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REPORTS OF CASES

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Supreme Court of Nebraska

SEPTEMBER TERM, 1932, AND JANUARY TERM, 1933

VOLUME CXXIV

HENRY P. STODDART
OFFICIAL REPORTER

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1932

JOSEPH C. FLESCH, APPELLEE, V. PHILLIPS PETROLEUM COMPANY, APPELLANT.

FILED NOVEMBER 4, 1932. No. 28544.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: TOTAL DISABILITY. "A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." *Wingate v. Evans Model Laundry*, 123 Neb. 844.
2. **Evidence.** Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue.
3. **Master and Servant:** WORKMEN'S COMPENSATION ACT: CLAIM FOR DISABILITY: PROOF. Under the workmen's compensation law, a claim for disability *held* properly allowed on contradicted evidence that an accidental injury to employee's feet resulted in traumatic arthritis therein, the defense being that the employee's disability was due to infectious arthritis independently of the accident.
4. ———: ———: ———: NOTICE. Failure to give employer notice of a claim for compensation within the statutory period of six months is not necessarily a defense, if employee's accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where notice is given within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident.

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

Gaines, McGilton, McLaughlin & Gaines, for appellant.

Henry G. Meyer and *James C. Kinsler, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Joseph C. Flesch, plaintiff, was employee, and Phillips Petroleum Company, defendant, was employer.

Plaintiff was engaged in the duties of his employment March 10, 1931, in an automobile service station operated by his employer at Forty-eighth and Dodge streets, Omaha. While then and there at work below the rear end of an automobile which had been elevated to a height of 55 inches on a hoist, he attempted to loosen rear shackle bolts with an iron bar which suddenly slipped when he was suspended thereon by his hands and, leaning forward, he unexpectedly fell six inches or more and landed with the balls and toes of his feet on a concrete floor. Alleging he thus sustained compensable injuries to his feet, he presented his claim to the compensation commissioner, who disallowed it. Plaintiff appealed to the district court for Douglas county and proceeded on the theory that the accident resulted in permanent disability in the form of traumatic arthritis in his feet. The claim was resisted by defendant on the grounds that the arthritis was caused by infection independently of the accident and that the necessary six months' statutory notice of a claim for compensation had not been given. The district court found the issues in favor of plaintiff and rendered a judgment in his favor for $15 a week from July 1, 1931, to September 1, 1931; $12.50 a week from September 1, 1931, to March 1, 1932; $15 a week thereafter during disability; $145 for services of his physician. Defendant appealed.

On a trial *de novo* in the supreme court, defendant presented a formidable argument on the proposition the employer proved by a preponderance of the evidence that the disability for which the employee claimed compensation was caused by infectious arthritis as distinguished from traumatic arthritis and not by an accident. This was the principal issue on which the parties divided.

Some material facts are not in dispute. Plaintiff entered the employ of defendant in January, 1931, when he was 23 years of age. As a prerequisite to his employment he was subjected to a physical examination by a physician of defendant's selection. As a result plaintiff was certified to be in a good condition of health without mention of any physical defects. Prior to March 10, 1931, he was not handicapped by any infirmity in his feet, but whenever he walked thereafter he suffered pain and weakness therein and was thus hampered in his work. He had fallen from the iron bar on which he had been suspended and had landed on his feet in the manner stated in his claim for compensation. He complained of his injuries without delay and on the night following the accident he treated his feet for pains and soreness. Continuously thereafter he sought and received the services of physicians without substantial improvement of his condition and lost his position July 1, 1931, when injuries to his feet unfitted him for the services he had been performing at defendant's service station and for any other work requiring him to be constantly on his feet. After the accident he suffered from pain and weakness in the metatarsal arch of his right foot where arthritis in some form developed. The facts thus outlined are not open to serious controversy. Plaintiff walked with crutches at the time of the trial and was totally disabled within the meaning of the workmen's compensation law, if his disabling injuries resulted from the accident March 10, 1931; the rule of law applicable to his disability being as follows:

"A workman, who, solely because of his injury, is un-

able to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." *Wingate v. Evans Model Laundry*, 123 Neb. 844.

In the present proceeding the trial in the district court on the main issue was a contest between expert witnesses. One physician testified for plaintiff and four for defendant. All resorted to physical examinations of plaintiff or to hypothetical questions, to radiographs or X-ray pictures of his feet, to the history of the accident, to the nature of the arthritis and to expert knowledge as bases of expert opinions. There was no disagreement on the point that arthritis may be either traumatic or infectious, the former being caused by a wound and the latter by an infection.

Plaintiff's physician testified that, to find a source of infection that would account for arthritis, he made without success an exhaustive search extending to laboratorial tests. Giving reasons, he expressed, in effect, the opinion that there was a fracture of, or a traumatic injury to, the distal end of the fifth metatarsal bone of plaintiff's right foot as the result of the accident and that the wound caused the arthritis from which plaintiff suffers. The experts called by defendant expressed the opinion, in substance, that the fall did not cause a traumatic injury resulting in arthritis and that the disorder was caused by an infection. Tonsils were mentioned as a source of arthritis, but they were promptly removed by surgery and plaintiff thereafter grew worse instead of better. A definite source of infectious arthritis was not discovered. Moreover, defendant's experts admitted they did not exhaust the sources of knowledge on this subject or have the benefit of laboratorial tests, though a focus of infection, if pointed out, would have strengthened their diagnosis and weakened the testimony of plaintiff's expert. Cogent reasons that strengthen the opinion of an

expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue. The circumstances support the claim for compensation. The expert testimony on behalf of plaintiff rests on the better foundations. The reasons given for the opinion of plaintiff's expert are more cogent than the reasons given for the contrary view expressed by the four experts on the other side. The evidence preponderates in favor of plaintiff.

Was failure to give the statutory notice shown? From the beginning defendant had actual knowledge of the accident. In contemplation of law the employer did not prove the defense that plaintiff's claim for compensation was defeated by failure to give the employer notice of the claim within six months. The accident occurred March 10, 1931. Defendant received legal notice December 2, 1931, through the proceedings before the compensation commissioner. Plaintiff was not entitled to compensation for a total disability caused by traumatic arthritis before July 1, 1931, and statutory notice was given within six months thereafter. Until that date he continued to work at defendant's service station except during short intervals while he was temporarily excused to procure treatment and to rest his feet. In the meantime he drew his wages and sought relief from physicians selected by defendant or from other physicians to whom he went on his own initiative. The statute provides:

"No proceedings for compensation for an injury * * * shall be maintained, * * * unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." Comp. St. 1929, sec. 48-133.

Physicians employed by defendant and a physician consulted by plaintiff did not agree before July 1, 1931, or at any subsequent date, that plaintiff had a disability known as "traumatic arthritis" traceable to the accident March 10, 1931. It would be exacting too much of an ordinary laborer and layman to charge him with knowl-

edge of an obscure scientific fact about which experts disagree and require him to give at his peril a notice based on that hypothesis. Such was not the import or purpose of the legislative act. The accident and the compensable injury were not simultaneous. From March 10, 1931, until July 1, 1931, the accident did not deprive defendant of his wages. The injury was latent and progressive during that period and did not at first indicate a compensable injury. Liberally construing the workmen's compensation law to give effect to its provisions and purposes, it has often been held that failure to give the employer notice of a claim for compensation within the statutory period of six months is not necessarily a defense, if the accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where notice is given within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident. *Selders v. Cornhusker Oil Co.*, 111 Neb. 300; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *Johansen v. Union Stock Yards Co.*, 99 Neb. 328; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121; *City of Hastings v. Saunders*, 114 Neb. 475; *Astuto v. V. Ray Gould Co.*, 123 Neb. 138. Failure to give timely notice, therefore, was not established as a defense.

The trial court charged defendant with $145 for services of William J. Nolan, a physician selected by plaintiff. This ruling is criticized as erroneous. It is insisted that skilled physicians in the employ of defendant were ready, able and willing to give plaintiff all necessary attention and treatment and that the employment of Nolan was unnecessary and unauthorized. A careful consideration of the record leads to the conclusion that the circumstances justified the selection of Nolan and the allowance for his services. A sufficient reason for reversing the judgment below has not been given. Plaintiff is allowed $150 for the services of his counsel in the supreme court.

AFFIRMED.

ALBERT SHAFFER V. STATE OF NEBRASKA.

FILED NOVEMBER 4, 1932. No. 28301.

1. **Criminal Law:** ERRORS: REVIEW. Upon review of a criminal action to this court, the errors relied upon for reversal must be so designated in the brief and definitely and specifically set forth and discussed therein.
2. **Indictment and Information:** LARCENY. The language of an information is in substantial compliance with the statute, where it alleges that a defendant did "unlawfully, wilfully, and feloniously steal, take, lead, and carry away one black Holstein calf, weight from about 300 pounds to about 400 pounds, of the value of $20, the personal property of one J. Merrell Shephard, * * * the owner thereof, and against his will."
3. **Criminal Law:** HARMLESS ERRORS. Upon review of proceedings in a criminal prosecution, harmless errors are not sufficient grounds for the reversal of a conviction.
4. ———: EVIDENCE: PREVIOUS CONVICTION. Where defendant in a criminal prosecution denies his previous conviction of a felony, the record of such a conviction is admissible in evidence, though pending upon a proceeding in error not yet determined.
5. **Evidence** examined, discussed in the opinion, and *held*, that the verdict is sustained thereby.

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 *Clifford L. Rein, contra.*

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

DEAN, J.

An information was filed in the district court for Dodge county against Albert Shaffer, the defendant, wherein it is charged that on or about the evening of April 17 or the morning of April 18, 1931, Shaffer and one Jerry Mack unlawfully and feloniously stole a black Holstein calf, of the alleged value of $20, without the consent or knowledge of J. Merrell Shephard, the owner. A demurrer to the information was filed by the defendant

and overruled by the court. Subsequently, upon submission, the jury found the defendant guilty as charged. Thereupon the court sentenced the defendant to serve a term of three years in the penitentiary, the sentence to commence at the expiration of a former sentence imposed upon him for a like offense. The defendant prosecutes error.

Fourteen assignments of alleged error are set out in the defendant's brief, but it is not stated therein that such errors are relied upon for a reversal. Elsewhere it is stated: "Space allotted to a brief * * * will not afford the opportunity to present a statement in connection with each of the errors appearing in the record and of the law pertaining thereto, but the appellant relies upon each and every error appearing in the record and presents the entire record and the law in this appeal." It is a fundamental rule that, upon review, all errors relied upon for reversal should be designated in the brief and definitely and specifically set forth and discussed therein. We therefore pass only upon those assignments of alleged error upon which the defendant apparently places principal reliance for a reversal.

The sufficiency of the evidence to sustain the conviction is attacked by the defendant. A review of the record, however, discloses the following material facts:

The defendant was engaged in the buying and selling of live stock and produce prior to the time in question here. It appears that Jerry Mack, named in the information with the defendant, was employed at various times by him to assist in loading and unloading cattle and at other odd jobs. Mack confessed to his part in the theft of the black calf in question and implicated the defendant, who was thereupon arrested. According to Mack's statement before the jury, he and the defendant stole the calf from the pasture of J. Merrell Shephard on the night of April 17, and it was taken with seven other calves to Meadow Grove and there sold at a public sale. Mack testified that he did not see the defendant until after the

sale, when he was shown a sales slip which disclosed that the calf had brought $13.75, of which amount he received $2 at the time, and $3 at a later period.

The owner of the calf testified that it was missed from the pasture on the morning of April 18, and that some evidence was seen where the calf might have been led or dragged away from the pasture near the road. He and his hired man identified the calf at the farm home of the man to whom it was sold at the sale in Meadow Grove.

The defendant admitted that Jerry Mack had been in his employ at various times, but he denied that they were together when the calf is alleged to have been stolen. He testified, however, and the evidence of a live stock dealer and a trucker substantiate his averment, that he purchased a black calf on or about April 16 at a sale near College View, and that it was this calf, and not the one alleged to have been stolen from Shephard, that was sold at Meadow Grove several days thereafter. A witness who lived on the defendant's land testified that the defendant did bring a black calf to his acreage which he, the defendant, stated had been bought by him in Lincoln, but this witness also testified that this particular calf died several days later and that it was buried on the defendant's land. To substantiate this fact, the carcass of the calf was produced. The evidence, therefore, tends to disprove the defendant's contention that the black calf in question here had been bought by him several days before the sale at Meadow Grove. And evidence was offered tending to prove that the defendant stated to one witness that he was going out to get some calves on the night in question and that he asked another witness to go along if he wanted to "make some easy money."

The defendant contends that the information does not state an offense. But we conclude that the language of the information is in sufficient compliance with the statute, where it alleges that the defendant did "unlawfully, wilfully, and feloniously steal, take, lead, and carry away one black Holstein calf, weight from about 300 pounds

to about 400 pounds, of the value of $20, the personal property of one J. Merrell Shephard, * * * the owner thereof, and against his will."

It is also contended that temporary absence of the trial judge from the courtroom during parts of the arguments to the jury constitutes reversible error. The record does not affirmatively show prejudicial error in this respect. The showing as to what occurred at the time related to a complaint of confusion in the courtroom and to the failure of defendant to procure a ruling on objections to challenged misconduct of the prosecuting attorney in addressing the jury. The record does not show that the jury were disturbed by a confusion in the courtroom or that counsel was thus interrupted to the prejudice of the defendant. The matter to which the objections were directed was not shown to be of such a nature as to amount to reversible error.

Defendant argues further that there was an error in a ruling on evidence. In reply to a question as to whether defendant had previously been convicted of a felony, he answered: "I don't consider myself convicted." The inquiry was proper. Comp. St. 1929, sec. 20-1214. A former judgment of conviction for cattle stealing was admitted in evidence, though not then reviewed but subject to review in an error proceeding. *Shaffer v. State,* 123 Neb. 121. The record of the unreversed judgment of conviction was not destroyed as evidence by the error proceeding. The statute provides:

"A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1929, sec. 20-1214.

A judgment or conviction in a criminal prosecution is not vacated by an undetermined error proceeding. Its enforcement may be temporarily suspended by bail and suspension of sentence pending review, but it is nevertheless a judgment until set aside, and as such it is evidence of a conviction. Pending review it is effective for the

purpose of imprisonment of the convict, unless suspended by authorized bail or other operation of law. It is only after it is set aside that it is not a judgment and not competent evidence of a conviction. The statute does not make an exception to its competency pending review. The record of the conviction was properly received in evidence.

We have examined certain instructions requested by the defendant and refused by the court, but find no error in the court's ruling thereon. The instructions given by the court of its own volition fairly reflect the facts and the law applicable thereto. Other assignments have been presented, but we do not find reversible error therein. The verdict is sustained by the evidence and the judgment is

AFFIRMED.

BERTRAM W. WRIGHT, APPELLEE, V. RICHARD L. WILDS ET AL.: WILLIAM SMALE, EXECUTOR, APPELLANT.

FILED NOVEMBER 4, 1932. No. 28279.

1. Witnesses: COMPETENCY: TRANSACTIONS WITH DECEDENT. No person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, except under conditions provided by section 20-1202, Comp. St. 1929.
2. Mortgages: ASSIGNMENT. Evidence *held* to establish that purported assignment of mortgage was not signed by mortgagee.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Reversed, with directions.*

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

Neighbors & Coulter, contra.

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

GOOD, J.

This is an action for the foreclosure of a real estate mortgage. Plaintiff alleged that he was the sole owner of the mortgage and note thereby secured. Defendant and cross-petitioner William Smale, as executor of the will of Ida E. Smale, his deceased wife, claims an undivided one-half interest in the mortgage and note. The trial court found that Ida E. Smale in her lifetime had assigned her title and interest in the mortgage and note to the plaintiff, and that plaintiff was the sole owner of those instruments. Cross-petitioner Smale has appealed.

Ida E. Smale and Mary A. Wright were sisters whose homes were in Pennsylvania. Some time prior to 1919 the sisters inherited 240 acres of land in Morrill county, Nebraska. In November, 1919, they sold the land to the defendant, Richard L. Wilds, and as part payment received from Wilds and wife a note for $3,500, secured by a mortgage on the land. The note was made payable to Ida E. Smale and Mary A. Wright. The sisters each owned a half-interest in the note and mortgage. For several years the interest on the note was paid annually, each of the sisters receiving one-half thereof. In 1922 Mary A. Wright died. The plaintiff, Bertram W. Wright, is her son, and, by virtue of assignments from other heirs of Mary A. Wright, became the owner of her half interest in the note and mortgage.

Plaintiff claims that on February 9, 1923, for a consideration of $1,000, Ida E. Smale, by an assignment, transferred to him her undivided half interest in the mortgage and note. Over objection as to his competency, he testified that on the 9th of February, 1923, he went from his home in Scranton, Pennsylvania, to Honesdale, and there met Mrs. Smale on Main street and took her to his home in Scranton, where the instrument, purporting to be an assignment of Mrs. Smale's interest in the mortgage, was executed in the presence of two witnesses, one of whom was a sister of plaintiff. The purported assignment is in the record. It was not acknowledged

and bears date February 9, 1923, but was not recorded in Morrill county until November 20, 1930. Mrs. Smale died in October, 1924. The instrument, purporting to be an assignment, is on a blank form printed by a Lincoln, Nebraska, firm. Plaintiff testified that at his request his attorney sent to Nebraska for the blank form and filled it out, and that plaintiff took and presented it to Mrs. Smale, who signed it. The attorney in question was called as a witness. He testified that he had never been requested to obtain a blank form from Nebraska; that he did not fill out the same, and that he had never seen it. Plaintiff's sister, one of the witnesses to the instrument, now resides in Morrill county. She testified that she saw her aunt sign the instrument in question, but upon cross-examination admitted that she married and had lived in Nebraska for some months prior to the date of the instrument, and that she had not been back to Pennsylvania since her marriage. Her signature is by her maiden name. It is apparent that this witness could not have been in Scranton at the time of the alleged signing, and could not have seen her aunt sign the instrument in February, 1923.

Two witnesses who were close neighbors and friends of Mrs. Smale testified that they saw her almost daily; that she was nearly blind, in poor health, and that at the date of the alleged assignment she was not able to leave her home, and they were positive that Mrs. Smale did not leave her home and go to Scranton. Plaintiff testified that after he returned Mrs. Smale to Honesdale he paid her $500 in cash and left her on Main street in that village, some distance from her home. There is no evidence of his having withdrawn any such sum from the bank, or where or how he secured or came to have $500 in cash in his possession at that time. Mrs. Smale kept a bank account, and there is no record therein that any amount, approximating such sum, was deposited in her bank, or that she had any considerable sum of money in her possession at any time after the date of the alleged

execution of the instrument. Plaintiff further testified that he paid the remaining $500 consideration for the assignment at various times by sending to his aunt cash in unregistered letters, but he produced no receipts or letters acknowledging receipt of such sums. He testified that some of the payments were made by postal money orders, but, when questioned, he could not name any post office at which he had secured such money orders.

It is disclosed that plaintiff, after the death of his mother, collected the interest upon the mortgage; that one-half thereof was turned over to Mrs. Smale, and that as late as in 1924, several months after the date of the alleged assignment, an interest payment was collected and one-half thereof turned over to Mrs. Smale. There are a number of letters in the record, written by plaintiff and his attorneys, which bear dates subsequent to that of the alleged assignment, and in which they were negotiating for the purchase of Mrs. Smale's interest in the mortgage. Plaintiff also produced two Pennsylvania bankers as witnesses who testified that in their opinion the signature on the alleged assignment was that of Mrs. Smale. Their opinion was based upon other signatures produced by plaintiff which were presumably genuine signatures of Mrs. Smale. Neither of the witnesses had ever seen Mrs. Smale write her name, and one of them was not even acquainted with her. Mr. Smale testified that the signature on the instrument was not that of his wife.

We have carefully examined the signature on the instrument, purporting to be an assignment, and have compared it with the other signatures, presumed to be genuine, having been produced by plaintiff, together with certain other signatures of Mrs. Smale which are admittedly genuine. A comparison leads every member of this court to the opinion that the signature on the instrument is not the genuine signature of Mrs. Smale, and that it is a forgery.

The rule has been frequently announced by this court that in equity cases, triable *de novo*, we will give consid-

eration to the fact that the trial judge observed and saw the demeanor of the witnesses while testifying, and was better able to judge of their credibility and fairness than is this court from the record. This rule is not applicable in the instant case, as all of the evidence relating to the execution of the purported assignment, save that of the sister of plaintiff, was by deposition.

