file an additional transcript was made after the statutory period of three months for doing so had expired. Their præcipes show they intended to take cross-appeals from the order overruling the motion for a new trial December 12, 1931, and they did not tender their additional transcript until April 18, 1932. Permission to file it is therefore denied and the motion to strike from the record their purported cross-appeals is sustained for want of jurisdiction.

JUDGMENT ACCORDINGLY.

STATE, EX REL. SOREN M. NELSON ET AL., RELATORS, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT.

FILED JUNE 22, 1932. No. 28335.

1. **Elections:** PRIMARY BALLOT. No person is entitled to have his name placed on the primary ballot unless he either affiliates with a political party which polled 5 per cent. of the entire vote at the last election of state, county, subdivision or district in which he seeks nomination, or affiliates with a newly-formed political party under the statute.
2. ———: STATUTES: CONSTITUTIONALITY. Statutes regulating nomination and election of candidates are reasonable and do not unnecessarily hamper or impede the right of electors to vote for whomsoever they wish. Such laws are constitutional where they leave elections free and open to all electors.

ORIGINAL proceeding in mandamus by the state, on the relation of Soren M. Nelson and others, against Frank Marsh, as secretary of state. Demurrer to petition. *Demurrer sustained, and cause dismissed.*

Roy M. Harrop, for relators.

C. A. Sorensen, Attorney General, for respondent.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and BEGLEY and BLACKLEDGE, District Judges.

DAY, J.

This is an application for a writ of mandamus, directing the secretary of state to place the names of the relators as candidates on the official ballot for the primary election. It was not filed in time to be heard prior to the primary election, and the relators have by leave of court amended their petition to ask that the names be placed upon the ballot at the general election to be held November 8, 1932. The secretary of state has demurred to the petition, which demurrer is now before us for determination.

The petitioners allege that they are qualified electors of the state and affiliate only with a political party known

as the Farmer-Labor party; that they have qualifications to hold the offices of governor, railway commissioner, or congressman for second district, to which they aspire; that they have filed petitions as required by statute containing the names of 25 qualified electors affiliating with said party, asking that relators' names be placed on the ballot.

We will first consider the right of relators to have their names placed on the primary ballot. This is important only for future guidance, since that primary election is now long past. Were the relators entitled to have their names placed on the ballot as candidates of the Farmer-Labor party? Section 32-1131, Comp. St. 1929, is:

"No person shall be entitled to or allowed to file a nomination certificate as provided for in this article, or to have his name placed upon a primary election ballot for any primary election to be held, unless the political party which he states in said affidavit he affiliates with, polled at the last election before the primary election to be held, at least five per cent. of the entire vote in the state, county or subdivision or district in which he seeks the nomination for office."

The statutes provide for the formation of a new party. Section 32-1135, Comp. St. 1929, provides: "In order to form a new political party there shall be present at a mass convention electors to the number of at least seven hundred fifty (750) in a state convention, one hundred fifty (150) in a congressional district or county convention," etc. Then the statute outlines the formal procedure. The method provided by this statute is mandatory. *State v. Marsh,* 117 Neb. 579.

These statutes are not violative of section 22, art. I of the state Constitution:

"All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

In *Baker v. Moorhead,* 103 Neb. 811, this court held that this section of the Constitution applies to elections

and not to the method of nomination. In *Morrissey v. Wait,* 92 Neb. 271, this court held that the legislature may regulate the nomination of candidates, provided that the regulations are reasonable and do not unnecessarily hamper or impede the right of electors to vote for whomsoever they please. To the same effect is *Orr v. Bailey,* 59 Neb. 128, in which this court stated that laws regulating the manner in which franchise right shall be exercised are constitutional so long as they leave election free and open to all electors.

The petition, neither alleging that the Farmer-Labor party was an established party in this state nor that it was a newly-formed party, failed to state a cause of action. In fact, in the oral argument upon the demurrer, the relators admitted that the Farmer-Labor party neither polled the requisite vote at the last election, nor complied with the law as to the formation of a new party. It was not claimed and the court will take judicial notice that the alleged Farmer-Labor party has never had its candidates on any primary or general election ballot in Nebraska, and is not known or recognized as an existing political party in this state.

Obviously, if relators were not entitled to file as candidates in the primary election, they are not entitled to have their names appear on the ballot as candidates of the Farmer-Labor party at the general election. Since there has not been a compliance with the statutes, the relators are not entitled to have their names placed on either the primary or the general election ballots as candidates of the so-called Farmer-Labor party.

This does not mean, however, that the people of the state are deprived of an opportunity to vote for Nelson for congress from the second district, Kramer for state railway commissioner, and Poundstone for governor. These men can cause their names to be placed upon the general election ballot as candidates by petition. Section 32-1108, Comp. St. 1929, sets out the method. Only 1,000 signatures are necessary. If they are unable to secure

such a petition the voters of the state have an unimpeded right to vote for them. Section 32-508, Comp. St. 1929, reads as follows:

"In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot."

The demurrer should be and is sustained and the cause dismissed.

DEMURRER SUSTAINED, AND CAUSE DISMISSED.

CLARENCE GREB ET AL., APPELLEES, V. LILLIE HANSEN ET AL., APPELLANTS.

FILED JUNE 22, 1932. No. 28427.

1. **Appeal**: BOND FOR COSTS. Provision of section 20-1914, Comp. St. 1929, that no appeal shall be allowed unless appellant shall within three months from the rendition of the final order file in the district court a bond is mandatory and jurisdictional.
2. ———: DISMISSAL. Where such bond is not filed as provided, the appeal may be, meaning must be, dismissed.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Motion to dismiss appeal sustained.*

Hoagland, Carr & Hoagland, for appellants.

Beeler, Crosby & Baskins, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and BEGLEY and BLACKLEDGE, District Judges.

DAY, J.

This case is before the court upon a motion to dismiss the appeal for that the appellant has not given a cost bond, as provided by section 20-1914, Comp. St. 1929, which is as follows:

"No appeal or error proceedings in any case taken from the district court to the supreme court shall be allowed, unless the appellant or appellants shall, within three months after the rendition of said judgment or decree or the making of such final order, file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the supreme court; or, in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose: Provided that if a supersedeas bond is executed no bond for costs shall be required. The giving of either form of bond or the making of such deposit shall be certified to by the clerk of the district court in the transcript for the supreme court. The appeal or error proceedings may be dismissed on motion and notice in the supreme court if no bond has been given and certified in the transcript."

The record in this case discloses that a supersedeas bond was not given. It shows that the decree was entered January 30, 1932, and on February 3, following, the motion for a new trial was overruled. The three months for filing the cost bond expired May 3, 1932, while, according to the supplemental transcript, it was filed May 31, 1932. Prior to the enactment of this statute in 1929, Laws 1929, ch. 72, there was no statutory provision for the filing of a bond for costs on appeal from the district court to the supreme court. A similar provision of the statute provides for an appeal from justice and county courts to the district court and requires the appellant to furnish a bond. Section 21-1302, Comp. St. 1929, provides: "The party appealing shall within ten days from rendition of judgment enter into an undertaking to the adverse party with at least one good and sufficient surety to be approved by such justice in a sum not less than $50 in any case nor less than double the amount of the judgment and costs." This section has been held both jurisdictional and mandatory. *Hier v. Anheuser-Busch Brew-*

ing Ass'n, 52 Neb. 144. This case was cited in *Crum v. Johnson,* 3 Neb. (Unof.) 826, in which it was said, without the bond the appellant could not perfect an appeal, for the statute providing for a bond in such cases is both jurisdictional and mandatory."