Section 20-1202, Comp. St. 1929, provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Clearly, this statute rendered the plaintiff incompetent to testify as to any conversation or transaction had between him and Mrs. Smale, since her personal representative was the adverse party.

Upon a consideration of the entire record, we are unanimously of the opinion that Mrs. Smale did not sign the instrument purporting to be an assignment of her interest in the mortgage, but that the same is a forgery. It follows that the findings and judgment of the district court are erroneous.

The judgment is reversed and the cause remanded to the district court, with directions to enter a decree of foreclosure, awarding to cross-petitioner William Smale, as executor of the will of Ida E. Smale, an undivided one-half interest in the mortgage and note secured thereby.

REVERSED.

WILLIAM FIEHN V. STATE OF NEBRASKA.

FILED NOVEMBER 4, 1932. No. 28319.

1. **Criminal Law:** INSTRUCTIONS: PRESUMPTION OF INNOCENCE. Where the defendant tenders no request for an instruction on the subject of the presumption of innocence, and the attention of the trial court has been in no other manner called to this point, and the subject of reasonable doubt is fully covered in the instructions given, the omission to instruct the jury concerning the presumption of innocence is, under the facts in this record, not reversible error.
2. ———: QUESTIONS FOR JURY. In a criminal prosecution, controverted issues of fact, where the evidence is in dispute, are for the jury to determine.
3. **Chattel Mortgages:** SELLING MORTGAGED CHATTELS. Section 69-109, Comp. St. 1929, subjects each and every person who violates the provisions thereof, and thereby depriving the mortgagee of his mortgage security, to the punishment therein provided.
4. ———: ———: DEFENSES. In a prosecution under said section, the accused may show as a defense (1) that the full value of the mortgaged chattel has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, or (2) that the mortgage debt has been paid.
5. ———: ———. The foregoing statute makes the inhibited acts constitute the crime.
6. ———: ———: TENDER. Evidence examined, and *held* to establish that the alleged tender made in behalf of the defendant, being wholly insufficient in amount, and made upon conditions prejudicial to the mortgagee at a time after the maturity of the mortgage indebtedness and subsequent to default, and not being kept good, is wholly without legal effect.
7. ———: ———: SENTENCE. Evidence examined, and *held* to sustain the verdict of the jury, and to justify the sentence imposed by the trial court.

ERROR to the district court for Stanton county: DE WITT C. CHASE, JUDGE. *Affirmed.*

O. S. Spillman and *Forrest Lear,* for plaintiff in error.

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

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

EBERLY, J.

This record presents a proceeding in error from the district court for Stanton county, prosecuted by William Fiehn, who will be hereinafter referred to as the defendant. An information was filed in that case charging him in proper terms with having, on October 25, 1930, after mortgaging certain described corn and during the existence of the lien created thereby, unlawfully sold a portion thereof to Louis Smithberger, without first procuring the consent in writing of the owner and holder of the debt secured by this mortgage, in violation of section 69-109, Comp. St. 1929. A trial to a jury resulted in a verdict of guilty, and a sentence of confinement for one year in the state penitentiary.

Substantially four grounds of reversal are relied on, viz.: (1) Failure of the district court to instruct the jury as to the presumption of innocence; (2) that the mortgagee, by authorizing the sale complained of, waived his lien; (3) that the sale of the mortgaged chattels by the mortgagor was made with the consent of the mortgagee, the former agreeing to apply the proceeds upon the mortgage debt, and thus the mortgagor became the agent of the mortgagee; (4) the tender of payment by mortgagor purged the transaction of criminality. Defendant further contends that the sentence is excessive.

As to the failure of the district court to instruct as to the presumption of innocence, the record fails to show any request for an instruction on that subject; and neither is such omission made one of the grounds of defendant's motion for a new trial. However, the district court, on its own motion, instructed the jury "that before the defendant can be found guilty of the crime charged in said information the state must have proved his guilt of the crime so charged beyond a reasonable doubt." The term "reasonable doubt" is also fully and properly defined. On this subject an eminent court said: "The doctrine of presumption of innocence and reasonable doubt are so closely related that it has been held that it

is not reversible error to omit to instruct on the law of presumption of innocence if the court has fully instructed on the subject of reasonable doubt." *State v. Douglas,* 258 Mo. 281.

In this jurisdiction we are committed to the rule that no conviction in a criminal case will be reversed for non-direction where no instructions were requested by the accused; and that this rule applies and controls where the omission to instruct relates to the presumption of innocence. This principle is subject, however, to the following qualification: "When his attention is called to that point, it is the duty of a trial judge, in a criminal case, to instruct the jury concerning the presumption of innocence to which the defendant is entitled, and he is not excused from so doing because an instruction presented by the defendant is improper in form. In such case he should modify the instruction by eliminating the objectionable portion thereof, or prepare and submit to the jury a proper instruction on his own motion." *Yeoman v. State,* 81 Neb. 244. As already suggested, no request for an instruction on this subject was tendered by defendant; neither was the attention of the presiding judge in any manner called to this point. As to the necessity of requesting instructions, see: *Gettinger v. State,* 13 Neb. 308; *Hill v. State,* 42 Neb. 503; *Housh v. State,* 43 Neb. 163; *Barr v. State,* 45 Neb. 458; *Edwards v. State,* 69 Neb. 386; *Georgis v. State,* 110 Neb. 352; *Mauer v. State,* 113 Neb. 418; *Osborne v. State,* 115 Neb. 65; *Grosh v. State,* 118 Neb. 517. It follows that the present record does not disclose that the trial court committed reversible error in failing to instruct as to the presumption of innocence.

As to the second and third contentions of the defendant, viz., that by authorizing the sale of the mortgaged corn the mortgagee waived his lien thereon; and by consenting to such sale in reliance on the promise of the mortgagor to apply the proceeds on the mortgage debt, the mortgagee thereby made the mortgagor his agent in

the transaction, it is to be observed that they are predicated upon the alleged fact that the mortgagee conferred the claimed authority in this case, or actually consented to the sale made. But whether authority to sell was conferred, or consent given, are disputed facts which the conflicting evidence presents to the jury for determination. On this subject the mortgagee testifies, with reference to the 1930 crop from which the sales were admittedly made: "Q. Have you ever personally talked to Mr. Fiehn regarding your rent notes or regarding that mortgage since the date of March 1, 1930? A. No. Q. Or had any correspondence with him? A. No. Q. Have you, in any manner, consented, or given him any consent, to sell any of the property under the mortgage that was given? A. No." The agent of this mortgagee, having exclusive charge of the collecting of the rent for this year, says in part: "Q. Now, following the giving of that mortgage, exhibit 4, did you, in any manner, authorize Mr. Fiehn to sell any of that mortgaged corn to Louis Smithberger? A. I did not. Q. Or to any person? A. I did not. Q. Did you give any written consent to Mr. Fiehn to sell any of this corn covered by the chattel mortgage, exhibit 4, to Louis Smithberger or to any other person? A. I did not."

True, the defendant's evidence conflicts with the statements just quoted, but the trial jury by their verdict determined this issue of fact against him.

But, even if the facts were as testified to by the defendant, we find ourselves unable to assent to his contentions. He relies on the doctrine announced by this court in *State v. Butcher*, 104 Neb. 380. The facts in the *Butcher* case were epitomized as follows: "It appears that defendant gave a mortgage to the Central City National Bank on a certain manure spreader, and that defendant sold the spreader at a public sale. The clerk of the sale was president of the mortgagee bank, and as clerk received the proceeds of the sale of the spreader. The record is not clear on whether the clerk gave express

oral consent to this sale, but there was either oral consent in so many words or acquiescence by remaining silent. Defendant bought a team of horses at the sale, and the clerk turned the proceeds of the spreader over to the party selling the horses, knowing at the time that the mortgaged spreader had been sold. The bank has since been unable to collect the full amount of the mortgage debt."

The contention presented to this court in that case involved in substance the issue of law here presented, as will be seen from the following excerpt from the brief on rehearing filed in the *Butcher* case: "Where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage at private sale, and with the proceeds pay the mortgage debt, and the sale is accordingly made, the mortgagee has thereby waived his lien. *Drexel v. Murphy,* 59 Neb. 210; *Littlejohn v. Pearson,* 23 Neb. 192." This contention as applied to a criminal prosecution under the statute was then, in view of the opinion announced, necessarily rejected by this court and it adhered to its former opinion in which it expressly declared:

"Section 534, Rev. St. 1913, subjects each and every person who violates the provisions thereof, and thereby depriving the mortgagee of his mortgage security to his injury, to the punishment therein provided.

"In a prosecution under said section, the accused may show as a defense that the full value of the mortgaged chattel has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, or that the mortgage debt has been paid.

"The foregoing statute makes the inhibited act constitute the crime."

In the instant case no part of the $583.20, which the defendant actually received for the sale of the mortgaged corn to Smithberger, or any sum equivalent thereto, was ever paid by him or in his behalf to the mortgagee; nor has the mortgage debt been paid. It follows that the

facts in the present case do not invoke the application of the rule announced in *State v. Butcher, supra,* but exclude the possibility of a defense logically based thereon. This is true for the reason that without any conflict in the evidence it appears that the accused has utterly failed to "show as a defense that the full value of the mortgaged chattel (sold by him) has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, or that the mortgage debt has been paid." *State v. Butcher,* 104 Neb. 380.

Neither do we find that the situation of the defendant has in any way been altered by the so-called tender made in his behalf. It appears from the evidence of defendant's witnesses that "after the defendant had been arrested" $600 had been raised, which was taken into the office of the mortgagee's agent in Stanton, Nebraska, and was offered in connection with a tendered chattel mortgage, to secure the remainder of the unpaid rent, then long past due. This agent asked time to communicate the offer in writing to the mortgagee, who was a resident of Hastings. The defendant's representative insisted on an immediate acceptance. When six days later the mortgagee authorized the acceptance of the offer as made, the defendant's representative returned the answer that the offer could not then be carried out. Thereafter nothing further was done, and nothing was in fact paid. The nature and conditions of this offer are disclosed by the following testimony of the witness who, in the defendant's behalf, transmitted the offer to the mortgagee's agent: "Q. Now, the $600 and the mortgages you offered that day on your car and the machinery were offered in complete payment and settlement of all the amounts due by your father on the rent notes for 1930, were they not? A. Yes; they were. Q. And on the condition that they be returned in complete settlement? A. Yes." At the time this transaction occurred, more than $1,100 was still unpaid on the 1930 rent, secured by a chattel mortgage on the crops raised that year; and defendant had then converted to his own

use and benefit mortgaged chattels the full value of which was in excess of the cash offered.

It will also be observed that the $600 offered was not tendered in payment of the "full value of the chattels sold Smithberger." The very conditions of the tender precluded such an application by the mortgagee. Complete settlement of the 1930 rent unpaid, then in excess of $1,100, was the sole basis of the offer. The acceptance of this offer involved the waiver of all rights the mortgagee might have then possessed against those who had purchased any part of the mortgaged corn with knowledge, actual or constructive, of the existence of the chattel mortgage thereon.

The rule is: "A tender to be sufficient in law must be in amount (in money) at least equal to the amount due; and an offer of a part of the amount due does not avail as a tender." 26 R. C. L. 639, sec. 20. So, too, "It is a general rule that a tender, to be effectual, must be unconditional, or, as sometimes expressed, it must be without conditions to which the creditor can have a valid objection, or which will be prejudicial to his rights." 26 R. C. L. 640, sec. 21. Thus, being wholly insufficient in amount, and made upon conditions prejudicial to the mortgagee at a time subsequent to default, and not being kept good, it obviously was wholly without legal effect. *Tompkins v. Batie*, 11 Neb. 147.

A careful reading of the record, including the evidence, convinces us that the accused has had a fair trial, and that the verdict of the jury finds ample support in the evidence. The trial court's instructions to the jury were certainly as favorable to the defendant, under the condition of the record, as could be justified by the law of the land. Indeed, the extent of this favorable scope is such as to suggest doubt as to their technical correctness as principles of law, in view of the explicit terms of the statute involved. However, the error, if an error, was in favor of the defendant and not against him. Certainly, in view of the admitted facts, as well as the issues of

fact determined adversely to the accused by the jury's verdict, the sentence imposed by the trial court is not deemed excessive.

The judgment and sentence are therefore,

AFFIRMED.

JACK DUFFEY V. STATE OF NEBRASKA.

FILED NOVEMBER 4, 1932. No. 28329.

1. Evidence examined and found sufficient to support verdict.
2. Criminal Law: VERDICT: PROOF. Evidence tending to prove an alibi does not destroy the sufficiency of the evidence of the state to support verdict, but only presents conflicting evidence on the question of fact.
3. ———: NEW TRIAL. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial.
4. ———: JURY. After the jury have retired to deliberate, the testimony of a witness or a part thereof may be read to them at their request in open court in the presence of the defendant and his attorney.
5. ———: TRIAL: ABSENCE OF ATTORNEY. Where defendant in a criminal case consents to his attorney leaving the trial before the end, attorney's absence of itself is not reversible error.
6. ———: INSTRUCTIONS. The instructions examined and construed as a whole properly submitted the questions of fact to the jury for their determination.

ERROR to the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Halligan, Beatty & Halligan and *Milton C. Murphy*, for plaintiff in error.

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

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

DAY, J.

The plaintiff in error was convicted in the district court for Perkins county, Nebraska, of the offense of committing an assault with intent to wound as denounced in section 28-410, Comp. St. 1929.

1. The state, in order to support the charge, offered the testimony of the complaining witness who testified concerning the details of the assault and identified the defendant as the assailant. The substance of this testimony is that he recognized his assailant as Jack Duffey. He was only slightly acquainted with him, but recognized him by his voice "the minute he spoke to me" and because he referred to the fact that he was "not allowed on my place." The complaining witness had said that the defendant could not come on his place. This is the only evidence identifying the defendant as the assailant. However, if believed by the jury, it is sufficient to sustain the conviction.

2. The defendant interposed the defense of alibi. It is argued that the evidence relating to this defense is so convincing as to render the evidence of the state insufficient to support the verdict. This contention is untenable. The evidence relative to alibi only presents conflicting evidence on the question of fact, to be determined by the jury.

The defendant's criticism of the instruction given by the court upon the question of alibi has been often discussed by this court and in *Westbrook v. State,* 123 Neb. 817, the Nebraska cases were collected and cited, approving this identical instruction.

3. The defendant insists that the trial court should have granted a new trial on the ground of newly discovered evidence. The newly discovered evidence which is relied upon was in the possession of the sheriff and neither the defendant nor the attorney had any knowledge at the time of the trial concerning this evidence. It is vital and relates directly to the only evidence of the state connecting the defendant with the crime. The statutes of

Nebraska provide (Comp. St. 1929, sec. 29-2101) that a new trial may be granted in a criminal case on the ground of newly discovered evidence. It may be granted on the ground of newly discovered evidence which is competent, material, and credible and which might have changed the result, and which the exercise of due diligence could not discover and produce at the trial. *Mauer v. State,* 113 Neb. 418; *Bailey v. State,* 36 Neb. 808; *Nelson v. State,* 121 Neb. 658. The trial court should have granted a new trial in this case to the end that the newly discovered evidence may be submitted to the jury together with the other evidence in the case.

4. While the jury were deliberating upon this case, they returned into court, and one of the jurors requested that the testimony of the complaining witness be read. At the request of this juror, the reporter read from his shorthand notes from the testimony of the complaining witness questions 1 to 40, inclusive, at which time the juror stated that is all he wanted. The defendant was present at the time, but his attorney was absent. It appears that the attorney for the defendant at the close of the trial said that he did not care to be called, and that he expected to leave Grant, the place of the trial, in a short time, and return to his home in Ogallala, which accounts for the reason that he was not notified when the jury requested this evidence to be read to them. The attorney was out of the county. It may be suggested that the attorney's responsibility had not ended in the trial of the case until the jury had returned. Defendant cannot permit his attorney to be excused without objection and then complain because he has not been notified. It should not be placed in the power of a defendant's attorney to arrest the progress of a trial by absenting himself therefrom. Sending for him should be recognized as a favor and a courtesy, rather than the duty of the trial court. In any event, since the jury were entitled to have the evidence read at their request, there was nothing prejudicial to the rights of the defendant in the absence of his at-

torney. The defendant now relies on the case of *Bartell v. State,* 40 Neb. 232, which reversed a judgment of conviction for the reason that the attorney for the defendant was not present and had no notice that the court directed the court reporter to read the evidence from his notes as requested by the jury. That case is distinguished from *Jameson v. State,* 25 Neb. 185, for that in the *Jameson* case the attorney for the defendant was notified and present in court. The case at bar is distinguished from the *Bartell* case, *supra,* for that the attorney for the defendant waived notice expressly and by leaving the county and making it impossible to notify him.

After the jury had retired to deliberate, the testimony of a witness for the state may properly be read to them at their request in open court in the presence of defendant and his attorney. *State v. Hunt,* 112 Ia. 509. See, also, *People v. Kasem,* 230 Mich. 278; *Hair v. State,* 16 Neb. 601; *Jameson v. State,* 25 Neb. 185; *Darner v. Daggett,* 35 Neb. 695. In *Willard v. State,* 195 Wis. 170, it was said: "The trial court is vested with a large discretion as to just how much of the evidence should be read."

Furthermore, reading of the evidence which was read to the jury in this case was not prejudicial to the rights of the defendant. It is not questioned but that the evidence was correctly read by the reporter as given in court by the witness. The jury were evidently in dispute as to the evidence of the complaining witness. It seems that the jury in carefully considering the evidence might well have reference to the record for the purpose of ascertaining the exact nature of the evidence.

5. Complaint is made to certain instruction for that it assumed a fact in dispute which must be found by the jury, which was an invasion of the province of the jury by the court. Portions of the instruction are quoted in the brief, which quotations would seem to support the contention of the defendant. However, a careful reading of the instructions in the record indicates that the two instructions complained of, the one with reference to the

question of malice, and the other with reference to the question of intent, taken as a whole, are not prejudicial to the defendant. All of the instruction cannot be stated in one clause or one sentence and each instruction in its entirety submits to the jury for their determination the question as to whether or not the defendant committed the assault. Furthermore, the instructions, taken as a whole, submitted the question to the jury for their determination by proper instructions, and the jury could not have been misled as to the issues in the case.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED.

ROBERT HUNTER V. STATE OF NEBRASKA.

FILED NOVEMBER 4, 1932. No. 28351.

Indictment and Information: INTOXICATING LIQUORS. The complaint charging one with transportation of liquor for the purpose of sale includes and charges the offense of transporting liquor with the minuteness necessary to sustain a conviction of the lesser crime.

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

Waring & Waring, for plaintiff in error.

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

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

DAY, J.

The plaintiff in error was convicted of a violation of the liquor laws. He was charged and convicted upon two counts; the first charging him with unlawful possession of intoxicating liquor, and the second charging him with the unlawful transportation with the intent to sell or dispose of the same.

The only error relied upon for reversal and argued in

the brief is that the evidence is insufficient to sustain the verdict on the second count of the complaint.

We have examined the entire record, and the evidence of the defendant himself, which establishes the fact that he was stopped by the sheriff, whereupon he got out of his car and stood beside it; that he had two bottles upon his person, and that, while the officers were searching his car, he threw the bottles upon the pavement, breaking them; that he had purchased the liquor in Omaha and had carried it with him until the time of his arrest in York. The testimony of the defendant at least is sufficient to sustain a verdict for transporting liquor. The complaint is sufficient to charge the defendant with this offense. Where the complaint charges one with transporting liquor for the purpose of sale, it includes and charges the offense of transporting liquor with the minuteness necessary to sustain a conviction of the lesser crime. *In re Application of Flanders,* 119 Neb. 761.

Having determined that the evidence in this case is sufficient to sustain the verdict and the judgment in the trial court, and no other question being presented, said judgment is

AFFIRMED.

JOHN F. PENSICK, APPELLANT, V. FRED BOEHM ET AL., APPELLEES.

FILED NOVEMBER 4, 1932. No. 28534.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: BURDEN OF PROOF.** The burden of proof is upon the claimant, under the workmen's compensation law, to prove the employment and the accidental injury arising out of and in the course of the employment.
2. ———: ———: **COMPENSABLE INJURY.** The accident causing the injury for which compensation is sought must be one arising out of and in the course of employment to warrant a recovery.

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

Wagner & Wagner, for appellant.

Otto F. Walter, contra.

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

DAY, J.

This is a proceeding under the workmen's compensation law in which the employee appeals from an order of the district court, dismissing his petition for compensation.