Another section which provides for the filing of a cost bond is section 20-1701, Comp. St. 1929, which is: "In all cases in which the plaintiff is a nonresident of the county in which the action is to be brought, before commencing such action the plaintiff must furnish a sufficient surety for costs." While the wording of this statute is in its terms as certainly mandatory as is the section under consideration, it is immediately followed in the same chapter by section 20-1702, which is as follows: "An action in which security for costs is required by the next preceding section, or in which a cash bond has been fixed, and has not been given, shall be dismissed on motion and notice by the defendant at any proper time before judgment, unless in a reasonable time to be allowed by the court, such security for costs be given or cash bond be furnished." This section was construed in *Hard v. Hard,* 51 Neb. 412. It was held in that case that, inasmuch as the party for whose benefit the bond was required had the costs taxed against him, there was no prejudice. This statute was construed also in the case of *King Bros. v. Jackson,* 25 Neb. 466, in which it was held that, even though the cost bond was not filed until after the time provided by the order of the court, made upon motion to dismiss for failure to give said bond, the court had not lost jurisdiction of the case. The construction of this statute by the court is obviously correct, since it is apparent from the statute itself that it was not the intention of the legislature to make the requirement of the giving of a cost bond by nonresident mandatory and jurisdictional. The cases construing this section of the statute because of the difference in the provisions thereof are not applicable to this case.

The last sentence of the statute under consideration, "the appeal * * * may be dismissed on motion and notice," must be considered as to its effect upon our interpretation of the statute. Does that indicate that it was the legislative intent that the court may or may not dismiss the appeal or that the court may allow the filing of a cost bond at any time during the proceedings? In sections 20-1701 and 20-1702, the legislative intent was unequivocally expressed, and in the cases cited the court followed it by permitting the filing of a bond thereafter. However, in the controversial statute, language could not be stronger than "no appeal shall be allowed." The legislative intent from those words alone is mandatory and not directory. Does the wording in the latter part, "no bond having been given the appeal may be dismissed," weaken the meaning? It would not seem so. Beal, Cardinal Rules of Legal Interpretation (2d ed.) p. 331, states the rule as: "In construing acts of Parliament, provisions which appear on face of them obligatory, cannot, without strong reasons given, be held only directory." *Baker v. Palmer* (1881) 8 Q. B. D. 9, 51 L. J. Q. B. 110. And the same work quotes from Lord Campbell, at page 434, as follows: "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed." *Liverpool Borough Bank v. Turner* (1860) 2 D. F. & J. 502, 30 L. J. 379. This court has followed this rule of statutory construction. *State v. School District*, 99 Neb. 338; *In re Arrigo*, 98 Neb. 134. It is the general rule in this country supported by the weight of authority.

In *State v. Amsberry*, 104 Neb. 279, we held that the word "may" in public statutes should be construed "must" whenever it becomes necessary to carry out the intent of the legislature.

In an early case, this court held: "When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory." *Hurford v. City of Omaha*, 4 Neb. 336, 351.

The meaning of the word "may" to determine whether a statute is directory or mandatory has occupied the attention of many courts. It has been the subject of much legal literature. We have merely cited a few cases which state the cardinal principles of statutory interpretation. With these fundamental principles in mind, we proceed to interpret this statute. It was the intention of the legislature expressed by the language of the act itself that no appeal shall be allowed except when as a prerequisite condition a cost bond should be filed. It was the intent of the legislature that only by the performance of certain acts could the appellate power of the supreme court be invoked. True, we have held that jurisdiction is conferred on the supreme court by the filing of a transcript. But that transcript must show on its face, among other things, that the appeal is from a final order, that it was filed in time, and now as provided by this statute that a cost bond was filed by appellant within three months. It was not the intention of the legislature to refer the matter of furnishing a cost bond within a certain time to the discretion of the appellant or to the court. Where a cost bond is not furnished, no appeal shall be allowed, and the court may (meaning must) dismiss the appeal.

Motion to dismiss appeal

SUSTAINED.

FRANK SUDYKA V. STATE OF NEBRASKA.

FILED JULY 1, 1932. No. 28091.

ERROR to the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

O'Sullivan & Southard, for plaintiff in error.

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

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

PER CURIAM.