The burden of proof is upon the claimant, under the workmen's compensation law, to prove the employment and accidental injury arising out of and in the course of the employment. *Rosandich v. Chicago, N. S. & M. R.,* 185 Wis. 184; *Hills v. Blair,* 182 Mich. 20; 2 Schneider, Workmen's Compensation Law (2d ed.) 1863.

The accident causing the injury for which compensation is sought must be one arising out of and in the course of employment to warrant a recovery. *Gale v. Krug Park Amusement Co.,* 114 Neb. 432. Numerous opinions of this court have discussed and determined whether an accident arose out of and in the course of the employment. Recovery has been permitted only where the accident was found to have occurred within the scope of the employment. Obviously, it is necessary that the claimant be an employee of the defendant at the time of the accident. After a careful study of the record herein, we find that a preponderance of the evidence does not establish that the claimant was in the employ of the defendants at the time of the alleged accident. The alleged accident was claimed to have occurred on March 11, 1931, while the contract of employment was terminated March 8, 1931.

Furthermore, the evidence leaves us in doubt as to whether the disability was the result of an accidental injury. No useful purpose is ever served by quoting the evidence at length when the decision of the case rests solely upon a question of fact. Suffice it to state that we find that the plaintiff is not entitled to compensation.

This finding is in accord with the judgment of the trial court, and the judgment of the trial court is accordingly
AFFIRMED.

SWIFT LUMBER & FUEL COMPANY, APPELLEE, V. ADOLPH HOCK, APPELLANT.

FILED NOVEMBER 10, 1932. NO. 28300.

Contracts: ACTION. One may not maintain an action on a contract to which he is not a party, unless it is shown that the contract was made for his benefit, or for the benefit of a class in which he is included.

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

M. M. Schmidt, for appellant.

Burkett, Wilson, Brown, Wilson & Van Kirk, contra.

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

GOOD, J.

Plaintiff sued to recover balance due on an account for fuel oil and other items furnished defendant. Defendant confessed the amount, and in a cross-petition set up a counterclaim, in which he sought recovery on contracts between plaintiff and one Buckstaff, which he alleges were made for defendant's benefit. After defendant had introduced his evidence and rested, on motion of plaintiff the court directed a verdict against defendant on his counterclaim and for plaintiff for the amount confessed by defendant. Defendant has appealed.

The record discloses that Buckstaff was the owner of two apartment buildings in the city of Lincoln which were heated by coal-burning furnaces. June 25, 1929, he entered into contracts with plaintiff, whereby the latter agreed to install two oil burners in each apartment house, one for the heating of water for domestic use in each of

the buildings, the other for heating building. The contracts between plaintiff and Buckstaff were in the form of written communications which were accepted by Buckstaff. We quote the pertinent part of the communications:

"With an Electrol properly installed in your furnace and burning fuel oil, you can heat your home or place of business, cleanly, quietly, safely, absolutely automatically, as cheaply as you can with coal and for 30 per cent. less than it will cost you for oil in any pot type oil burner. The Electrol is absolutely guaranteed. We are inclosing a copy of our guarantee."

The guaranty inclosed is in the following language:

"We guarantee the Electrol Fuel Oil Burner to heat your home or place of business cleanly, quietly, safely and as cheaply as you can with coal.

"To please you in economy, in performance and in every way.

"If it does not do so and you advise us at the end of the first heating season, we will remove it, install your old heating plant as we found it and refund all money paid us in full.

"(Signed) Swift Lumber & Fuel Co."

The oil burners were installed, and some two months after these contracts were made, Buckstaff leased the two apartment houses to the defendant. Defendant, being desirous of knowing the cost of heating, made inquiries of Mr. Buckstaff and the coal dealers from whom fuel had been purchased for the two preceding years, and ascertained that the cost of coal ran from $508 to $540 a season for each building. Defendant claims that the contracts between plaintiff and Buckstaff, together with the guaranties, were submitted to and considered by him in entering into the leases with Buckstaff for the two buildings. He also contends that a salesman for the plaintiff was present when he was negotiating with Buckstaff for the leases of the properties, and that he, in effect, repeated the terms of the contracts and guaranteed and

assured defendant that plaintiff would carry out its contracts and make good its guaranty. For the heating season of 1929 and 1930 defendant purchased fuel oil from plaintiff. Defendant alleged, and offered testimony to prove, that the cost of oil for the heating seasons from 1929 to 1931 was largely in excess of the cost of the coal for the two previous years. He claimed that, pursuant to the contracts between plaintiff and Buckstaff, defendant was entitled to recover upon these contracts the difference between the cost of the coal and the cost of the fuel oil.

It may be observed that there is no evidence in the record with reference to the cost of coal for the years 1929 to 1931; nor is there any evidence as to what the janitor's services would cost for stoking the furnaces and removing the ashes; so that, in any event, there is no basis for comparing the cost of heating by oil with the cost of heating by coal. The cost of coal for the two years ending in June, 1929, would not be a proper basis for determining its cost for the two succeeding years. Moreover, it is a matter of which every one is cognizant that some winters are mild and comparatively warm, as compared with other seasons, and that the mild seasons require less fuel than the colder ones. What was the character of the several heating seasons as to mildness is not disclosed.

This and other courts have frequently held that, where one makes a contract or promise to another for the benefit of a third person, such third person may maintain an action upon the promise, although the consideration does not move directly from him. In order that a third person may maintain an action upon a contract to which he is not a party, it must be shown that it was made for his protection and benefit, or for the protection and benefit of a class to which he belongs.

In 13 C. J. 709, it is said: "By the weight of authority the action cannot be maintained merely because the third person will be incidentally benefited by performance of

the contract; he must be a party to the consideration, or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance."

In the instant case the contracts were made between plaintiff and Buckstaff when the latter was operating his apartment buildings. There was no suggestion in the contracts that Buckstaff intended to lease the buildings; nor is there any suggestion in the contracts that the provisions thereof were made for the benefit of any one other than Buckstaff. Unless it is proved that the contracts between plaintiff and Buckstaff were made for the benefit of third persons, a third person cannot bring an action thereon. There is a total failure of proof in this respect.

Defendant further alleged and testified that a salesman for plaintiff was present when defendant was negotiating with Buckstaff for the leasing of the buildings, and made substantially the same representations. There is not shown any contractual relation between plaintiff and defendant in this respect, and no consideration was paid by defendant to plaintiff; nor is it disclosed that the salesman had any authority whatsoever to make any such representations that would be binding upon the plaintiff.

In no view of the case as presented was defendant entitled to recover on his counterclaim. The court properly directed a verdict for plaintiff and against defendant on his counterclaim.

JUDGMENT AFFIRMED.

ROBERT YOST, APPELLEE, V. NELS S. NELSON, APPELLANT: IOWA-NEBRASKA LIGHT & POWER COMPANY, APPELLEE.

FILED NOVEMBER 10, 1932. No. 28275.

1. **Trial.** In a law action, controverted issues of fact, where the evidence is in dispute, are for the jury to determine.
2. **Damages.** In a personal injury action, plaintiff may recover for medical and hospital expenses, necessitated by the injury, if he has paid or incurred liability for such expenses.

3. ———: PLEADING and PROOF. In a personal injury action, an allegation in the petition that plaintiff has suffered injuries consisting of "bruises, lacerations and contusions to his * * * head; a deep cut and severe bruise to his right eye, * * * that plaintiff's nose was severely fractured," etc., is sufficient to permit evidence to be received that, as a result of such injuries, plaintiff's brain was affected.
4. Negligence: JOINT ENTERPRISE. Two persons riding in an automobile are not engaged in a joint enterprise, where one is the owner and operator of the car and the other a mere guest, and when the guest is not contributing to the expense of operating the car, has a different destination from the owner, a different purpose in going, and has no right to control the action of the owner and operator.
5. Appeal. A judgment will not be reversed because of harmless error.
6. Damages. "Diminution of earning capacity is not, of necessity, measured by its diminution in the particular calling in which plaintiff was engaged at the time of the injury, or by the amount of wages which he was then receiving; hence, plaintiff may show that he was capable of earning more than he was earning at the time of the injury, and the jury may consider what plaintiff might have been able to earn but for the injury in any employment for which he was fitted." 17 C. J. 903.
7. Appeal: VERDICT. Under the evidence outlined in the opinion, *held* that the verdict was not excessive.

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

Good, Good & Kirkpatrick and *Herman N. Mattley,* for appellant.

Flansburg & Lee and *John O. Sheldahl, contra.*

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

EBERLY, J.

This is a personal injury action in which plaintiff recovered judgment, and defendant has appealed.

Plaintiff was injured in an automobile collision which he charges was caused by negligence of defendant. On June 14, 1930, plaintiff was riding in a Chevrolet coupé,

owned and operated by one Gray. They were traveling east on the S. Y. A. highway a few miles east of Seward. Defendant Nelson, accompanied by his wife and two guests, was traveling west on the same highway. The two cars collided. The point of contact between the two cars was the right front end of each, to the width of about 18 inches. After the collision defendant's car remained almost in the same position in the highway as at the time of impact. It was headed slightly to the south of west. Gray's car was thrown a considerable distance, and came to rest on the north side of the highway and off the traveled portion, facing nearly south.

In his petition plaintiff charges that defendant was traveling at a high rate of speed and on the south or left-hand side of the highway, and that, when it was apparent that Gray's car could not pass defendant's car on the south or right-hand side of the highway, an instant before the collision Gray sharply turned to the left to avoid a collision. On the other hand, defendant contends that Gray was traveling on the north or his left-hand side of the highway and that, when they were approaching very close together, defendant turned to the left, trying to avoid a collision. Defendant contends that after the collision his car was near the center of the highway; that the left front wheel was a little to the south of the center of the highway; the right front wheel to the north of the center, and that both of the rear wheels of his car were to the north of the center. The evidence on behalf of plaintiff tends to show that defendant's car came to rest, or stopped, near the south side of the highway, and too close to permit a car, going in the opposite direction, to pass with safety on the south side thereof. The evidence on behalf of plaintiff tends to support his contention, while that on behalf of defendant tends to support defendant's contention. There is a hopeless and irreconcilable conflict in the evidence.

In law actions it is the function of the jury to determine issues of fact as to which the evidence is in conflict.

Defendant's contention that the evidence is insufficient to justify a finding that defendant was negligent in the premises is not well founded.

Defendant argues that the trial court erred in permitting the jury to consider, as an element of damages, medical and hospital expenses incurred by plaintiff in treatment and care of his injuries, sustained in the automobile collision, on the ground that plaintiff has not paid nor become legally liable for such expenses. The evidence shows that the hospital and medical bills were paid by plaintiff's employer, as an advance of funds to plaintiff, and that he was to recompense his employer for the funds so advanced. Plaintiff, in a personal injury action, may recover for medical and hospital expenses, necessitated by the injury, if he has paid such expenses or incurred liability therefor. The question of recovery for medical and hospital expenses was properly submitted to the jury.

It is argued that it was error to admit evidence of an injury to plaintiff's brain, on the ground that the particular injury was not pleaded and was not the natural and necessary result of injuries alleged in the petition. In his petition plaintiff alleged that he had sustained severe and serious injuries to his person, "consisting, among other things, of bruises, lacerations and contusions to his * * * head; a deep cut and severe bruise to his right eye, * * * that plaintiff's nose was severely fractured," etc.

We are of the opinion that the allegations of the petition were sufficient to permit proof that the brain was affected as a result of the bruises and contusions on his head, and that the facts do not bring the case within the rules of law contended for by defendant.

It is contended by defendant that at the time of the accident plaintiff and Gray were engaged in a joint enterprise, and that any negligence on the part of Gray should be imputed to plaintiff.

The evidence discloses that plaintiff and Gray were employed by the same corporation; that Gray owned and operated the car in which plaintiff was riding. The ac-

cident occurred late Saturday afternoon. Plaintiff and Gray had both completed their work for their employer for that week, and were not returning to their headquarters or regular places of abode. Gray's family lived in Iowa, and he was going there to spend Sunday. Plaintiff had been invited to have dinner on Sunday with friends in Lincoln, and Gray consented to carry him as far as Lincoln. There was no joint occupation at the time, no joint purpose in the trip, and no joinder of the two in the expenses thereof. Plaintiff had no authority over the actions of Gray, and there was no joint control of the car.

In *Judge v. Wallen,* 98 Neb. 154, this court held: "While two traveling salesmen are engaged in the joint enterprise of transporting themselves by automobile over the territory canvassed by both for different merchants, one of the salesmen owning and operating the automobile and the other paying sums about equal to the cost of gasoline and oil consumed, the latter, if possessing joint control over the automobile, may be liable for the negligence of the other in operating it." In the opinion is quoted with approval the following from the case of *Koplitz v. City of St. Paul,* 86 Minn. 373: "Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the conduct or the means or agencies employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others." The facts disclosed by the record in the instant case clearly show that plaintiff and Gray were not engaged in a joint enterprise.

It is strenuously contended that the court erred in submitting to the jury an alleged act of negligence regarding which there was no evidence. Among the alleged acts of

negligence was that defendant was operating his car without proper brakes. No evidence upon this point was introduced. Defendant testified that he did not apply his brakes. The trial court, in outlining the issues presented by the pleadings, stated this as one of the allegations made by plaintiff in his petition, and further on it gave specific instructions with regard to acts of negligence which were supported by evidence, but not with reference to this act. The trial court further instructed the jury that only such acts of negligence could be considered as the jury might find were sustained by a preponderance of the evidence.

It would have been much better practice for the trial court to have outlined to the jury only such issues of fact as were supported by the evidence. However, in the instant case it is plain that the only act of negligence that could have influenced the jury was that defendant was driving on the wrong side of the highway and not keeping a proper lookout. The further fact that defendant testified that his brakes were not applied would certainly inform the jury that, if the brakes were defective, they had nothing to do with causing the accident.

We are persuaded that the mere stating that plaintiff alleged in his petition defective brakes as an act of negligence could not have influenced the jury in arriving at their verdict, and, while it may have been error, it was not prejudicial. Only errors that are prejudicial to the complaining party are grounds for reversal of a judgment.

Defendant seems to urge that plaintiff was permitted to recover for earning capacity in an occupation in which he was not employed at the time of the accident. Without objection, evidence was received that plaintiff, by occupation, was a lineman, and that the duties of a lineman were working on telephone poles, installing wires and equipment, and that a regular lineman received wages of $140 a month, or more. It is true that at the time of the accident, resulting in his injuries, plaintiff was engaged

in assisting in the survey of a gas pipe line between Crete and Seward, and was receiving but $125 a month. Because of his injuries, he was unable to resume his occupation as a lineman; one of his legs was so injured that he did not have the full use thereof, and, as a result of his injuries, he was dizzy and unable to retain his balance, which rendered it unsafe and practically impossible for him to climb poles, or work at any considerable height, or to resume his former occupation of lineman. The court instructed the jury that, in fixing the amount of damages, they might take into consideration any impairment shown by the evidence in plaintiff's earning capacity.

In 17 C. J. 903, it is said: "Diminution of earning capacity is not, of necessity, measured by its diminution in the particular calling in which plaintiff was engaged at the time of the injury, or by the amount of wages which he was then receiving; hence, plaintiff may show that he was capable of earning more than he was earning at the time of the injury, and the jury may consider what plaintiff might have been able to earn but for the injury in any employment for which he was fitted." We think the criticism in this respect is not justified by the record.

Finally, it is contended that the verdict is excessive. There is no rule to determine with exactness the amount that would compensate a person for personal injuries sustained. It must be left to the good judgment of the jury, and, unless from the evidence the court can say, as a matter of law, that the recovery is excessive, the verdict will not be disturbed.

There is evidence in the record tending to prove that plaintiff's injuries were severe and, in a number of respects, permanent; that the bones of his nose were crushed; that the air passage in one side of the nose is entirely obstructed and the other partially so, so that breathing through the mouth is necessary. His face is permanently disfigured. One leg was permanently injured, resulting in partial loss of its function. There was an injury to the tenth dorsal vertebra, resulting in im-

pingement on the nerves and causing pain and discomfort, which is probably permanent. As a result of his injuries, he cannot stoop and lift heavy objects. He is subject to dizziness and experiences difficulty in maintaining his equilibrium; suffers frequent headaches, and his earning capacity has been considerably reduced. He is unable to follow his occupation of lineman. In view of the facts disclosed, we are unable to agree with defendant that the court can say, as a matter of law, that the recovery is excessive.

Prejudicial error has not been found. The judgment is AFFIRMED.

CLARENCE P. BAINTER, APPELLANT, V. LEO APPEL ET AL., APPELLEES.

FILED NOVEMBER 10, 1932. No. 28276.

1. **Trial:** DIRECTION OF VERDICT. If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon.
2. **Statutes.** Under the Constitution of this state, a statute which contains no emergency clause does not become operative until three calendar months after the adjournment of the legislature by which it was passed.
3. **Automobiles:** OPERATION: STATUTE: CONSTRUCTION. Chapter 110, Laws 1931, having been enacted to secure uniformity in the state laws regulating the operation of vehicles on highways throughout the nation, should be construed in the light of the cardinal principles of the act itself to give effect to this design.
4. ———: LAW OF THE ROAD. In this state, upon highways of sufficient width, except upon one way streets, the driver of an automobile shall drive the same upon the (his) right half of the highway, unless it is impracticable to travel on such side of the highway, and in crossing an intersection of highways shall likewise cause such vehicle to travel on the right

half of the highway, unless such right half is obstructed or impassable.

5. ———: RATE OF SPEED. In the absence of special provisions of the statute to the contrary, or the existence of unusual conditions rendering such speed unsafe, it is *prima facie* lawful for a driver of an automobile to drive the same on the portion of the highway over which he then has the right of way, at a speed of not exceeding fifteen miles an hour when approaching within fifty feet of, and in traversing, an intersection of highways, when such driver's view is obstructed.

6. ———: OBSTRUCTION OF VIEW. A driver's view shall be deemed to be obstructed when at any time during the last fifty feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all highways entering such intersection for a distance of two hundred feet from such intersection.

7. ———: OPERATION: NEGLIGENCE. Plaintiff, driving his automobile westward on the right side of the road and traveling in a lawful manner, and as to eastbound traffic having the exclusive right of way, could assume that one driving in the opposite direction would not project his car into a cloud of dust on plaintiff's side of the road and strike him.

8. ———: COLLISION: LIABILITY. To sustain a recovery by the owner of an automobile for injuries resulting to him and his car from a collision with a truck then transporting the property of defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the truck was the defendant's servant, and was at the time of the accident engaged in the master's business or pleasure with the master's knowledge and direction.

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

Baker, Lower & Sheehan, for appellant.

Ralph J. Nickerson and *Crossman, Munger & Barton, contra.*

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

EBERLY, J.

This was originally an action at law instituted in the district court for Sarpy county by Clarence P. Bainter, as plaintiff, against Leo Appel and Western Asphalt Paving Corporation, as defendants. Plaintiff sought a recovery from the defendants for damages to his person and property alleged to have been caused by the negligence of the defendants in the operation of a truck on and over "Old U. S. Highway 38," resulting in a collision with plaintiff's automobile on August 5, 1931, at a point on that public highway between three and four miles south of Gretna, Nebraska.

There was a trial to a jury. At the close of plaintiff's evidence the trial court sustained the separate motions of defendants for a directed verdict in their behalf, and dismissed plaintiff's action. This action of the district court was predicated upon the proposition that plaintiff's evidence was insufficient to establish a cause of action against either defendant, and disclosed contributory negligence on the part of the plaintiff in a degree sufficient to defeat a recovery by him. From the judgment thus entered, and the order of the district court overruling his motion for a new trial, the plaintiff appeals.

In view of this record, it is obvious that the correctness of the determination of the trial court is to be tested by the following established principles: (a) "If there be any testimony before the jury, by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him." *Grant v. Cropsey*, 8 Neb. 205. See, also, *Hunt v. State Ins. Co.*, 66 Neb. 125; *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43. (b) "In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish." *Preston v. Stover*, 70 Neb. 632; *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273. (c) "Where, from the testimony before the

jury, different minds might draw different conclusions, it is error to direct a verdict." *Suiter v. Park Nat. Bank,* 35 Neb. 372; *Schwerin v. Andersen,* 107 Neb. 138.

We premise our discussion of this appeal with the observation that the fact of the collision, and the damages suffered therefrom by the plaintiff, must in this proceeding be taken as uncontroverted. The determinative evidence, in view of the issues necessarily determined by the trial court in directing a verdict for defendants at the close of plaintiff's evidence, is therefore restricted to the facts and circumstances appearing in the record which support or disprove inferences of negligence in the transaction on the part of the defendant, or which tend to establish contributive negligence on the part of the plaintiff.

It may be said that the public highway referred to in the evidence as "old thirty-eight," and on which this collision occurred, at the scene of the accident was laid out and constructed in a general east and west direction. A short distance east of the place of collision "old thirty-eight" was intersected by the new public highway, then under construction, and which extended from the southwest to the northeast. These roads will hereafter be referred to as the "new highway" and the "old thirty-eight." This court will take judicial notice that measured between their lateral boundaries each of these public highways was not less than 66 feet in width; and also that the paved surface of the "new highway" and the graded and graveled portion of "old thirty-eight" occupied the central portion of the respective highways in which situated. It also appears that at the time of the accident the paving of the "new highway" (including a portion of the intersection with "old thirty-eight") had been in part completed, and for its protection had been covered with soil. The "new highway" was then in use, at least by trucks engaged in construction work thereon. "Old thirty-eight" from this intersection, inclusive and westerly therefrom, was then in use by the public generally.

The testimony of defendant Appel, whose truck collided with plaintiff's automobile, testifying as plaintiff's witness, is, in substance, that on August 5, 1931, at approximately 4:30 p. m. he was employed in personally operating this truck and then conveying a load of sand, gravel and cement, the property of the Western Asphalt Paving Corporation, over "old thirty-eight" from "Melia, our plant, to the mixer." This material was intended for use in paving the "new highway."

Plaintiff testified in substance as follows: On the day of the accident he, with five others in his Graham Paige, of which he was the driver, were traveling from Council Bluffs, Iowa, via Omaha and Lincoln, to Fairbury, Nebraska. At 4:30 on that day this Graham Paige, with plaintiff at the wheel, traveling west over "old thirty-eight," was approaching the junction of the two public highways already referred to. At this place "two cars passed me * * * going a pretty good rate of speed." "They kicked up some dust" and caused plaintiff "to slow down." As he "pulled up" in the intersection and had just started to cross the pavement, "something whizzed by" traveling on the "new highway" and created a big cloud of dust at this point. The dust came up "right in front of my car." He was "into it before he knew what had happened." The speed of his car, when crossing the intersection, was from five to seven miles an hour. "I couldn't stop on the highway (intersection) so I just drove slowly off." While he was in the cloud of dust he could see a little, though his view was evidently greatly curtailed. As he was driving slowly along on his right-hand side of the road (north half) he saw "this truck coming out of the dust." He then knew "there was going to be a head-on collision" and applied his brakes. He almost came to a stop before the impact; he had in fact put on his brakes while passing through the cloud of dust so the car was moving slowly when the approaching truck was first discovered. Plaintiff testifies that the actual impact of the collision with the Appel truck took place probably fifty or sixty feet

west of the intersection, resulting in the practical destruction of his automobile. Other disinterested witnesses place this point of actual impact as "fifteen feet or so west of the intersection," and one witness says on this topic: "I should judge fifteen or twenty feet west of the center of the intersection." All witnesses agree that plaintiff's car in passing through the dust cloud was at all times on the "right side" or north half of "old thirty-eight;" that the collision was head-on, and that both cars were then north of the center line of "old thirty-eight." Indeed, here the two colliding vehicles stood after the collision, with their front wheels locked together, the truck facing eastward and the Graham Paige facing the west. There is evidence that defendant's truck had been traveling over the north half of this highway to the eastward for some distance west of the point where the collision occurred. There is no evidence that this was due to accident, or in any manner to the presence of the dust cloud, but the facts elicited by defendants' attorney on cross-examination support the inference that the driver of the truck was intentionally operating it over the north half of "old thirty-eight" at the time of impact, and had been for a period of time prior thereto, and there are no facts appearing in the record which would support the inference that the south half of "old thirty-eight" was here "impracticable to travel," "obstructed," or "impassable."

The date of this accident, August 5, 1931, invites our attention to the fact that the legislature of 1931 at its forty-seventh session enacted chapter 110, Laws 1931, entitled "An act relating to motor vehicles and regulating the operation of vehicles on the highways," etc. This act was approved by the executive May 7, 1931. The forty-seventh session adjourned *sine die* on May 2, 1931. This enactment, having been adopted without an emergency clause, notwithstanding the date of approval by the executive, took effect August 3 following, and its provisions, so far as applicable to the subject-matter involved in this litigation, are controlling. Const. art. III, sec. 27; *McGinn*

v. State, 46 Neb. 427; *State v. City of Kearney,* 49 Neb. 325.

This legislation evidences the substantial adoption by Nebraska of the provisions of the "Uniform act regulating the operation of vehicles on highways" as recommended and approved by the commissioners on uniform state laws in 1926, and which since that time has been, in effect, adopted by the legislatures of seventeen of the states of the Federal Union, in addition to our own. Section 59 of this chapter 110 provides: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact similar legislation." In the construction of similar enactments adopted for the purpose of securing uniformity and certainty in certain laws throughout this nation, this jurisdiction is committed to the view that each of such statutes should be so construed, in the light of the cardinal principles of the act itself, as to give effect to this design. *Peter v. Finzer,* 116 Neb. 380; *International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325. See, also, *Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.,* 239 U. S. 520.

This law of 1931 does not in terms repeal or amend section 39-1001, Comp. St. 1929, providing: "Whenever any persons, traveling with any carriages, shall meet on any road in this state, the persons so meeting shall seasonably turn their carriages to the right of the center of the road, so as to permit each to pass without interfering or interrupting," etc. This enactment of 1931 embraces, however, the following additional requirements and includes certain definitions which are applicable to the situation disclosed by the evidence referred to, viz.: "The following words and phrases when used in this act shall for the purpose of this act have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning: (a) Motor Vehicles. Every vehicle as herein defined, which is self-propelled. * * * (e) Highway.

Every way or place of whatever nature open to the use of the public, as a matter of right for the purposes of vehicular travel. * * * (f) Private Road or Driveway. Every road or driveway not open to the use of the public for purposes of vehicular travel. (g) Intersection. The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other. * * * (i) Right of Way. The privilege of the immediate use of the highway." Comp. St. Supp. 1931, sec. 39-1132.

"Upon all highways of sufficient width, except upon one way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway." Comp. St. Supp. 1931, sec. 39-1139.

"In crossing an intersection of highways * * * the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right half is obstructed or impassable." Comp. St. Supp. 1931, sec. 39-1140.

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." Comp. St. Supp. 1931, sec. 39-1141.

"(a) The driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety." Comp. St. Supp. 1931, sec. 39-1143.

"(a) Except as otherwise provided in this section, the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane

for traffic nearest to the right-hand side of the highway and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway, and when intending to turn to the left shall approach such intersection in the lane for traffic to the right of and nearest to the center line of the highway and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left. For the purpose of this section, the center of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another." Comp. St. Supp. 1931, sec. 39-1146.

"Except in those instances where a lower speed is specified in this act, it shall be *prima facie* lawful for the driver of a vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe it shall not be lawful. * * * 3. Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last fifty feet of his approach to such intersection, he does not have a clear and uninterrupted view of such intersection and of the traffic upon all highways entering such intersection for a distance of two hundred feet from such intersection." Comp. St. Supp. 1931, sec. 39-1135.

So, also, we are required to take judicial notice of the provisions of the official state highway rules and regulations (1930) as formulated by the department of public works, pursuant to section 39-1416, Comp. St. 1929. 7 Ency. of Evi. 990. These are to be construed as in addition to the Nebraska statutes rather than in explanation or interpretation thereof. This court has recognized the validity of powers thus exercised by the department of public works. *Trussell v. Ferguson,* 122 Neb. 82. Paragraph (r) of section 13 of these rules and regulations (page 13) is: "A vehicle shall not stop within an * * * intersection."

It thus appears that plaintiff in continuing the movement of his automobile westward on the right or north half of the highway after being enveloped by a cloud of dust which obstructed his view, at a speed of from five to eight miles an hour, was not only well within the express statutory limitation, but was then proceeding in strict obedience to the commands of the law. No "lower speed is specified in this act," and the record is barren of facts from which it may be inferred that this speed was then unsafe.

Defendant Appel's contention is that when plaintiff's view became obstructed by the dust cloud in the intersection he should have stopped where he was, or blown his horn, or turned on his lights. The terms of the statutes and regulations already quoted wholly fail to support this contention. Plaintiff was not required to stop, or blow his horn, or turn on his lights, but the statute contemplates only that he proceed on his right half of the highway at a rate of speed not in excess of fifteen miles an hour, and the "regulations," as we have noted, expressly denied to him the right to stop in the intersection.

Neither has the rule that "it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps" any application to the facts of the instant case. This court has properly applied the rule quoted in cases where the collision was between a moving automobile and an object which relative to the automobile was stationary. *Roth v. Blomquist,* 117 Neb. 444. But to apply it to approaching automobiles colliding with each other would violate the very reason by which the rule is supported. Indeed, its strict observance by both drivers in the case supposed would not avoid the collision.

In the present case the car of plaintiff was correctly placed and at the time of the impact, as well as prior thereto, was traveling in a lawful manner where and as the terms of this enactment directed. Plaintiff, then, as

to the north half of this highway, had the exclusive statutory right of way as against eastbound traffic thereon. This being true, plaintiff, as driver of his car, had the right to assume that no one, in violation of the express commands of this legislation, would pass over the center line of this highway with his motor vehicle, travel eastward on the north half thereof, project his car into a cloud of dust on plaintiff's own side of the road, and strike him. The fact that the accident occurred in this manner constitutes ample evidence to go to the jury on the question of defendant Appel's negligence, and fully sustains the inference that plaintiff was wholly free from contributory negligence. *Crowe v. O'Rourke,* 146 Wash. 74; *Lawrence v. Bartling & Dull Co.,* 255 Mich. 580; *Tomlinson v. Clement Bros.,* 130 Me. 189. The district court erred, therefore, in directing a verdict for the defendant Appel.

As to the defendant Western Asphalt Paving Corporation, it may be said that the sole evidence connecting it with the transaction is the evidence of witness Appel already set out. Under the issues as made by the pleadings, to sustain a recovery for injuries occasioned by the operation of the Appel truck, the burden was imposed on the plaintiff to show by a preponderance of the evidence that Appel, who was in charge of and operating the machine occasioning the damages, was the Western Asphalt Paving Corporation's servant, and was at this time engaged in his master's business or pleasure with the master's knowledge and direction. *Neff v. Brandeis,* 91 Neb. 11; *Weber v. Thompson-Belden & Co.,* 105 Neb. 606.

As the evidence in the record wholly fails to prove the relation of master and servant as existing between Appel and the Western Asphalt Paving Corporation, the action of the trial court in directing a verdict in favor of the latter is approved. As to defendant Appel, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion; as to defendant Western Asphalt Paving Corporation, the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

HUBBELL BANK ET AL., APPELLANTS, V. CHARLES W. BRYAN, GOVERNOR, ET AL., APPELLEES.

FILED NOVEMBER 10, 1932. No. 28303.

1. **Banks and Banking:** GUARANTY FUND: ASSESSMENTS. Legislative act to provide for guaranty fund by assessments levied against state banks under the police power must be related to some public purpose and must not be arbitrary and unreasonable.
2. ———: DEPOSITORS' FINAL SETTLEMENT FUND ACT: VALIDITY. Depositors' final settlement fund act lacked the public purpose necessary to support such legislation as an exercise of the police power.
3. **Constitutional Law:** DEPOSITORS' FINAL SETTLEMENT FUND ACT. Such an act, which provides that solvent banks shall be assessed in the future, to pay the losses of depositors in banks which had failed prior to its enactment, is invalid for that it takes the property of one and gives it to another, depriving the one of his property without due process of law.
4. ———: ———: POLICE POWER. Public purpose sufficient to support an exercise of the police power of the state is not imparted into a legislative act, merely because it supersedes and replaces a statutory enactment which did have such public purpose.
5. **Statutes:** CONSTRUCTION. Provision expressing legislative intent as to the separability of the various parts of a statute is an aid merely to judicial interpretation.
6. ———: ———. "The legislative intent is the cardinal rule in the construction of statutes." *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734.
7. **Constitutional Law:** DEPOSITORS' FINAL SETTLEMENT FUND ACT. Police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation.
8. **Courts:** JUDGMENT AS BAR. "A decision of the supreme court of the United States in a suit brought immediately upon the enactment of a bank guaranty law, holding such law to be constitutional, does not preclude a subsequent suit for the purpose of testing, in the light of later actual experience, the validity of assessments made thereunder, alleged to be unreasonable and confiscatory, and hence repugnant to the due process clause of the Fourteenth Amendment." *Abie State Bank v. Bryan*, (282 U. S. 765) 75 L. Ed. 690.
9. **Constitutional Law:** POLICE POWER. When conditions change so that what was once an insignificant taking of private property for an ulterior public advantage under depositors' guaranty

fund law becomes a taking of private property exclusively for private purpose confiscatory in its application, the law cannot be sustained as a constitutional exercise of the police power of the state.

10. ———: GUARANTY FUND ACT: VALIDITY. It is established in this case that conditions have so changed that the depositors' guaranty fund act is deprived of its public purpose; that the assessments thereunder are now confiscatory; and that it now takes private property exclusively for a private purpose. In such a case, one is deprived of his property without due process of law, in violation of the Fourteenth Amendment to federal Constitution and section 3, art. I of the Constitution of the state of Nebraska.

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

Peterson & Devoe, for appellants.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

F. C. Radke and *Barlow Nye,* for E. H. Luikart, receiver.

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

DAY, J.

This is a suit in equity brought by the state banks of Nebraska to enjoin the collection of the regular and special assessments levied for the use of the depositors' guaranty fund and the assessments levied and to be levied for the benefit of the depositors' final settlement fund under the provisions of legislation which became effective March 18, 1930. This suit was brought against the department of trade and commerce and governor of the state, as *ex officio* head of the department. The defendants filed a counterclaim in which they sought to recover a judgment against the banks for the amount of the assessments which had been levied under both statutory provisions. The case was decided upon a demurrer which resulted in the banks being denied relief and a judgment being en-

tered against the banks individually for the amount of assessments levied under both the old and the new law. This suit was determined by the lower court upon a demurrer to the pleadings, so that there is no issue of fact in controversy.

In 1909 the Nebraska legislature enacted a statute (Laws 1909, ch. 10) establishing a depositors' guaranty fund which was created and replenished from the proceeds of assessments based upon average daily deposits levied upon all state banks. The claims of all depositors in failed state banks were to be paid, first, from the assets in the hands of the receivers thereof, and, secondly, if said fund was insufficient, the deficit was to be paid from the depositors' guaranty fund. The statutory provisions creating and regulating the depositors' guaranty fund are found in sections 8024 to 8028, and 8033, Comp. St. 1922, with some amendment thereafter which however did not change the general structure of the depositors' guaranty fund.

There is no necessity to delineate in this opinion the unhappy history of the banking business in Nebraska and particularly those dark pages from 1920 until 1930. It is sufficient for the purpose of this opinion to state that in 1930 the condition was such that the governor called a special session of the legislature primarily to consider the banking situation. This special session (46th Extraordinary) enacted chapter 6, Laws 1930, Special, which is commonly known as the depositors' final settlement fund law, which became effective March 18, 1930. Among other things it provided for the transfer of assets from the depositors' guaranty fund to the depositors' final settlement fund, including certain assessments against the banks which had not been paid, accruing under the old law, and provided for an assessment to be levied upon the state banks for a period of ten years, based upon their average daily deposits. It provided that those who had claims as depositors in banks which had failed prior to March 18, 1930, under the old guaranty fund law

should be paid from this new fund *pro rata*. It repealed the old guaranty fund law, not only by a specific repealing clause, but also by changing the provisions by almost every section of the new law. Consequently, it marked the end, from a legislative standpoint, of the depositors' guaranty fund.

The assessment of state banks for the payment of claims of depositors in failed state banks has from the time of the inception of such legislation been sustained as constitutional as an exercise of the police power of the state. We quote from the opinion of Mr. Justice Holmes in *Noble State Bank v. Haskell*, 219 U. S. 104 (1911), in which he stated this principle as follows:

"Where the mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. The police power extends to all the great public needs, *Camfield v. United States*, 167 U. S. 518, and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them by compelling cooperation so as to prevent failure and panic."

The Nebraska statute establishing the depositors' guaranty fund was argued before the supreme court of the United States at the same time as the *Haskell* case (*Shallenberger v. First State Bank of Holstein*, 219 U. S. 114), and the judgment in the *Haskell* case was decisive in the latter. From the date of this decision of the supreme court of the United States to the present, there has never been any deviation in any judicial expression from the principle that a depositors' guaranty fund law must rest for constitutional support on the exercise of the police power of the state by its legislature. Further it is held, also, that such an exercise of the police power must not be arbitrary and that its exercise must be related to some public purpose. This view has been recently reiterated by this court. *Abie State Bank v. Weaver*, 119 Neb. 153, and

also in *Weaver v. Koehn,* 120 Neb. 114. To the same effect is the opinion in *Abie State Bank v. Bryan,* 282 U. S. 765. The depositors' final settlement fund act provides for a fund to pay partially and *pro rata* the claims for depositors in state banks closed prior to March 18, 1930, by transferring the assets of the old guaranty fund and the levying of a new assessment upon every state bank. The claims of depositors in banks failing after March 18, 1930, were not protected in any manner by this fund.

The public purpose sufficient to support the constitutionality of the depositors' guaranty fund was the stabilization of commerce and the creation of public confidence in the banks. It had a public purpose. It was within the reasonable exercise of the police power, but the situation with respect to the depositors' final settlement fund is radically different. It had for its sole and only purpose the payment of the claims of depositors in banks which had failed prior to its enactment by levying assessments upon solvent state banks whose depositors did not come within the purview of the act. In practical effect, this new act destroyed the confidence in the state banks. It does not stabilize commerce but tends to disrupt it. In truth, it serves no public purpose which can justify the exercise of police power of the state. Considered from the standpoint of its effect, it does but one thing: It takes money from the solvent state banks, and thereby indirectly from the depositors in these banks, and pays it to depositors in other state banks which had failed prior to its enactment. In this, it creates a classification that is unreasonable and unconstitutional, as we have already held. *Weaver v. Koehn,* 120 Neb. 114.

Due process of law, as a limitation upon the police power, requires that it be exercised in such a manner that it is not arbitrary and unreasonable. *Jay Burns Baking Co. v. Bryan,* 264 U. S. 504; *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1; *State v. Geest,* 118 Neb. 562.

In excluding depositors whose claims accrued since March 18, 1930, from participation and giving benefits

to depositors in prior failed banks, it deprives plaintiffs of property without due process of law. Taking property of one and giving it to another is not due process. *Missouri P. R. Co. v. Nebraska,* 164 U. S. 403; *Missouri P. R. Co. v. Nebraska,* 217 U. S. 196; *Chicago, St. P., M. & O. R. Co. v. Holmberg,* 282 U. S. 162. There is no judicial authority to support the view that the final settlement fund is related in any manner to a public purpose, but it does in fact, as said by Mr. Justice Dean in *Weaver v. Koehn, supra,* constitute the taking of money belonging to one class to pay the claims of another class. From the brief of the attorney general we quote:

"We agree with counsel for plaintiffs that if the depositors' final settlement law had been passed as an entirely new measure, unrelated to the creation, administration and distribution of the depositors' guaranty fund, there would be little doubt of its unconstitutionality on the ground, so well stated by this court in *Weaver v. Koehn,* 120 Neb. 114, that it would 'constitute the taking of money belonging to one class to pay the claims of those of another class.' "

However, it is then argued that, since the law replaced the old guaranty fund law which did have a public purpose, the depositors' final settlement fund by some process of metempsychosis now has such a public purpose as is essential to support such legislation. To support the view that the legislature has authority, several cases are cited which are not strictly in point for the reason that in no instance has a state legislature attempted to provide for future assessments to pay off the losses in other banks in the past. In at least two of the cases cited, the guaranty fund was voluntary and the banks could come under the provisions or not, as they chose. *Spokane & Eastern Trust Co. v. Hart,* 127 Wash. 541; *State v. Bone,* 120 Kan. 620. In *State v. Smith,* 234 N. W. (S. Dak.) 764, it is shown that the legislature of South Dakota discarded the old guaranty system and established a new and different system whereby each bank was required to build up a

reserve in the state treasury to be maintained for the protection of its own depositors, which remained the private property of the bank. *Wirtz v. Nestos,* 51 N. Dak. 603, involved the matter of the payment of depositors under the old fund as did the case of *Lacy v. State Banking Board,* 118 Tex. 91, in which membership in the state guaranty fund was also optional.