Frank Sudyka, plaintiff in error, was convicted as a common gambler, under section 28-948, Comp. St. 1929, and sentenced to a month in jail and to be further committed until he paid a fine of one dollar and the costs. The defendant had demurred to the information and the demurrer had been overruled some weeks prior to the trial. He renewed this demurrer orally at the beginning of the trial. The pleading filed by him was styled by him as a "Demurrer" and several of its numbered paragraphs consisted of the usual allegations of a demurrer in a criminal action. Another paragraph demurred "because the information is duplicitous and charges a number of offenses in one count," setting out the specifications relied on. It did not ask that the information be quashed. The trial court considered the whole plea as a demurrer and overruled it. Section 29-1811, Comp. St. 1929, provides that a demurrer or plea in bar waives all defects which may be excepted to by a motion to quash or by a plea in abatement. Moreover, it is not clear that the information is duplicitous. It was drawn well within the language of section 28-948, defining a "common gambler." It charges Sudyka with being a common gambler because he kept, exhibited, assisted and permitted others to keep and exhibit gaming tables and an establishment and devices and apparatus to win and gain money and other prop-

erty of value. These facts alleged seem to be specifications charging the defendant with the single offense of being a common gambler. The rule is thus stated in 27 C. J. 1020:

"Duplicity. The general rule that an indictment or information must not in the same count charge accused with the commission of two or more distinct and substantive offenses, and that in case it does so it is bad for duplicity, is applicable to an indictment or information charging a gaming offense. However, if the facts charged constitute but a single offense, the indictment is not duplicitous. And in accord with the general rule, where several ways are set forth in the same statute by which the offense of gaming or playing with cards or other gambling devices may be committed, or by means of which the offense of keeping a gaming house or permitting gaming at a certain house may be committed, and all are embraced in the same general definition and made punishable in the same manner, a count which charges them conjunctively is not open to the objection of duplicity."

The judgment of the district court is

AFFIRMED.

EDWARD E. BULLINGTON V. STATE OF NEBRASKA.

FILED JULY 1, 1932. No. 28277.

1. **Indictment and Information: ELECTION.** Under three counts of an information, a defendant was charged with the forgery, possession, false uttering and publishing of a certain check. *Held*, that the court did not err in overruling a motion to require the state to elect upon which count it would rely, where all of the counts relate to but one transaction and not to separate and distinct offenses.
2. **Forgery: INFORMATION.** It is a sufficient compliance with the statute, where, although the name of the particular person defrauded was omitted therefrom, the information charges that the defendant "unlawfully and with intent to prejudice, damage and defraud, did make, forge and counterfeit a certain check."

3. ———: INTENT. "Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud." 26 C. J. 974.
4. ———: SUFFICIENCY OF EVIDENCE. In an action against a defendant for uttering a forged check, evidence examined, discussed in the opinion, and *held* that it supports the verdict.

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

I. C. Bachelor, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

DEAN, J.

Edward E. Bullington was informed against in the district court for Red Willow county and there charged under three counts of an information with the forgery, possession, and the false uttering and publishing of a certain check for $50, well knowing such check to be fraudulent and of no value. The jury found the defendant not guilty as to count one and guilty as to count three. Count two of the information was withdrawn. A motion for a new trial was denied and the defendant was thereupon sentenced under count three to serve a term of two years in the penitentiary. He prosecutes error.

It is argued that the court erred in refusing to sustain a motion of the defendant requiring the state's counsel to elect upon which count of the information he would rely in the premises; and this on the alleged ground that "only one crime was charged in the three counts." We do not find that the court erred in the above ruling. As above noted, under count one of the information it is charged that the defendant forged the check in question at a certain time and place, and, under count two, that he possessed the forged check with intent to utter it as genuine, and, under count three, that he uttered the forged check as genuine with intent to defraud. Clearly,

the counts all relate to but one transaction and not to separate and distinct offenses and the court therefore did not err in refusing to sustain the defendant's motion. *Furst v. State,* 31 Neb. 403; *Hill v. State,* 42 Neb. 503; *Cohoe v. State,* 82 Neb. 744.

Nor do we think the omission from the information of the name of the particular person defrauded was fatal to the prosecution of the case. Section 29-1506, Comp. St. 1929, contains this provision:

"It shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with intent to defraud."