It is contended, however, that this question was adjudicated by *Abie State Bank v. Bryan,* 282 U. S. 765. The legislation was enacted in the interval occurring between the decision in this court and its disposition by the supreme court of the United States. The question of the constitutionality was not and could not have been presented to this court. In the case of *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, the court held:

"The jurisdiction of this court, under section 709, Rev. Stat., to review the proceedings of state courts is limited to specific instances of denials of federal rights specially set up in and denied by the state court." See, also, *Silver v. Silver,* 280 U. S. 117; *De Saussure v. Gaillard,* 127 U. S. 216; *Chesapeake & Ohio R. Co. v. McDonald,* 214 U. S. 191.

No ordinary exercise of the judicial process could import into the legislative act of March 18, 1930, any public purpose whatsoever which justified the passage of the act under the exercise of the police power by the legislature. This question was not adjudicated in the case of *Abie State Bank v. Bryan, supra.* Therefore the said act, in so far as it attempts to levy an assessment on state banks to create a fund to pay depositors' claims against banks having failed prior to the enactment thereof, is in violation of the due process clause of the federal Constitution. It is also violative of section 1 of the Fourteenth Amendment. It is also violative of section 3, art. I of the Constitution of Nebraska, in that it deprives persons of their property without due process of law.

Since we have reached the foregoing conclusion, it is necessary to consider the effects thereof, with reference to the repeal of the statutory provisions of the depositors'

guaranty fund. Section 16, ch. 6, Laws 1930, Special (Comp. St. 1929, sec. 8-178) is an expression of the legislative intent and of the inducement for the passage of the act, as to the separability of the various sections.

The legislative expression is that sections 1 to 5, and 16, ch. 6, Laws 1930, Special, are inseparable. Section 18, ch. 6, Laws 1930, Special (Comp. St. 1929, sec. 8-180) provides that sections 6 to 16, inclusive, as far as inducement is concerned, are independent of every other section. Since the legislature expressed itself both ways upon the matter of legislative intention and of inducement, in contradictory language, it would seem to amount to the same thing as an absence of a clear-cut expression of intent. In such a case, it would seem necessary to arrive at the legislative intent without reference to such expression. Such a provision "is an aid merely; not an inexorable command," said Mr. Justice Brandeis in *Dorchy v. Kansas*, 264 U. S. 286. See, also, *Nixon v. Allen*, 150 Ark. 244; *State v. Montgomery*, 177 Ala. 212. The provision in this statute is novel and is apparently original with our legislature. The only cases reported which we have found are concerned with provisions that various parts shall be separable. We adopt the rule that a provision expressing legislative intent as to the separability of the various parts of a statute is an aid merely to judicial interpretation. It is obvious that contradictory provisions are of no aid in this case. It is emphatically argued that section 16 was included in section 18 inadvertently and that we should construe it as though it referred to sections 6 to 15, instead of 6 to 16. It is not the province of the court to amend an act to make it conform to the unexpressed intent of the legislature. *Van Horn v. State*, 46 Neb. 62. In an early case, *In re Groff*, 21 Neb. 647, we read:

"We hold, therefore, that where a part of an act is not dependent upon that which is unconstitutional, and is complete in itself and capable of being executed, it will be maintained."

In *State v. Stuht*, 52 Neb. 209, it was said:

"Another test to be applied here is, may the constitutional and unconstitutional portions of the law in question be separated, and is the former so complete within itself and independent of the latter that the former will be operative and can be enforced without the latter? If so, the former will be upheld and the latter disregarded or rejected. The foregoing is the rule announced and enforced by this court."

The various sections of these statutes will be operative and can be enforced without the invalid provisions. Who can say, in view of the contradictory expressions, which was the inducement? Perhaps, for some members of the legislature one section, and for others a different section, was the inducement. "The legislative intent is the cardinal rule in the construction of statutes." *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734. See *State v. School District*, 99 Neb. 338.

This court cannot say that the legislature would not have passed the repealing clause without the other provisions. The various parts are severable. In 1 Cooley, Constitutional Limitations (8th ed.) pp. 241, 242, quoting from *Smith v. Janesville*, 26 Wis. 291, it is said:

"No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional or contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain."

The taking effect of the law was not made conditional or contingent, but absolute and immediate. Section 19, ch. 6, Laws 1930, Special, provides: "Whereas, an emergency exists, this act shall be in force and take effect from and after its passage and approval." There was no provision for the law taking effect conditionally or contingently.

But state banks also challenge the constitutionality of the assessments levied under the provisions of the depositors' guaranty fund law beginning with the special assessment of December 15, 1928, and including that of

April 17, 1929, and January 2, 1930, and the regular assessments levied on July 1, 1929, and January 1, 1930, for that by reason of changed conditions the regulatory act in its operation has become confiscatory. These are the same assessments mentioned in subdivision (c), sec. 1 of the depositors' final settlement fund law, which were transferred to that fund.

The defense interposed to this claim is that of *res judicata*. The supreme court of the United States, after a consideration of our depositors' guaranty fund law, held that it was not violative of the federal Constitution in *Shallenberger v. First State Bank of Holstein*, 219 U. S. 114. But this is not so conclusive as to exclude further consideration as to whether under changed conditions and under facts established by experience the assessments imposed thereunder have become confiscatory. In *Abie State Bank v. Bryan*, 282 U. S. 765, it was said:

"As to the first objection, it is sufficient to say that the bank guaranty law was sustained by this court as a police regulation (*Shallenberger v. First State Bank of Holstein, supra; Noble State Bank v. Haskell*, 219 U. S. 104, 575), and that a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation. *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, 162; *Allen v. St. Louis, Iron Mountain & Southern R. Co.*, 230 U. S. 553, 555, 556; *Lincoln Gas & Electric Co. v. City of Lincoln*, 250 U. S. 256, 268. In the *Shallenberger* case, the suit was brought immediately upon the enactment of the law, and that decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of assessments in the light of the later actual experience."

The rule is stated in the syllabus to be as follows:

"A decision of the supreme court of the United States in a suit brought immediately upon the enactment of a bank guaranty law, holding such law to be constitutional, does not preclude a subsequent suit for the purpose of testing, in the light of later actual experience, the validity

of assessments made thereunder, alleged to be unreasonable and confiscatory, and hence repugnant to the due process clause of the Fourteenth Amendment." (75 L. Ed. 690.)

A further quotation from the opinion in the case is illuminating:

"When the suit was brought, these banks were confronted with a situation which contained no promise of relief from the assessments for which the act, as it then existed, provided, and the cumulative effect of which was alleged to be disastrous. It was the special assessments under the old law that were definitely assailed. Under the modifying act of 1930, only three of these special assessments and two regular assessments remain effective; and, for the future, there is a limitation of the obligation to a total annual assessment of two-tenths of one per cent. of average daily deposits instead of assessments aggregating six-tenths, as were made possible by the previous law. The future assessments, to this restricted amount, are limited to a period of ten years. This, obviously, is a change of great importance. The appellants sought an injunction, and their petition necessarily related to the assessments in December, 1928, and thereafter, as the payments previously made were not in any event recoverable by the banks. Considering the reduction in the extent of the obligation as to future assessments, we are unable to say that the statute in this modified form is confiscatory, or other than a reasonable method of liquidating the guaranty plan. In this view, the judgment of the supreme court of the state denying an injunction should be affirmed."

The substance of said opinion, as we understand it, is that, due to changed conditions resulting from new legislation, the court was unable to determine from the record whether the assessments were confiscatory. It therefore follows that the question now presented was not adjudicated in the above case.

The question now squarely presented is whether or not

the special assessments levied on December 15, 1928, April 17, 1929, and January 2, 1930, and the regular assessments levied on July 1, 1929, and January 1, 1930, in view of changed conditions, including our finding herein that the depositors' final settlement fund is invalid and the old law, known as the depositors' guaranty fund, is thereby restored to an effective state, is confiscatory. If under the facts it is confiscatory, it is violative of the Fourteenth Amendment to the federal Constitution. If it is confiscatory, then it can no longer be sustained as a constitutional legislative enactment under the police power for a public purpose. If confiscatory, the public advantage does not justify taking of private property for what, in its purpose, is a private use.

In addition to the changed condition relating to changed statutory enactments, there are facts and circumstances inherent in the conditions of the banking business in this state since December, 1928. These facts are established by the record. It was a fact determined in 1928 that, due to the unprecedented number of failures of state banks, the depositors' guaranty fund was faced with a deficit of millions, and that it was impossible to restore the solvency of the fund. The comparatively small regular assessments had been levied and collected. In addition, the larger and more oppressive special assessments have been levied regularly for years, in the vain hope of restoring the solvency of the fund. The banks were faced with an indefinite continuance of these regular and special assessments. At the same time, the public purpose which this legislation undoubtedly had in the beginning was no longer served. From the condition of the fund itself, instead of a stabilizer of the state banks, it became a menace and a threat, sufficient to cause a great loss of public confidence in the banks with subsequent loss of business and earning power.

When this question was presented to this court at an earlier date, *Abie State Bank v. Weaver*, 119 Neb. 153 (December 7, 1929), the writer was of the opinion that

under the prevailing conditions the assessments levied under the law were then confiscatory. However, a majority of the court were then of a different opinion. In that case, on appeal the supreme court of the United States held: "That decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of assessments in the light of later actual experience." *Abie State Bank v. Bryan,* 282 U. S. 765. The cases cited by the court, as noted elsewhere in this opinion, dealt with rate-making. In the case of *Municipal Gas Co. v. Public Service Commission,* 225 N. Y. 89, the opinion by Judge Cardozo so clearly states the principle, that the question of confiscation is affected by changing conditions, that we quote herewith:

"The argument is that a statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation, but none for confiscation that results from changed conditions. We do not view so narrowly the great immunities of the Constitution, or our own power to enforce them. A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless. *Ex parte Young,* 209 U. S. 123, 147, 148. It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; the coming years must tell whether the prophecy is true."

Have conditions so changed in the state banking situation that the assessments in controversy here were or are confiscatory? The result of the operation of all the banks in the state have been compiled from the record by both plaintiffs and defendants. The plaintiffs contend that the operation of the banks for a two-year period

resulted in a loss of $23,576.09, while the defendants argue that the operations resulted in a gain of $984,138.73. The discrepancy is due largely to the time when the loss by real estate owned by the banks is charged against them. That such a loss occurred cannot be denied. The argument that the banks in January, 1932, were in better condition and that their business was more profitable is not impressive. It is not supported by the facts pleaded, and admitted by the demurrer. Even taking the numerical argument submitted by the defendants, the alleged operating gain is not one-third the amount required to pay the assessments levied during the period. For a period consisting of some eleven months prior to December 15, 1928, it appears that the banks were able to earn more than enough to pay the assessments, although it is now clear from the record, which includes further experience since this case was before this court, that this supposed earning was more apparent than real for that in the spirit of optimism the banks had not yet charged off some of their losses. During the period from December 15, 1928, to January 1, 1931, covering approximately two years, there is either a loss or a profit so small that it is sufficient to meet less than one-third of the assessments levied against the banks for the benefit of the guaranty fund. The assessments for this period can only be paid by the banks by a direct taking of their capital stock. Such a collection would impair the capital of the banks and would weaken their stability. In this respect, the law itself defeats the public purpose for which it had hitherto existed; that is, in the interests of the public welfare to stabilize banking and business conditions. Such a taking under assessments levied under the guise of the police power for the public welfare is a confiscation of property and deprives the plaintiffs of their property without due process of law in violation of section 1 of the Fourteenth Amendment to the federal Constitution and section 3, art. I of the Constitution of the state of Nebraska. Under such conditions, the public advantage

having long since vanished, and what was once a comparatively insignificant taking of private property having become such that it will impair and in time will dissipate the capital stock of the banks exclusively for a private purpose, it cannot be sustained under the police power of the state. *Noble State Bank v. Haskell,* 219 U. S. 104.

Furthermore, whether these assessments are levied and collected under the old depositors' guaranty fund or under the later enactment, the depositors' final settlement fund, there is no public purpose involved therein, a thing so necessary to the validity of said assessments.

It was stipulated by the parties at the time of trial in the district court, February 15, 1932, and made a part of the pleadings by reference:

"That in November, 1920, there were 1,012 state banks in Nebraska; that at the time of the filing of the petition in the case of Abie State Bank v. Bryan in the district court of Lancaster county, Nebraska, in December, 1928, the number had been reduced to 726, and that since that time 222 have become insolvent and have been closed by the department of trade and commerce and 12 have gone into voluntary liquidation, reducing the number of going banks in the state as of this 19th day of November, 1931, to 492; that the 726 going banks in December, 1928, had a combined capital of $19,001,000 and a combined surplus of $5,957,557.62."

Since the beginning of this suit until the time the decree was entered in the district court, a period of approximately three months, 50 of the plaintiff banks failed and were taken over by the department of trade and commerce for liquidation. For the period from December 15, 1928, to January 1, 1931, about two years, some 200 state banks were taken over by the department of trade and commerce as insolvent. Since the date of the decree in the trial court, February 15, 1932, until the 12th of September, 1932, 20 more banks have closed. This would seem to be irrebuttable testimony to the confiscatory character of the assessments. True, it has been argued

that the banks have not paid the assessments and therefore the matter of assessments for the depositors' guaranty fund or the depositors' final settlement fund have in no way affected the banks. This is not convincing, since it is not difficult to comprehend the effect of the collection of almost three million dollars from the banks of this state. Can it be doubted that such a collection under the present conditions would have greatly accelerated and increased the effects of the catastrophe?

Since the depositors' final settlement fund act became effective March 18, 1930, to the middle of September, 1932, 157 banks against which these assessments have been levied have closed. Of this, about 30 have reopened on some plan of reorganization. The total set-up in the 125 failed banks which have not reopened as a contingent liability for the depositors' final settlement fund is almost $700,000, while the amount so set up in the reopened banks is about $226,000. The collection of the $900,000 from those banks being liquidated or reorganized by the department of trade and commerce would be taking the money from one group of depositors who could not benefit from the provisions of the act and paying it to another group of depositors in banks which had failed prior to March 18, 1930. There is no public purpose involved to sustain such an action. It would be taking the money from one person and devoting it to a private use. The taking of money belonging to one class to pay claims of those of another class is in violation of the due process provision of the federal and state Constitutions. *Weaver v. Koehn,* 120 Neb. 114.

Finally, if these assessments are collected by the department of trade and commerce, they will become impressed with the judgment liens against the fund. *Bliss v. Bryan,* 123 Neb. 461. The proceeds will then be distributed among the depositors of a few banks, which failed more than five years ago. From any viewpoint from which we consider these assessments, it is apparent that all public purpose has been abandoned in relation

thereto and that it now amounts to taking the property of one class of citizens to pay another class in contravention of the constitutional rights of the plaintiffs. The logical conclusion reached from the foregoing consideration of the questions presented is that the judgment of the trial court should be reversed and the suit remanded, with directions to enter an injunction against the defendants, as petitioned by the plaintiffs.

REVERSED.

LEWIS H. BERGFIELD ET AL., APPELLANTS, V. CHARLES BERGFIELD, APPELLEE.

FILED NOVEMBER 10, 1932. No. 28134.

1. **Witnesses**: COMPETENCY: CONVERSATIONS WITH DECEDENT. Section 20-1202, Comp. St. 1929, which excludes as incompetent, with certain specified exceptions, testimony of one with direct legal interest in the result of the action concerning transactions and conversations between the witness and the deceased person, against the representative thereof, does not apply where the transaction or conversation was between a third party and a deceased person, and not between the latter and the witness, in which the witness took no part.
2. ———: ———: INTEREST IN ACTION. Testimony relating to a conversation between witness and deceased is inadmissible where such witness has a direct legal interest in the action, and the provisions of the statute are not waived by the introduction of testimony relative to transactions and conversations had between the deceased and other witnesses that do not relate to the conversation and transaction narrated by witness for the opposing party.
3. **Trial**: EXCLUSION OF TESTIMONY. Error may not be predicated upon the exclusion of testimony sought on direct examination, where no offer of proof was made and the questions asked did not clearly indicate the materiality of the answers sought.
4. **Landlord and Tenant**: ESTOPPEL: ORAL CONTRACT TO CONVEY: SPECIFIC PERFORMANCE. Although appellee was a tenant of deceased for a number of years and thereafter both lived on the farm until the mother's death, the rule that a tenant cannot deny his landlord's title is not applicable. Appellee's claim of right to specific performance after death is entirely consistent with his tenancy during her lifetime.
5. **Evidence** examined and *held* sufficient to sustain the decree.

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

Fred E. Maurer and *Frank J. Munday,* for appellants.

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

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

RHOADES, District Judge.

The plaintiffs, Lewis H. Bergfield and Viola Bergfield, herein designated as appellants, commenced this action against their brother, Charles Bergfield and other children and grandchildren of their mother Henrietta Bergfield, who died intestate December 28, 1929, the prayer of their petition being for partition of an 80-acre farm of which their mother held the record title at the time of her death.

The defendant, Charles Bergfield, herein designated as appellee, answered admitting the relationship of the parties, and generally denying the other allegations of the petition, and by way of cross-petition alleged that in the year 1912 his mother was a widow then 67 years of age, having in her care a mentally incompetent granddaughter, and possessing no property or means with which to support herself and the granddaughter; that appellee, the youngest child, was then living on and farming the place for his mother, all of the other children having left the home; that in the year 1912 and while so situated the mother made an oral contract and agreement with appellee by which she promised that, if appellee would continue to live with her, make a home for and support her and assist in taking care of the incompetent granddaughter, she would deed or will the farm to appellee; that appellee, relying thereon, fully performed said agreement during his mother's lifetime and still continues to support the child; that appellee has been in continuous possession of the farm ever since, paid all taxes thereon

and improved same. Appellee further states in detail the services rendered and expenses incurred by him in reliance upon his mother's said promise and agreement; that he kept no account of such services, expenses or improvements, but that same would in the aggregate greatly exceed the value of the farm; that appellee's mother neglected to make a will or deed as agreed. Appellee prayed for specific performance of the oral contract and that the title to said farm be vested in him and quieted against all the parties.

Appellants' reply alleged that in about the year 1907 the mother set appellee up in farming and leased the farm to him on shares, which arrangement continued until the mother's death; that the mother, and from 1913 to 1926 an incompetent sister of appellee, did all the housework and some outside work for appellee; and denied generally the allegations of the cross-petition.

A default on the cross-petition of Charles Bergfield was duly entered against some twelve of the children and grandchildren of Henrietta Bergfield who were made defendants, and a trial was had as to the other parties to the action, resulting in a finding in favor of the appellee on his answer and cross-petition, and the title to the farm was decreed to be in him and quieted as against all other parties.

1. Appellants' first assignment relates to the ruling of the trial court by which one of the defendants, Emma Revel, a daughter of the deceased, when called as a witness for the appellee, was permitted to testify as to conversations had between the deceased and appellee, the objection being that the prohibition of section 20-1202, Comp. St. 1929, was thereby violated. The second assignment relates to similar testimony given by Anna Bergfield, another daughter of deceased who was also called as a witness for appellee.

The statute provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased

person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," etc. The testimony of Emma Revel, given over this objection, clearly shows that the conversation about which she testified was between the deceased and appellee, rather than between deceased and the witness, and that the other witness, Anna Bergfield, was also present, and the answer of Anna Bergfield to which the objection was interposed concluded with the statement "And I have heard my brother Charles (appellee herein) and my mother talk the matter over several times since the year 1912."

In *Kroh v. Heins,* 48 Neb. 691, Judge Norval, in referring to the statute in question, said: "It merely excludes proof of transactions and conversations between the witness and the deceased. The provisions of section 329 do not apply where the transaction or conversation was not between the witness and the decedent, but between the latter and a third person." To the same effect are *Hajek v. Hajek,* 108 Neb. 503; *Warnick v. Warnick,* 107 Neb. 747, and other cases. In the last mentioned case it is said: "It is probable that Elizabeth Warnick took part in some of the conversations concerning which she testified; but the record also shows that she took no part in many of the conversations as to which her testimony related. * * * Although the witness may have a direct legal interest in the result of a suit, still he is a competent witness against the representative of a deceased person as to any conversation between the deceased and a third person, in which the witness took no part." Applying this rule to the instant case, it is apparent that the testimony of these two witnesses was not violative of the statute.

2. Appellants' third and fourth assignments relate to the action of the trial court in excluding testimony of Lewis H. Bergfield and Herman Bergfield, both appellants herein, as to their conversations with deceased with reference to the oral agreement and transaction between their mother and appellee, the claim being that, although

these witnesses had a direct legal interest in the result of the action, their testimony comes within the exemption of the statute and was admissible after the transaction and agreement was shown by appellee's witnesses Emma Revel and Anna Bergfield.

The record shows that neither of these witnesses were present at the time of the making of the oral agreement between appellee and his mother. The trial court did not err in excluding appellants' proffered testimony of a witness having a direct legal interest in the action, such testimony relating to a conversation between witness and deceased. The fact that appellee had produced testimony of a witness as to a transaction and conversation between appellee and deceased does not constitute a waiver under the terms of section 20-1202, Comp. St. 1929, because there was no transaction between appellants' witnesses and the deceased, and the conversation offered was not the same conversation nor between the same persons as that related by appellee's witnesses. The *transaction* which is the subject of this action was between the deceased person and the appellee. The provision of the statute which appellants claim constitutes a waiver and rendered the testimony of these witnesses admissible because appellee's witnesses had previously testified regarding the transaction or conversation is not applicable because the transaction was not "between the deceased person and the witness." Neither is it applicable to the conversation "between the deceased person and the witness" because appellee had not introduced any witness who had testified regarding such conversation, but on the other hand had introduced witnesses who had testified to conversations between the deceased person and the appellee. Hence, none of the cases cited by appellants on this question of waiver as applied to this proffered testimony are in point.

3. Furthermore, the record before us fails to show any offer of proof made by appellants. This court will not indulge in speculation or inference as to what answers might have been made to questions propounded on the di-

rect examination of a witness where no offer of proof is made by the party calling the witness. Appellants may not predicate error upon the exclusion of testimony where no offer of proof was made. *Barr v. City of Omaha*, 42 Neb. 341; *Mordhorst v. Nebraska Telephone Co.*, 28 Neb. 610; *Metzger v. Royal Neighbors of America*, 86 Neb. 61. The questions asked did not clearly indicate the materiality of the answers sought. The record affirmatively shows the contrary. Questions 451 and 452 were as follows: "451 Q. And do you know the nature of the agreement that your mother made with him when he got there? A. I do. She told me— 452 Q. What was it?" This was objected to as incompetent and hearsay and the objection sustained. The undisputed evidence is that appellee went to live on his mother's farm in 1907, and that the oral agreement between appellee and his mother was not made until the year 1912, and it is admitted that during the 5 years intervening appellee occupied the farm as a tenant of his mother; hence, the proffered testimony was wholly immaterial. As regards the proffered testimony of Herman Bergfield, question 537 is the only one referred to in the assignment, and that question was fully answered, and both the question and the answer referred to the terms upon which appellee went onto the farm in 1907. It not being shown, either by the question or by any other offer of proof, that either of the proffered witnesses could have given any testimony material to the oral agreement between appellee and his mother, claimed by appellee to have been made in 1912, no prejudicial error is shown in the trial court's rulings.

4. Appellants' fifth assignment is based upon the claim that, appellee having entered into possession of the farm as a tenant, he is now estopped to assert a claim of ownership thereto without proof that he surrendered possession to his landlord. We see in this case no reason for the application of the rule that a tenant cannot deny his landlord's title. The fact that appellee is shown to have been a tenant of his mother from 1907 to 1912, and during that

time and thereafter both lived on the farm until the mother's death, is not inconsistent with appellee's claim of title after his mother's death, but is entirely consistent with such claim. Appellee would not have been prevented from asserting ownership of the farm if his mother had actually conveyed same to him by deed during her lifetime, or from taking and asserting title thereto by devise from his mother. It follows, therefore, that specific performance of the mother's oral contract may be decreed by the court without violating the rule. The application of the rule in the cases cited by counsel for appellants was upon the theory that the possession of the tenant could not ripen into a title adverse to his landlord or confer any right whatever upon the tenant in and of itself unless the tenant either yielded up his possession as tenant, or by an unequivocal act asserted a right of possession inconsistent with his tenancy. In the instant case the appellee is not claiming or asserting any title by virtue of his possession of the land. His claim of title after his mother's death, in fulfilment of the oral contract, is entirely consistent with his tenancy during his mother's lifetime.

5. The remaining assignments of error relate to the sufficiency of the evidence to sustain the oral contract of the mother to deed or will the farm to appellee, and in the consideration of this question we are mindful of the well-established rule that the evidence necessary to warrant specific performance of such a contract must be clear and convincing.

The making of the agreement is established by the direct testimony of two witnesses. Emma Revel, a daughter of Henrietta Bergfield, testified: "I think it was in the year of 1912 that my mother made an agreement in the presence of myself and my brother Charles and my sister Anna, that if he would take care of her and provide well for her as long as, until her death, that she would either deed him the land or make a will that he should have the land or property that she left at her death."

This testimony was corroborated by the testimony of

Anna Bergfield, another daughter, who further said: "I have heard my brother Charles and my mother talk the matter over several times since the year 1912."

James P. Doyle, who lived on a farm four miles from the Bergfield place, and was intimately acquainted with appellee and his mother, testified that the mother told him that she had agreed to give the place to appellee. William N. Kreps, an implement dealer in the nearby town, from whom appellee bought a windmill for the farm, testified that the mother said to him: "I gave him (appellee) the place and if he wants to improve it let him go ahead and improve it. I gave him the place." Henry Huselbusch, another farmer living two miles from the Bergfield farm, testified that the mother told him that "she wanted Charles to have the place, and that she had neglected to deed it to him." These, and other witnesses, testified as to the care which appellee took of his mother and the pleasant relations between the mother and son.

In a trial *de novo*, we find the evidence in the record fully justifies the decree entered by the trial court, and the same is therefore

AFFIRMED.

ARTHUR A. FOREMAN V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1932. No. 27857.

1. **Banks and Banking**: FALSE STATEMENTS: INTENT. In a prosecution against a bank officer for feloniously making to the department of trade and commerce a false statement of the bank's assets, intent to deceive is an element of the felony.
2. ———: ———: ———: PROOF. Under a plea of not guilty, intent to deceive a person authorized to examine into the affairs of a state bank is essential to a conviction in a prosecution against a bank officer for making false book entries of assets and false statements to the banking department and must be proved beyond a reasonable doubt.
3. **Criminal Law**: INTENT: QUESTION FOR JURY. Where a statute makes intent to deceive an element of a felony, the issue as to such intent in a criminal prosecution is a question for the jury and not for the court.

4. Banks and Banking: FALSE STATEMENTS: INTENT: INSTRUCTION. In a prosecution against a bank officer for feloniously making to the banking department false statements of the bank's assets, an instruction that such false statements by accused and his book entries showing them prove intent to deceive persons authorized to examine into the affairs of the bank is erroneous.

5. ———: ———: ———: ESTOPPEL. In a prosecution against a bank officer for feloniously making to the banking department false statements of the bank's assets with intent to deceive persons authorized to examine into the bank's affairs, evidence that accused made the false statements and book entries showing them does not estop him from denying he thus intended to deceive.

6. Criminal Law: INTENT: INSTRUCTION. In a criminal prosecution, an argumentative instruction singling out and emphasizing evidence adduced by the state on the issue of felonious intent to deceive and ignoring testimony of accused denying such intent is erroneous.

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

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

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

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

ROSE, J.

In a prosecution by the state in the district court for Dawson county, Arthur A. Foreman, defendant, president and director of the Farmers State Bank of Overton, was charged in 14 counts of the information with violating the banking laws. In some of the counts he was accused of making false book entries and in others with making false statements and reports. He pleaded not guilty, and upon a trial was convicted only on counts 9, 13, and 14, in each of which he was charged with feloniously making to the department of trade and commerce a false state-

ment of the bank's assets with intent to deceive the department's secretary and others. For each offense he was sentenced to the penitentiary for not less than two nor more than four years, the sentences to run consecutively. Assigning errors in the proceedings, defendant presented for review the record of his conviction. Pursuant to a former opinion the judgment below was affirmed. *Foreman v. State,* 122 Neb. 619. To give further consideration to the evidence and to the instructions of the trial court, reargument at the bar was allowed and presented. Upon a reconsideration of the record, a different conclusion has been reached.

A reexamination of the evidence, of instruction 9 in connection with counts 9, 13, and 14 of the information, and of other instructions, is essential to a correct determination of the proceeding in error.

Count 9 charged that defendant unlawfully made to the department of trade and commerce, with intent to deceive its secretary and others, a false statement in a report of an asset of the bank. As charged, the false asset reported in the statement consisted of a credit of $27,798.69 due from the South Omaha State Bank to the Farmers State Bank, though the actual credit did not exceed $17,798.69.

The record of the trial contains evidence to the effect that defendant had sent to the South Omaha State Bank his personal note for $10,000—the difference between the true and the false credit; that he immediately credited on his bank books the amount of his note; that the South Omaha State Bank rejected his note and refused the credit, contrary to former transactions of a similar nature; that his statement to the banking department reported the excessive credit without a correction of the bank books to eliminate the amount of the 10,000-dollar item as an asset.

Counts 13 and 14 also charged defendant with making felonious false statements of bank assets to the department of trade and commerce with intent to deceive its secretary and others.

The ninth instruction of the trial court to the jury is set out at length in the margin of the official report of this opinion.*

*Footnote.—"You are doubtless aware the state has not been able to produce a witness who testified as to what the defendant's intent was when he made or caused to be made book entries or statements as set forth in the counts of the information, except the testimony of William Nagel as to the ten-thousand dollars credit on the books of the Farmers State Bank of Overton, Nebraska, as alleged in counts 9, 11, and 12 of the information. But aside from this testimony the state does claim that it has connected the defendant with intentionally making said false book entries or statements to deceive the department of trade and commerce, or any person authorized by law to examine into the affairs of the bank in regard to the crime charged in each count of the information, not by direct and positive evidence, but by the testimony of witnesses and exhibits tending to prove a catalogue of facts and circumstances which the state claims presumably and circumstantially connects the defendant with intentionally making said false book entries or statements to deceive the department of trade and commerce as alleged in the counts of the information, by the evidence beyond a reasonable doubt.

"In this behalf you are instructed that circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eye-witnesses, and when it is strong and satisfactory the jury should so consider; neither enlarge nor belittle its force. It should have its just weight with the jury, and if, when it is all taken as a whole and candidly and fairly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations and circumstances which do not appear in evidence, but you should make those just and reasonable inferences from all facts and circumstances shown which the careful judgment of a reasonable man would ordinarily make under the circumstances.

"Such evidence, to justify a conviction, should be of such a character as to exclude every reasonable hypothesis other than the defendant's guilt, and that it was the intention of the defendant, Arthur A. Foreman, to deceive the department at the time he made or caused to be made the alleged false book entries or statements as set forth in the various counts of the information. And in this case, if you find from the evidence and circumstances beyond a reasonable doubt said alleged false entries were wilfully and knowingly made, that is sufficient as to the intent to deceive on the part of the defendant in making said entries, you should act accordingly."

The jury were therein instructed on the issue of felonious intent and on evidence of such intent. The statute under which defendant was prosecuted makes "intent" to deceive an element of the felony defined by the legislature. Comp. St. 1929, sec. 8-133; *Spearman v. State,* 120 Neb. 799. Under a plea of not guilty, intent to deceive a person authorized to examine into the affairs of a state bank is essential to a conviction in a prosecution against a bank officer for making false book entries of assets and false statements to the banking department and must be proved beyond a reasonable doubt. Where a statute makes intent to deceive an element of a felony, the issue as to such intent in a criminal prosecution is a question for the jury and not for the court, though evidence of guilt is uncontradicted. *Osborne v. State,* 115 Neb. 65; *Williams v. State,* 118 Neb. 281; *Grosh v. State,* 118 Neb. 517. In a prosecution against a bank officer for feloniously making to the banking department a false statement of the bank's assets, an instruction to the effect that false entries in bank books and false statements in reports prove intent to deceive a person authorized to examine into the affairs of the bank is erroneous. Evidence that accused made the false statements as charged and book entries showing them do not estop him from denying he thus intended to deceive. *Fricke v. State,* 112 Neb. 767. In an opinion by former Chief Justice Sullivan, he said:

"In the trial of an information charging a felony, the presiding judge is without lawful authority to determine the issue, or any of the questions of fact involved in the issue. That power belongs exclusively to the jury, regardless of the state of the evidence. They must be fully satisfied of the existence of every fact constituting an element of the crime charged, and it cannot be assumed that they are so satisfied because they ought to be." *Goldsberry v. State,* 66 Neb. 312.

In effect, instruction 9 invaded the province of the jury, judicially decided that evidence of defendant's false entries in bank books and reported false statements proved

felonious intent to deceive, deprived defendant of the jury's unfettered finding on that issue and applied the doctrine of estoppel to the element of unlawful intent charged in the information—all contrary to established rules of criminal law. The instruction went further, singled out and gave emphasis to evidence of the felonious intent of defendant to deceive, ignored his testimony that he had no such intent and disregarded the inference that he gave his individual note and entered on the books a prospective credit for the proceeds thereof with intent to save the bank. The criminal law is to the contrary. *Williams v. State*, 46 Neb. 704; *Chapman v. State*, 61 Neb. 888; *Clarence v. State*, 86 Neb. 210. The instruction is also objectionable as too argumentative. *Goldsberry v. State*, 66 Neb. 312. It is in conflict with the criminal law recently announced in *Fricke v. State*, 112 Neb. 767. Under the plea of not guilty, defendant was entitled to a trial in which the jury were permitted to pass on every element of the felony with which he was charged, including the intent to deceive. This fundamental right was denied. The error was prejudicial and cannot be explained away. It was not cured by other instructions or by estoppel of conduct attributed to defendant.

The word "statement" in connection with the felony defined by the legislature is used in the statute, in counts 9, 13, and 14 of the information and in instruction 9 given by the court to the jury. Instruction 9, therefore, applies to the three counts on which defendant was convicted.

For the reasons stated, the syllabus and the opinion reported in *Foreman v. State*, 122 Neb. 619, are withdrawn, the former affirmance vacated, the judgment of the district court reversed and the cause remanded for further proceedings.

REVERSED.

JENNIE R. KIMBALL, APPELLEE, V. F. L. HARDY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1932. No. 28270.

Landlord and Tenant: LEASE: ASSIGNMENT. Where a lessee vacated certain leased premises and transferred his interest therein to a third party who procured tenants and collected the rentals and agreed to "observe all the covenants in the lease of said premises to the said second party (the lessee) given by the owners thereof, and to save the second party harmless with reference thereto," *held*, that such agreement constituted the third party an assignee of the lease and that he is liable for any unpaid rentals due the plaintiff lessor.

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

H. N. Mattley and *Lester L. Dunn*, for appellants.

Chambers & Holland, contra.

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

DEAN, J.

This action was begun in the district court for Lancaster county by Jennie R. Kimball, the plaintiff, against F. L. Hardy and Benjamin H. Fogelson, the defendants, to recover $1,800 for certain rentals alleged to be due and owing the plaintiff pursuant to the terms of a written lease, and $80 under a plumber's lien. Fogelson filed a general denial. Hardy admitted the execution of the lease and that rent was due thereunder, but he alleged in a cross-petition that he had suffered damages in the following sums, namely: $425 for failure of the plaintiff to yield possession of the premises at the agreed time; $800 a month for four months' loss of business; $73.45 for the cost of repairing sidewalks adjacent to the rented property; $200 for damages resulting from failure to repair the roof; $350 for the cost of repairing a heating plant; and $500 for damages alleged to have been sustained in the installation of a new building front.

Upon submission, the jury returned a verdict in favor of the plaintiff and against the defendants for $1,757, upon which the court rendered a judgment. The defendants have appealed.

On or about June 17, 1926, F. B. Kimball and Jennie R. Kimball, the plaintiff, executed and delivered a lease of the property in suit to defendant Hardy, the lease to commence as of October 15, 1926, and to continue in effect until October 15, 1931, or for a 5-year period. A covenant of the lease provides that a total rental of $18,000 shall be paid by Hardy during this period, $900 of which was due when the lease was signed, $300 was due three months after date of possession, and $300 of which was to be paid every month thereafter. Under the terms of the lease Hardy was to do any necessary remodeling and keep the heating system in repair, and to install a new metal store front, all such improvements at the termination of the lease to become the property of the plaintiff. It may here be noted that, since the execution of the lease, the plaintiff, Jennie R. Kimball, has acquired the sole interest in and to the property.

It appears that, up to November 1, 1929, Hardy conducted a used car business in the leased building. At that time, as an inducement and in consideration of the sale by Fogelson to him of a half interest in a bowling alley, Hardy agreed to sell and transfer all cars and equipment located in the leased building to defendant Fogelson who, in turn, agreed to find tenants and collect the rentals on the leased building. In pursuance thereof, a written instrument was executed between the defendants wherein Fogelson agreed to pay the rental of the building, at the rate of $300 a month, from November 15, 1929, to November 15, 1931, and wherein it is provided that Fogelson shall "observe all the covenants in the lease of said premises to the said second party (Hardy) given by the owners thereof, and to save the second party harmless with reference thereto." The evidence discloses that any amount over $300 collected by Fogelson was to be his profit and

any amount under that sum was to be his loss, and that the average monthly rental amounted to $350 as collected by him.

The defendants deny that Hardy at any time assigned or intended under the agreement to assign the lease of the property in suit to Fogelson. The main question for determination then is whether the evidence is sufficient to constitute Fogelson an assignee of the lease.

The evidence of a tenant of the leased building discloses that the matter of rent was discussed by him with both the defendants, and that he at first paid the rentals to Hardy, but that, from April 16, 1930, until February, 1931, all rental checks were made payable to Fogelson pursuant to a conversation between himself and the defendants wherein it was remarked that Fogelson was taking over the lease. To substantially the same effect is the evidence of other witnesses who testified that they discussed the rental terms of the leased building with both of the defendants and that checks were at first sent to Hardy but later to Fogelson. Certain of these checks are in the record and tend to prove that, during the period for which the plaintiff seeks to recover rent, Fogelson received the rental checks from the tenants.

It has been stated: "A subletting for the entire term is an assignment of the lease, and privity of estate is created thereby between the landlord and the sublessee, and the sublessee, as assignee, is liable to the landlord for the rent specified in the lease." 36 C. J. 379. Elsewhere it is said: "Where a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease." 36 C. J. 373. See, also, *Hogg v. Reynolds*, 61 Neb. 758. "The general rule recognized in practically all jurisdictions is, that if a lessee conveys the leased premises for a period coextensive with his term, leaving no reversionary interest in himself, the conveyance is an assignment and not a sublease." 7 Ann. Cas. 537. And, in an early case, it was held: "Where leased premises were actually transferred by the

lessee, during the last month of the lease, for which rent had not been paid, the lessee vacating the premises and his successor taking possession, the lessor could, at his option, sue and recover from the lessee for the month's rent, or from his successor, treated as assignee, for the period of his occupancy under the agreement of transfer, though both the lessee and his successor denied that there was any assignment." *Grauer v. Rudinsky,* 111 N. Y. Supp. 530.

In the present case the evidence conclusively shows that Fogelson had possession and control of the property in suit from November 1, 1929, until February, 1931. And where the lessee vacated the leased premises and transferred his interest therein to a third party who procured tenants and collected the rentals and agreed to "observe all the covenants in the lease of said premises to the said second party (the lessee) given by the owners thereof, and to save the second party harmless with reference thereto," we conclude that such agreement constituted the third party an assignee of the lease and that he is liable for any unpaid rentals due the plaintiff lessor. Possession of the leased premises was surrendered by defendant Hardy to the plaintiff in a letter dated February 24, 1931. It is undisputed that the plaintiff had received no rent from September, 1930, to February 24, 1931, or for more than five months. The unpaid rent, and certain rentals due from a hamburger stand erected on the premises, together with interest thereon, all total approximately the sum found by the jury to be due the plaintiff under the terms of the lease, and we think the evidence is sufficient to support the verdict.