And in the present case, although the name of the particular person defrauded was omitted therefrom, the information is sufficient, where it charges that the defendant "unlawfully and with intent to prejudice, damage and defraud, did make, forge and counterfeit a certain check."

The evidence discloses that on or about November 30, 1931, the defendant was introduced to a certain witness as "E. R. Harrison," that being the name that appears on the check in question here. This witness testified that he and the defendant talked for some time and that the defendant then requested him to cash two traveler's checks in the sum of $50 each. It appears that the defendant signed his name to the checks in the presence of this witness, but the light was dim and the difference in the signatures was not detected at the time. Later the checks were presented for payment at the First National Bank of McCook where the forgeries were discovered. Some of the officials testified that, upon an examination thereof, the checks did not appear to be genuine and that they knew of no bank located in Lincoln to whose order the checks purported to be drawn.

It appears from the defendant's evidence that he received the checks in a card game and he testified that he had never changed them in any manner. He testified that he gave the checks in exchange for 15 gallons of whiskey

and that he received no money in the transaction. The man who was given the checks by the defendant, however, denied that he ever sold any whiskey to the defendant, but testified that he gave the defendant $100 in bills in exchange for the checks. The defendant testified that he met the "E. R. Harrison" named in the checks but once and that he has not seen him since nor does he know Harrison's address or his whereabouts. Certain witnesses testified that they were told the defendant had given the "bogus" checks in exchange for whiskey, but it appears that none of the witnesses were present when the defendant signed his name to the checks.

The defendant contends that the court erred in refusing to submit a proffered instruction to the jury on the question as to whether the check involved here was void on its face. However, the question was one of law for the court and was properly passed upon.

Error is also assigned in the giving of an instruction wherein the jury were informed that, although the "invalidity (of the check) might have been apparent or readily detected," this fact did not constitute a ground for defense. In respect of this feature, it has been stated by a recognized authority that "to be the subject of forgery it is not necessary that an instrument be perfect or complete." 26 C. J. 911. And at page 974 there appears an elementary observation by the same author wherein it is said: "Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. Evidence that the advantage which the instrument if genuine would have given has been obtained, or that the injury which such an instrument could inflict has been accomplished, sufficiently shows an intent to defraud."

To the casual observer the check in question here would appear on its face to be regular in all respects. But the officials of the bank, where it was sought to cash the checks, were of course familiar with checks and signatures generally and were suspicious of their genuineness. And, as stated above, where the check in question was on

its face regular in form it may be the subject of forgery. The jury passed on the disputed questions and found against the defendant and, upon an examination of the evidence, we find that the verdict is amply supported thereby. The judgment is

AFFIRMED.

JOE L. VYBIRAL ET AL., APPELLEES, V. JOE J. MALY ET AL., APPELLANTS.

FILED JULY 1, 1932. No. 28209.

1. **Mortgages**: DURESS. Evidence examined, and *held* insufficient to establish the defense of duress.
2. **Bills and Notes**: CONSIDERATION. The consideration for a promissory note need not move to the maker; it is sufficient if it moves to a third party at maker's request.
3. ———: BONA FIDE PURCHASERS. It is immaterial whether plaintiffs are innocent holders for value before maturity of commercial paper, when no defense thereto has been established.

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

Julius J. Zitnik, for appellants.

H. A. Bryant, F. C. Radke and *W. A. Crossland, contra.*

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

GOOD, J.

This is an action to foreclose a mortgage upon real estate, given by defendants to secure two notes or bonds, each for $2,000, and each having attached thereto five interest coupons for $100 each. Defendants admitted the execution and delivery of the notes and mortgage, and, as a defense, alleged that the notes and mortgage were obtained by duress, without consideration, and that plaintiffs were not innocent holders. A trial resulted in a decree for plaintiffs, from which defendants have appealed.

The mortgagee and payee, named in the notes secured by the mortgage, is the Nebraska State Savings Bank. They are dated the 3d of October, 1928. A few months thereafter the mortgagee and payee sold the notes to the plaintiffs Vybiral, receiving therefor the full face value, with accrued interest. The notes, however, were not properly indorsed, the indorsement being by F. J. Kirchman, President.