We have examined the allegations contained in the cross-petition of defendant Hardy and do not find merit therein. In respect of the alleged failure of the plaintiff to yield possession of the premises at the agreed time, the evidence discloses that Hardy was informed several months before he desired to move into the leased building that the parties then occupying it were uncertain when

they would move out and that it was therefore impossible for the plaintiff to name a positive possession date. And while the lease in suit was to commence as of October 1, 1926, it appears that the defendant Hardy did not begin paying any rental until February 15 of the following year because of the expense incurred by him in moving into a temporary location. Nor does it affirmatively appear that the delay in constructing a new building front was occasioned through any fault of the plaintiff. And in respect of the amount alleged to be due the defendant Hardy by reason of sidewalk repairs, the evidence tends to prove that the plaintiff constructed a driveway and sidewalk adjacent to the leased premises, as provided in the lease, but that Hardy caused additional work to be done at his own expense without informing the plaintiff. It appears too that, under the plaintiff's orders and at her expense, the roof of the leased building was several times repaired, and that Hardy did not thereafter complain in respect of leaks therein, nor did he at any time report to her any specific damage to cars in his business by reason thereof. The jury were correctly instructed in respect of the facts herein and the law applicable thereto. The judgment is

AFFIRMED.

STATE, EX REL. EMIL F. LUCKEY, COUNTY ATTORNEY, APPELLEE, V. LAWRENCE G. WEBER, APPELLANT.

FILED NOVEMBER 17, 1932. No. 28565.

1. Quo Warranto: TOWNSHIP OFFICERS: ELECTION: OATH. The provisions of section 26-242, Comp. St. 1929, that every person, before he enters upon the duties of his office, and within ten days after he shall have been notified of his appointment or election, shall take and subscribe, before some person authorized thereunto, an oath for the faithful performance of his office, and that he shall cause a certificate thereof to be filed with the town clerk, are mandatory and are applicable to the office of road overseer.
2. ———: ———: ———: ———. The neglect of a road overseer to comply with the provisions of section 26-242, Comp.

St. 1929, may be deemed a refusal by him to serve in that capacity.

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

McElfresh & Walker, for appellant.

Emil F. Luckey, contra.

August Wagner, amicus curiæ.

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

DEAN, J.

An information in *quo warranto* was filed March 9, 1932, by the county attorney in and for Platte county, against Lawrence G. Weber, the respondent herein, to oust Weber from the office of road overseer of road district No. 18, in Oconee township. The action is based on the ground that Weber failed to take an oath or affirmation before some person authorized to administer oaths that he would faithfully perform the duties of road overseer, and that he failed to have a certificate of such oath or affirmation filed, as required under section 26-242, Comp. St. 1929. From an order of the court ousting him from office, Weber has appealed.

The record discloses that Weber was a qualified elector of road district No. 18, and that he had acted continuously since January, 1927, in the capacity of road overseer; that at the annual township meeting, held January 19, 1932, he was reelected road overseer by the qualified voters of the district; that on January 23, 1932, notice of his election was received by Weber from the township clerk; and that, on February 13, 1932, Weber filed his oath and bond with the county clerk, such instruments being approved February 18 by the county board. It is also disclosed that Weber was notified in a letter from the township board, dated February 10, that he had failed to qualify for the position of overseer and that the office had

therefore been declared vacant. And about two weeks before the trial, Weber's road equipment was taken from him by the sheriff.

Section 26-242, Comp. St. 1929, contains the following provision, namely:

"Every person chosen or appointed to the office of town clerk, assessor, town treasurer, or overseer of highways, before he enters upon the duties of his office, and within ten days after he shall be notified of his election or appointment, shall take and subscribe before some authorized person an oath or affirmation to faithfully and impartially perform the duties of his office as prescribed by law, and shall cause a certificate of the same to be filed in the office of the town clerk."

And section 26-243, Comp. St. 1929, provides that if any person chosen or appointed to any of the town offices shall neglect to take or subscribe an oath, and cause a certificate thereof to be filed as required under section 26-242, such neglect shall be deemed a refusal to serve in the office in question.

It is the contention of respondent Weber that the legislature intended that township officers shall qualify and take office under the provisions of sections 12-101 to 12-121, inclusive, Comp. St. 1929, of the chapter entitled, "Bonds and Oaths, Official," which prescribe generally the procedure to be followed in giving bonds and the oaths thereunder. And Weber also contends that the legislature intended that, in the reelection of an incumbent to office, as in the present case, he shall qualify by taking oath and giving a bond in the manner so prescribed under the above chapter.

The oath and bond filed by Weber February 13, 1932, before the county clerk are in the record. The bond is contained on one page, at the bottom of which is an oath signed by Weber and by him subscribed in the presence of a notary public. It is Weber's contention that such oath and bond which he filed are a sufficient compliance with the law in the premises, and that it was not imperative

that he take an additional oath or affirmation, nor was it necessary that he have a certificate thereof filed with the town clerk, as provided under section 26-242, above cited. We do not agree with this contention. The provisions of section 26-242, Comp. St. 1929, that every person, before he enters upon the duties of his office, and within ten days after he shall have been notified of his appointment or election, shall take and subscribe before some person authorized thereunto an oath for the faithful performance of his office, and that he shall cause a certificate thereof to be filed with the town clerk, are mandatory and are applicable to the office of road overseer. And neglect to comply with the provisions of section 26-242 may be deemed a refusal to serve in the capacity of the office in question.

The respondent's compliance with the provisions of section 12-117, Comp. St. 1929, by the filing of his bond and the oath thereunder are not a sufficient compliance with the statute. We think the provisions of section 12-117 must be construed with those of section 26-242, and that, in addition to filing his oath and bond, it was imperative that the respondent should have taken an oath or affirmation to faithfully perform his duties, and that he should have caused a certificate of such oath or affirmation to be filed. By his failure to so qualify for the office, the township board was justified in deeming such neglect a refusal by the respondent to serve in the capacity of road overseer.

AFFIRMED.

LOUIS SCHESCHY, APPELLEE, V. WILLIAM BINKLEY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1932. No. 28250.

1. **Schools and School Districts:** CONTRACTS: LIABILITY. Although contracts for construction of school building and for purchase of supplies are unenforceable, district is liable for reasonable value of that which it retains and uses. Comp. St. 1929, sec. 79-513.
2. ———: EXPENDITURES: SUIT BY TAXPAYER: LACHES. Tax-

payer must act with reasonable promptness to maintain a suit to prevent irregular or unlawful expenditure of money by a school district. Whether laches constitutes defense in suit in equity depends on particular facts.

3. ———: ———: ———: ———: PLEADING. To be available as a defense, laches and estoppel must be pleaded.
4. ———: ———: ———: DEMAND. Demand upon officers is necessary before taxpayer has right to maintain a suit for the recovery of funds for school district.
5. Examination of evidence discloses insufficiency to support judgment against officers of district.

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

W. C. Dorsey, Leslie F. Johnson and *Walter R. Johnson,* for appellants.

Daniel J. Gross and *Grenville P. North, contra.*

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

DAY, J.

This was a suit in equity brought by a resident and taxpayer of school district No. 61 of Douglas county on behalf of himself and all other taxpayers similarly situated for an accounting and to recover from the appellants for the benefit of the district funds which they were alleged to have unlawfully received. The petition alleges that each of the appellants herein were at various times treasurer of the district and that they had never accounted at the end of their respective terms for the funds that came into their hands as treasurers according to the law. It is further alleged in the petition that the plaintiff has demanded that school district No. 61 by and through its proper officers bring this suit for an accounting against the said treasurers, the appellants herein, and that said officers of said school district have failed and refused to bring this suit.

The defendants deny the charges generally and particularly denied that the appellant Claussen was ever treasur-

er, and alleged that the accounts as treasurer of the other two appellants are correct and comply with the requirements of the law. The appellants Binkley, Claussen, and Wurth appeal from a judgment rendered against them by the trial court. Other officers of the district were parties defendant, but judgment was not entered against them and no issue is presented to this court relative to them.

Much testimony was introduced at the trial of the case relative to the history of the transactions of the school district for a period covering ten or more years. Most of it concerns itself with the building of temporary buildings prior to the erection of the present brick schoolhouse. This appears to have been a district in which the school population was rapidly increasing and required additional room from year to year. The evidence emphasizes the fact that in 1922 the appellants Claussen and Binkley, who at that time were members of the school board, worked on the construction of a new temporary building and were paid by the district for such labor. Later, in 1924, the evidence relates to money paid to Binkley and Claussen for moving an old building and fixing it up for temporary school purposes.

The items for which the plaintiff seeks recovery and for which the trial court allowed recovery were for payments made to these officers of the district for items of merchandise. One of the most frequent items was for gasoline. There is no evidence in this record that the gasoline was not furnished; that the district did not get the benefits of its use; nor that the price for which it was furnished was unreasonable. There was evidence that certain sums were paid to the appellants Binkley and Claussen first in 1922 and later in 1924 for work and labor upon temporary building construction. There is much evidence as to what took place, accompanied by insinuation and inuendo. The evidence is undisputed that the plaintiff in this case knew about this work and once worked with them in 1924 in moving an old building to the school site for a temporary schoolroom. The district has had the benefit of this labor

as well as the items of merchandise heretofore mentioned. The district cannot retain the benefits and not pay for the improvements. *Grand Island Gas Co. v. West,* 28 Neb. 852; *Omaha Road Equipment Co. v. Thurston County,* 122 Neb. 35.

The plaintiff relies upon section 79-513, Comp. St. 1929: "No school officer shall be a party to any school contract for building or furnishing supplies, except in his official capacity as a member of the board." It is upon this premise that the plaintiff suggests that a recovery is justified. We have construed similar statutes and have uniformly held that such a contract is not enforceable; that nevertheless the governmental unit used it and is liable for the reasonable value of the merchandise which it retains and uses. *Omaha Road Equipment Co. v. Thurston County,* 122 Neb. 35. Recovery is not upon the theory that the contract was a valid one, but upon the theory that it would be inequitable and unconscionable to permit the retention of the benefits and permit a division of the government to avoid payment therefor. The statute relating to counties construed in the above case is much stronger than the present statute. Likewise, in *Grand Island Gas Co. v. West,* 28 Neb. 852, we said: "All officers of a city are prohibited from being directly or indirectly interested in any contract or agreement to which the city, or any one for its benefit, is a party, and such contract may be avoided by the city." But that, "inasmuch as the city has accepted the benefits of the contract, it must do equity * * * must pay * * * the reasonable value of the light received by it, prior to the commencement of the action."

This rule finds support in many earlier cases in this and other courts. In *Clark v. Dayton,* 6 Neb. 192, it was held: "Although this contract was illegal by reason of the failure of the commissioners to advertise for proposals under a plan and specifications, still the contractor having completed the bridge, and the same having been accepted by the commissioners, he is entitled to compensation. Under

such circumstances payment will not be enjoined at the suit of a taxpayer."

"When valuable services are rendered a county under a void contract, the county will be liable for the value of the benefits so received if the county board could have made a valid contract for such services." *Huctead v. Richardson County,* 104 Neb. 27.

"One who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by the statute, is entitled to recover their reasonable value, in the absence of a statute * * * denying such right." *Cass County v. Sarpy County,* 66 Neb. 476, rehearing denied, 72 Neb. 93. See *Bankers Trust Co. v. Rood,* 211 Ia. 289, 73 A. L. R. 1421.

Let it be remembered that there was no contract, but that the district through its officers attempted to and did build its own buildings. The thing furnished to the district by the appellants herein in this connection was labor and, in the absence of evidence proving that there was fraud in the matter or that the charges were unreasonable, which there is not in this case, there can be no recovery in this suit.

These transactions relate to the building of the schoolhouse occurring in 1922 and 1924, ten and eight years ago. The plaintiff in this action and those most interested with him in its prosecution, including every witness for the plaintiff, knew all about the transaction at the time and for all these years since. In fact, some of them also worked upon the project with the appellants. "A taxpayer * * * must act with reasonable promptness. If he is guilty of gross laches, and knowingly permits the contractor to incur liabilities in good faith in the construction of the greater portion of the work, an injunction will be denied." *Brown v. Merrick County,* 18 Neb. 355. Whether laches constitutes defense in a suit in equity depends upon particular facts. *Tombrink v. Sarpy County,* 120 Neb. 160. "Laches does not * * * grow out of the mere passage of time; but is founded upon the inequity of permitting

the claim to be enforced." *Geiss v. Trinity Lutheran Church Congregation,* 119 Neb. 745. The defense of laches and estoppel is not pleaded in this case. There is a conflict of authority upon this question with other authorities, about equally divided numerically. However, in this state, in order to be available in a defense, it must be pleaded. *German Nat. Bank v. First Nat. Bank,* 55 Neb. 86; *Keller v. Harrison,* 151 Ia. 320.

The plaintiffs have alleged in their petition that they made a demand upon the officers of the school district to present this suit. There is no evidence in the record that any demand was made upon the officers at the time of the bringing of the suit or at any other time. Usually a demand is essential to the right of a taxpayer to maintain an action for the recovery of funds for the district. *Reed v. Cunningham,* 126 Ia. 302.

It is now contended that a demand would have been useless, and that one is not required to do a useless thing. *Folts v. Globe Life Ins. Co.,* 119 Neb. 143, and other cases are relied upon; but an examination of the record reveals that there is no evidence to support a finding that a demand would have been useless.

Lest we forget, this was a suit for an accounting against the various treasurers and officers of the district. The records were brought into court by the plaintiff's witness who was treasurer of the district at the time the suit was instituted; his term having since expired, he had retained the books apparently for the purpose of this lawsuit. These books accounted for the receipt and disbursement of all money.

The money having been accounted for, there was nothing more to the suit unless it had been fraudulently disbursed. In order to recover, it would be necessary to prove either that the amount paid for merchandise and labor was not a fair and reasonable price, or that the school district did not get the benefit of the expenditure. This is not to say that the district should continue to buy supplies from members of the board. The law does pro-

hibit contracts between the district and its officers. It could and should be stopped in a proper suit.

The evidence in this case is not sufficient to support a finding either that the appellants have failed to account or that they have received and used money for which the district has not received benefit. In accordance with this finding, it follows therefore that the judgment of the district court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

MCGREW MACHINE COMPANY, APPELLANT, V. ONE SPRING ALARM CLOCK COMPANY, APPELLEE.

FILED NOVEMBER 17, 1932. No. 28292.

1. Trial: VERDICT. If jury returns verdict in favor of plaintiff which shows an allowance of part of defendant's claim in cross-petition, it is not error to refuse to direct the jury to return and deliberate further, and to show in verdict the amount allowed on cross-demand.
2. Judgment. It is not error for the trial court to enter a judgment on a general verdict when action is based on several causes of action and counterclaims thereto, although the jury might, if proper instructions were asked and allowed, have returned separate verdicts on each.
3. Trial: VERDICT. Responsibility for returning a true verdict is upon the jury, and it is a matter of accommodation, and not a legal requirement, that the trial judge supply forms of verdict to the jury.
4. ———: ———. If the judge does not submit forms of verdict to the jury, he is required to give more clear, detailed and specific directions as to the various findings allowable.
5. ———: ———. Objections to the mere form of a verdict should be made prior to or at the time it is rendered, and before the jury is discharged, so that the judge may direct the jury to correct the same.
6. Damages. Nominal damages mean no damages at all, or damages that exist in name, but not in amount. In some cases, nominal damages are spoken of as a mere peg to hang the costs on.
7. Appeal: VERDICT. If the trial judge has good reason to believe that the submission to the jury of requested interrogatories for

special findings may confuse the jury, it is not an abuse of discretion for him to refuse to give them to the jury.

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

Mockett & Finkelstein and *Tyler & Peterson*, for appellant.

Jessen & Dierks, contra.

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

PAINE, J.

Plaintiff, who was the appellant in this court, sued defendant and appellee for $7,484.14, due upon certain contracts to manufacture and deliver parts of its one spring alarm clock. Defendant claimed the parts furnished were not made according to specifications, and were of no value whatever, and in a cross-petition defendant asks judgment against plaintiff in the sum of $17,399.43. The jury returned a verdict for the plaintiff in the sum of $1,000, for which amount judgment was entered on October 8, 1931, with 7 per cent. interest. Plaintiff, being dissatisfied with the verdict returned in its favor, filed a motion for new trial, setting out 57 errors therefor. From an overruling of the motion for new trial, plaintiff gave a supersedeas bond of $400 and appealed to this court to reverse and set aside said verdict and judgment.

In this case we find the record is very extensive, with 153 pages of briefs, three volumes in the transcript and bill of exceptions, with a fourth heavy volume of blueprints and order sheets, and a large box of exhibits of parts of, and also complete, alarm clocks. It would take many pages in this opinion to give a complete synopsis of the pleadings and the evidence set out in this mass of material, and if this opinion is to be kept down to an acceptable length it must be limited to a brief summary.

A. F. Kendle, who had resided in Syracuse, Nebraska, for 30 years, and was a jeweler and watchmaker by pro-

fession, invented a one spring alarm clock, after working on it for six or eight years, and made by hand an excellent working model. The Reliance Die Shop in Chicago under his direction completed certain parts thereof, and a number of his friends then organized at Syracuse the One Spring Alarm Clock Company, the defendant herein, for the manufacture and sale of this new clock. Negotiations were begun with the plaintiff company for the purpose of manufacturing dies, from which parts could be made, and also of perfecting and manufacturing the various parts of the same, so that this clock could be put out on a commercial basis. After several years, the relations between the companies became very unsatisfactory, and the plaintiff brought suit in Otoe county.

The petition sets out several causes of action, the first one being upon an oral agreement entered into prior to January 14, 1929, to perform certain services on a cost plus basis, which services were performed and goods furnished amounting to $2,111.51. It is admitted that payments were received of $769.45, leaving a balance due thereon of $1,342.06.

For a second cause of action, the plaintiff said there was a balance of $2,373.58 due under a written contract dated April 2, 1929, for special dies, limit gauges, and wheels. For answer to this, the defendant stated that it had paid $8,000 to Chicago die makers for dies which were delivered to the plaintiff, and that the parts made by plaintiff were not up to standard in material and workmanship, or according to the specifications, and said articles were refused, and denied there was anything due thereon.

In its third cause of action, plaintiff sued for 2,000 sets of parts of the one spring alarm clock, at a cost of $1.30 a set, a total of $2,600, upon which $200 was paid, leaving $2,400 due. The defendant, for answer to this, alleged that the plaintiff did not use material equal to the material in the model clock, and, of the sets furnished, only 200 were used, which, however, the defendant was compelled to work over by hand before they would meet the specifi-

cations and requirements, or could be used, and that the other sets, 1,800 sets, were returned to the plaintiff as unsatisfactory.

The plaintiff's fourth cause of action was for certain pinion wire, which, it is alleged, the defendant had agreed to take off plaintiff's hands if it was not entirely used, and that there was $944.40 due for the value of the wire left on plaintiff's hands, which facts defendant denies. Plaintiff, therefore, sues for a total sum of $7,484.14.

The defendant, in its cross-petition, claims that all payments made by it were made under a written contract, being exhibit 2, dated April 2, 1929, under which the plaintiff company agreed to make all dies required for the 12 wheels for a sum not to exceed $2,500, to make special tools for the Brown & Sharp automatic screw machine for not to exceed $500, to make limit gauges for not to exceed $800, which sums the defendant agreed to pay in part payments as the work progressed, and alleged that the plaintiff agreed that all work would be according to specifications, and would guarantee the same as to material and workmanship, and that only when the tools and dies were completed and approved would the unpaid balance be due and payable. Defendant alleges that, as the plaintiff failed to turn out satisfactory work, there has been a complete failure of performance under the contract, exhibit 2, and that, except for $81.98, express charges paid, and $13.32 for telephone calls, all other payments made under the terms of exhibit 2 should be returned to the defendant for entire failure under the terms of the contract, and that therefore the defendant is entitled to recover the sum of $2,339.43.

The plaintiff, for answer to the first cause of action of defendant's cross-petition, alleges that all dies and tools were made of first grade materials, and perfectly performed the operations for which they were intended, and that part of the money paid to the plaintiff was for extra work not provided in the contract, exhibit 2, and denied all other allegations.

At the close of the evidence, the court withdrew from the jury the second, third, and fourth causes of action of the defendant's cross-petition, on the ground of failure of evidence to support the same.

This brief statement is a mere outline of the voluminous pleadings, and will indicate the many issues contested and the wide scope of the evidence taken in support thereof.

The trial judge gave some 12 instructions, which covered all the issues involved in a fairly satisfactory manner, and in his refusal to give 17 additional instructions requested by the plaintiff is based a large number of the errors set out.

1. Plaintiff claims that the jury entirely disregarded the evidence and the instructions, and returned a verdict not supported by either, and that a new trial must be granted.