The Vybirals kept their mortgage and bonds in a safe deposit box in the bank from which they purchased the notes. It appears that the bank's officers had means of access to this box. Later, the mortgage and notes were abstracted from plaintiffs' box, and, without their knowledge, were listed as a part of the assets of the bank. Subsequently, the bank became insolvent and a receiver was appointed. Plaintiffs discovered that their notes and mortgage had been taken and were held by the bank; brought an action against the receiver to recover possession, and obtained a decree of the court that they were the owners and holders of the notes and mortgage. They thereafter brought this action to foreclose.

The bank, when the first instalment of interest became due, paid the interest to the plaintiffs and detached and retained possession of one coupon from each of the principal notes. The receiver of the bank joins in seeking foreclosure of the mortgage as to these two coupons. Kirchman was president of the Nebraska State Savings Bank and was also an officer of a bank located at Touhy, Nebraska. One Carek was cashier of the latter bank, and it was found that he had misappropriated funds of that bank, and that the funds embezzled by him amounted to a considerable sum. The defendants are brother-in-law and sister of Carek. It appears that they were willing to assist Carek in raising funds to make good his shortage, and executed the notes and mortgage to raise money to assist him in replacing the funds which he had embezzled. On the day the notes and mortgage were executed, Kirchman by telephone called the defendants, who

lived ten or more miles distant, and requested them to come in and execute the notes and mortgage. It appears they were advised at this time that they were expected to sign the notes and mortgage. They voluntarily went to the bank at Wahoo for that purpose. It is a fair inference that the matter had been previously discussed and talked over between them and Carek. They went to the office of the Nebraska State Savings Bank, were there but a few minutes, and executed and signed the mortgage, the two principal bonds and the five coupons attached to each. In their testimony they say, in response to very leading questions, that threats were made that if the bonds were not signed Carek would be prosecuted and sent to the penitentiary for his embezzlement, and that if they signed he would be free. Defendants were accompanied on this occasion by another sister of Carek. The evidence given by each, as to just what occurred and was said by Kirchman, varies materially. There was introduced in evidence a written order and statement, bearing date October 8, 1928, five days subsequent to the date of the notes and mortgage, and which was signed by each of the defendants and witnessed. This statement directed the Nebraska State Savings Bank to pay to Carek the proceeds of the $4,000 mortgage, and defendants further stated therein: "We also hereby state that said $4,000 mortgage was executed by us freely and voluntarily and without request or solicitation from your bank, or from any officer of your bank, * * * and that we executed said mortgage solely and only for the purpose of assisting our said relative C. C. Carek, who is in financial straits and needs this assistance." There is no evidence that any threats were made to induce the signing of this instrument. Their written statement is totally at variance with the oral testimony of each of the defendants and of the sister of one of them, as to what occurred at the time the notes and mortgage were executed. The defense of duress seems to be an after-thought.

In view of the contradiction of all the testimony, tending to show any duress, set forth in the written statement signed by defendants and witnessed, and the variance in the oral testimony, we think the trial court, who saw the witnesses and their manner of testifying before him, was fully justified in finding that there was, in fact, no duress practiced to obtain the notes and mortgage, and, from an independent examination of the record, this court reaches the same conclusion.

Defendants assert that they received nothing for the signing of the notes and mortgage, and that they were without consideration. Consideration is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. The consideration need not move to the promisor; it is sufficient if it moves to a third party at the request of promisor. *Faulkner v. Gilbert,* 57 Neb. 544. The evidence discloses that the proceeds of the notes and mortgage were paid to the State Bank of Touhy, from which Carek embezzled. It is evident that the mortgagee parted with $4,000 of its money, the full consideration named in the notes. It is immaterial that the consideration did not go directly to the defendants. It was sufficient that the bank parted with its money at the instance and request of the defendants. The defense of want of consideration is wholly without merit.

In view of the fact that there is no defense shown that would defeat the notes and mortgage in the hands of the original payee, it is immaterial whether the plaintiffs occupy the position of innocent holders for value.

The record appears to be free from error. The judgment is therefore

AFFIRMED.