As one ground for reversal, the plaintiff insists that, by returning a general verdict, the jury necessarily found in favor of the plaintiff on every material issue raised in the pleadings, including all four causes of action.

Defendant insists that the verdict of $1,000 conclusively establishes the contrary. Upon the return of the verdict, the plaintiff did not except to it, but the defendant claims it excepted to it for the reason that it did not find the amount allowed the defendant upon its set-off, and moved the court that the jury be required to correct the verdict in this respect, which motion was overruled.

In *Everson v. Graves,* 26 Neb. 262, suit was brought on two promissory notes, which defendant admitted executing, but presented a set-off, and, as a result of the trial, a verdict was returned by the jury in favor of the plaintiff, and Chief Justice Reese held that, if a cause was submitted to a jury upon the demand of plaintiff and the cross-demand of defendant, and the jury returned a verdict in favor of the plaintiff, which showed an allowance of part of the defendant's set-off, it was not error on the part of the district court to refuse to order the jury to re-

tire and return in their verdict the amount allowed in the set-off.

2. Plaintiff also insists that, where several causes of action are joined in the same proceeding, and pleaded separately, separate verdicts should be returned on each cause of action, and cites us to *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, in which case, brought by an administratrix to recover damages for the death of Roy B. Hindmarsh, there were two separate causes of action, though not separately pleaded, and the jury returned a single verdict in the sum of $4,000, and, while it is held that the two separate causes of action should be separately pleaded and separate verdicts returned, yet in the case cited the judgment was affirmed upon one general verdict being returned. Plaintiff also cites us to *Schmuck v. Hill*, 2 Neb. (Unof.) 79, in which Commissioner Pound held to the same effect, that, if several causes of action are set up in a petition, a separate verdict upon each is not improper.

The plaintiff charges that, when the defendant denies the allegations of a cause of action and pleads a counterclaim, a general finding is sufficient to dispose of both issues, and cites us to the case of *Guthrie v. Brown*, 42 Neb. 652, in which an equity action was referred to a referee and, upon the report being filed, trial was had to the district judge upon the evidence taken before the referee, and a general finding and single judgment was entered by the district judge, and Commissioner Irvine held that it was not necessary to make a separate finding upon the counterclaim, but that the judge could dispose of both issues with a single entry, and section 20-818, Comp. St. 1929, holds that two such demands may be deemed compensated so far as they equal each other.

3-5. In the case at bar, the form and number of verdicts to be returned by the jury is discussed from many angles, and it may be stated that the responsibility for returning a true verdict rests upon the jury. It is a matter of accommodation, and not a legal requirement, that the

trial judge supply the jury with the proper forms in any given case. *Birdsall v. Carter,* 11 Neb. 143.

It is a general rule that, where the judge assumes to submit forms of verdict, he should not omit therefrom any one or more forms of verdict which may properly be returned on any of the issues.

While the trial judge is not required to submit forms of verdicts to the jury, yet, if he does not, he is required to give clear and specific directions as to the various findings allowable, and complete information as will enable the jury to prepare its own verdict, to avoid uncertain and indefinite verdicts being prepared and returned by a jury.

It is good practice for the judge to prepare forms of verdict which will meet all requirements of the case, and, in an abundance of caution, submit the same to the counsel in the case, and, if they do not agree on the forms, counsel should make his objection at that time, before the instructions are read to the jury. If no objection is made by counsel at that time, it is usually considered that objections are waived. *Hamilton Investment Co. v. Bollman,* 268 Fed. 788; *Kelley-Clarke Co. v. Leslie,* 61 Cal. App. 559; *Vaughan v. Farmers & Merchants Bank,* 146 Ga. 51; *Freeby v. Town of Sibley,* 183 Ia. 827; 27 R. C. L. 858, sec. 30; *O'Connell v. United States,* 253 U. S. 142.

In the case of *Walter v. Louisville R. Co.,* 150 Ky. 652, Ann. Cas. 1914D, 441, we find this statement: "Moreover, appellant did not object to the form of the verdict at the time it was rendered, but treated it as sufficient for the purposes of the case, and permitted the jury to be discharged without objection. If appellant had desired to raise the question of the sufficiency of the form of the verdict, he should have done so at the time it was returned, in order that the court might, as would have been its duty, have directed the jury to correct the form of its verdict so as to conform to the law."

We see no reversible error in the procedure adopted in this case, for counsel objecting furnished no forms of verdict to the court, and called attention to the matter only

after the verdict had been received and filed and the judgment entered thereon.

6. Again, the plaintiff insists that a verdict for nominal damages, contrary to instructions to allow it substantial damages, if the verdict was in its favor, should be set aside, and cites in support of its contention the case of *Meier v. Bridgeport Irrigation District*, 113 Neb. 344, in which case a suit was brought for damages to crops on account of the failure of an irrigation district to furnish water, the prayer asking for $13,343. At the trial the jury returned a verdict for only $1, and this court held that the verdict should be set aside on that ground. By the term "nominal damages" is meant a trivial sum, which recognizes a right, but makes no adequate return therefor. It has been said that a return of nominal damages is really no damages at all, but a mere peg to hang the costs on. *Rainier v. Masters*, 79 Or. 534, L. R. A. 1916E, 1175. In the case of *Berney v. Adriance*, 142 N. Y. Supp. 748, it was held that a verdict for $2,500 is not for a trifling sum, and therefore not nominal damages. "Nominal damages mean no damage at all—that they exist only in name, and not in amount." 8 R. C. L. 423, sec. 4. Certainly this court will not set aside a verdict for $1,000 on the ground that it is but nominal damages.

7. It is insisted in this case that special findings should have been returned by the jury. This court has frequently held that, even though many vital issues are set out in the pleadings, the district court is not required to direct the jury to return special findings. And, further, if special findings are requested by either of the parties in a case prior to the time of reading the instructions to the jury, that it is entirely a matter within the discretion of the trial court whether such request for special findings will be submitted or refused, and that exceptions should be taken thereto, and a denial of the submission of such findings will not be reviewed by this court except for abuse of discretion. *Town v. Missouri P. R. Co.*, 50 Neb. 768; *Buel v. Chicago, R. I. & P. R. Co.*, 81 Neb. 430; *Reed v.*

McRill, 41 Neb. 206; *First Nat. Bank v. Miltonberger,* 33 Neb. 847. Section 20-1121, Comp. St. 1929, clearly indicates that the court may direct the submission of such issues to the jury, and that the jury itself render a special verdict without direction from the court.

In *Thompson v. Thompson,* 49 Neb. 157, the jury were directed to answer certain special interrogatories. They returned these answers into court with their general verdict, and the same were received and recorded, without any protest or objection from any one. It was insisted in the supreme court that, the foreman of the jury having failed to sign the answers to the special interrogatories, the court erred in rendering judgment thereon. It was held by this court that such objections should have been made to the trial court at the coming in of the verdict, and that it was too late to make them afterwards.

Frequently the jurors are confused by attempting to make answers to special findings submitted, and the result is that these answers do conflict with the general verdict. In *Karr v. Brown,* 112 Neb. 626, the general verdict was for $422.04, while the answers to the special findings indicated that it should be for $71.96. Therefore, as under section 20-1120, Comp. St. 1929, the special finding of facts controls the general verdict, it was necessary to affirm the case on condition that a remittitur be filed for the difference. See *Walker v. McCabe,* 110 Neb. 398; *McClary v. Stull,* 44 Neb. 175; *Kafka v. Union Stock Yards Co.,* 78 Neb. 140.

In the case at bar, there is no record that requests for special findings were submitted to the trial court, which should have been done, and his denial thereof made a part of the record, if a reversal is to be based thereon.

Many errors are laid on the giving, and refusal to give, of various instructions, but it appears to this court that all of the important matters were concisely covered in the 12 instructions submitted, and no vital feature was overlooked, and that the refusal of the court to give the 17 instructions submitted resulted in no prejudicial error.

Payne v. Clark, 117 Neb. 238; *Sonneman v. Atkinson,* 121 Neb. 752; *Trussell v. Ferguson,* 122 Neb. 82.

We see nothing in this record to support any lack of good faith in the conduct of either party. The defendant was undertaking to perfect and place on the market a new one spring alarm clock. It was found, for instance, in practice that, when the hole punched by the die in one of the many wheels therein was off center the slightest fraction of an inch, the clock would not keep satisfactory time, and when sold would be returned by the customer. The parties hereto worked under a written contract, as well as oral contracts and verbal understandings, and the court is unable to discover in this record any deliberate attempt by either party to overreach the other. The plaintiff knew the purpose of the work it was employed to do, and the article manufactured from the dies and parts furnished by the plaintiff failed to perform in the same accurate manner as the original clock made by the inventor by hand, and the clocks were not salable. The result was the loss of all the stockholders invested in the defendant company, and the jury considered all of these questions, and finally returned a verdict for $1,000 for the plaintiff company as the amount they were entitled to under the evidence. This court sees no good reason to set the verdict and judgment aside.

AFFIRMED.

Rose, J., took no part in the opinion.

ARTHUR E. MCCAULEY V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1932. NO. 28350.

1. **Contempt: PROCEDURE.** A proceeding against a party for contempt in this state under section 20-2121, Comp. St. 1929, is in the nature of a criminal prosecution, and is governed by the rules of construction applicable thereto.
2. ———. Courts are charged with the duty and necessity of guarding their proceedings against everything which interferes with due and orderly administration of justice.

3. ———: SENTENCE. Sentence of six months in the county jail and a fine of $250 for contempt of court in attempting to bribe a juror engaged in the trial of a case *held* not excessive.

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

Hugh J. Boyle, for plaintiff in error.

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

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

PAINE, J.

This was a trial to the district judge for contempt of court, and the defendant was found guilty, and sentenced to serve a term of six months in the county jail of Holt county and to pay a fine of $250.

Upon December 24, 1931, an information was filed in the district court for Holt county by the county attorney, charging Arthur E. McCauley with contempt of court, in that he approached George Gilman, one of the jurors then engaged in the trial in the district court in the case of State of Nebraska v. John M. Flannigan and James C. Flannigan, and said to him: "Well, you fellows are about through up there. If this jury is hung and you come up to my office in Atkinson there will be $50 in it for you." It is further charged in the information that said conversation was then and there wilfully intended to influence the action, judgment and decision of said juror, George Gilman, and was a wilful attempt to obstruct said proceedings and a wilful attempt to hinder the due administration of justice, and was a contempt of the said district court. Upon this an order was issued by the district judge, under which an attachment for contempt was issued by the clerk of the court to the sheriff, directing that the defendant be brought into court. An answer was filed by the defendant, admitting that George Gilman was a member of the jury, as alleged, and denying all other allegations.

Upon January 2, 1932, the defendant was duly arraigned, and entered his plea of not guilty, the defendant being present in court and appearing by M. F. Harrington, his attorney, and the state being represented by Julius D. Cronin, county attorney.

At the trial, George Gilman, the juror, being the first witness called by the state, testified that he had known Mr. McCauley by sight for a good many years, and met him about 5 o'clock, after the jury had been discharged for the day, in front of the Medlen butcher shop, and that the conversation occurred, as charged in the information, to the effect that he would give the juror $50 at his place of business in Atkinson if the Flannigans were acquitted. That in reply to this offer on the part of the defendant, he testified: "I told him to go to hell, and went on into the butcher shop." The defendant denied that he had ever spoken to Juror Gilman in his life, although he was acquainted with his brothers. The defense rested largely upon an alibi, and the defendant testified that he attended the trial of the Flannigans, and that court adjourned, on the evening of December 17, about 4:10, and that he and his wife, upon leaving the courtroom, separated, and that he immediately drove to Atkinson with one Thomas Donlin, and that by 5 o'clock, the time it was charged the offense was committed, he was in Atkinson, and not in O'Neill. That he left O'Neill within 15 minutes after court adjourned, and arrived there about 5 o'clock, and went into his restaurant, which is a small place, having nine stools, and talked to his partner, Alvin Heying. That he went there to get some one to take his place in the restaurant that evening, as he wanted to be free to accept an invitation to go to Judge Harrington's for supper at 6 o'clock in O'Neill. That he left Atkinson again at 20 minutes to 6, and drove right back to O'Neill with Thomas Donlin, reaching there about 6:15 and parking the car right in front of Judge Harrington's office. That he got his wife from Helen's Hat Shop, where she had been waiting, and, with Judge Harrington, walked to the judge's

home. The following witnesses, his wife, Mrs. Arthur E. McCauley, Thomas Donlin, High Nightengale, Charles Davis, Clarence Sauser and Alvin Heying, each were called by the defendant in his behalf, and testified in support of this alibi.

J. J. Harrington testified that he asked for an adjournment of the Flannigan case at about 4:10 on the afternoon of December 17, on account of lack of witnesses, and that Judge Dickson desired to run until 5 o'clock, but finally consented to take a recess about 4:10. He testified that Mr. and Mrs. McCauley had dinner that evening at his home and they played pitch for a while.

After several witnesses had been called by each side, both the defendant and the state rested. Arguments were made to the court, and the case was continued for further proceedings. Upon January 4, 1932, the court, after due consideration, found the defendant guilty, as charged, and continued said cause for sentence.

On January 5, 1932, the defendant filed a motion for new trial, setting out six alleged errors. Upon January 22, 1932, cause came on for hearing upon the motion for new trial filed by the defendant and the affidavits in support thereof, and the county attorney desiring to reopen the case and submit further testimony, the court found that the defendant's motion for new trial should be sustained, and so ordered. Whereupon, further testimony was heard on behalf of the defendant and the state, and each party rested. Thereafter the defendant asked leave to withdraw his rest and offer exhibit 2, which was allowed. The case being submitted to the court upon the information, pleadings, and all of the evidence, the court found the defendant guilty of contempt of court. Thereupon, the defendant filed a motion for new trial, being the same and identical six grounds set out in the motion for new trial filed January 5. The second motion for new trial being overruled, defendant was sentenced to the county jail of Holt county for six months and to pay a fine of $250. Upon January 25, 1932, a writ of error was allowed by

the district judge, bond of $1,000 filed, and sentence suspended pending appeal to this court.

The second motion for new trial set out only these assignments of error: That the finding of the court that the defendant was guilty was not sustained by sufficient evidence; was contrary to the evidence; was contrary to the law; that the defendant should have been found not guilty; for errors excepted to during the trial; and set out no other assignments of error. However, in the argument it is insisted that, when the first motion for a new trial was sustained upon January 22, and additional evidence taken, consisting of 36 pages, being the evidence of four witnesses called by the state, four witnesses called by the defense, and one called by the court, it was not sufficient to sustain the conviction of the defendant, being clearly supplementary to the evidence taken at the first hearing.

It is perfectly clear, from a reading of the evidence and the record, that the case was opened up for the introduction of additional evidence on each side, and that it was understood between the attorneys and the court that all of the evidence taken at the trial upon January 2 and the additional evidence taken upon January 22 should be considered by the court in arriving at a decision in the case, the conduct and record of both parties being the same as if they had withdrawn their respective rests and been given the right to add more testimony.

In examining this bill of exceptions, prepared by direction of defendant's counsel, we find that it embraces all of the evidence taken upon both days, and not simply that taken on the last day, after the motion for new trial was sustained. This complete bill of exceptions was submitted to the county attorney of Holt county as defendant's bill of exceptions, and, in allowing the bill of exceptions, the judge of the district court attached his certificate thereto, stating that he had examined the above and foregoing bill of exceptions, and, as a part of the certificate, we find this statement of the trial judge: "I further certify that the finding of the defendant, Arthur E. McCauley, guilty of

contempt of court on the 22d day of January, 1932, was based upon the entire evidence taken in the case; both the evidence submitted by both sides at the hearing commencing January 2, 1932, and the additional hearing on January 22, 1932, and that this cause was submitted upon said entire evidence, and not upon the additional testimony taken on January 22, 1932;" and under this statement the court approved the bill of exceptions upon March 19, 1932. No objection was made to this statement in the certificate by the defendant's counsel.

A proceeding against a party for contempt in this state is in the nature of a criminal prosecution, and is governed by the rules of construction and practice applicable thereto. *Connell v. State,* 80 Neb. 296. And a judgment for contempt is reviewed on error in the same manner as criminal cases. *Zimmerman v. State,* 46 Neb. 13.

In the federal court it has been held that one may be held for contempt for communications with jurors, and it is not necessary to prove that the communications had, or acts done, were accompanied by a wrongful intent, it being sufficient if they would have a tendency to improperly affect the action of the jury. *Kelly v. United States,* 250 Fed. 947.

In a Kentucky case, the defendant, charged with misdemeanor, approached a member of the petit jury for the term during which he was to be tried and offered to pay him a certain sum if he would qualify as a juror in his case and hang the jury, and he was held guilty of criminal contempt. *Mitchell v. Commonwealth,* 206 Ky. 634.

In an Iowa case, a juror during a trial drank in a saloon with the brother of the defendant and one of his witnesses, and on examination on *voir dire* had falsely said he had expressed no opinion on the case. It was held that the court did not exceed its rightful powers in adjudging said juror to be in contempt of court, for trial courts are charged with the duty and necessity of guarding their proceedings against everything which interferes with the due and orderly administration of justice. *Murphy v. Wright,* 167 Ia. 75.

In a Nebraska case, where an interested party invited a juror to meet him at the Paddock hotel in Beatrice that evening, and then took him to a saloon and attempted to find out how he stood in the case, whereupon the juror told him to "cut it out," it was held that even this inquiry was contempt of court, and the wrong-doer was punished. *Emery v. State,* 78 Neb. 547, 9 L. R. A. n. s. 1124.

And one has been held guilty of contempt for telling a juror on the street that he did not believe the testimony of certain witnesses called in the case. *State v. Brewer,* 1 W. W. Harr. (Del.) 363. And courts have even gone so far as to hold that approaching a venireman and expressing sympathy for the defendant's family, and also when a person expressed an opinion as to the defendant's guilt, such person could be held guilty of contempt. *State v. Broxson,* 163 La. 94.

In the case of *Sinclair v. United States,* 279 U. S. 749, 63 A. L. R. 1258, the United States supreme court affirmed the conviction for contempt where the act consisted simply in hiring 15 operatives of the Burns International Detective Agency to shadow the jurors in the case of United States v. Harry F. Sinclair and Albert B. Fall, and where none of the detectives approached or communicated with a juror, or attempted to do so, and even though no juror may have been conscious of being under observation.

Section 29-2308, Comp. St. 1929, provides, among other things: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." And while the record may not be as full and complete as might be desired, to show the exact procedure followed in the case, yet no question is raised in the motion for new trial relating thereto, and we are convinced that no substantial miscarriage of justice has actually occurred.

It is provided in section 20-2121, Comp. St. 1929, that any wilful attempt to obstruct the proceedings of courts, or hinder the due administration of justice, is a criminal contempt, and may be punished by fine and imprisonment. The trial court saw the witnesses who attempted to substantiate the alibi of the defendant, he noted their demeanor and conduct under direct and cross-examination, and rejected their evidence. He was in a better position to judge of their credibility than this court.

We have carefully considered the sentence meted out to the defendant; the jail sentence is the same as that given to Sinclair in the case hereinabove discussed. Justice McReynolds, in closing his opinion in that case, said: "Considering the whole record, we think appellants had a patient hearing upon adequately defined issues, with abundant opportunity to put forward all proper defenses and explanations. * * * The punishments imposed are not excessive; the court kept within the limits of its reasonable discretion and did nothing which injuriously affected the substantial rights of the parties."

As the attempt of the defendant to bribe the juror had no effect upon the juror, who respected his oath and intended to carry it out, it might be argued that the sentence was rather severe, but the success or failure of a criminal undertaking of this kind has nothing to do with the question of guilt or of punishment. This court is not disposed to interfere too much with trial judges who do all in their power to keep sources of justice pure, and in seeing to it that trials before them are conducted in orderly and proper manner, the offense of tampering with a juror should not be lightly passed over, or regarded as of little moment, and all judges must protect the dignity of their courts. We therefore affirm the judgment and sentence of the trial court.

AFFIRMED.

IN RE ESTATE OF JOSEPH BLOCHOWITZ. FRANK J. BLOCHOWITZ, APPELLANT, V. ALBERT J. BLOCHOWITZ ET AL., APPELLEES.

FILED NOVEMBER 25, 1932. No. 28289.

1. **Executors: APPOINTMENT: "LEGALLY COMPETENT."** In the statute providing for the appointment of the nominee in a will as executor, the words "legally competent," with the context, mean fit or qualified to act as officer of the court and trustee in administering upon the estate of testator according to judicial standards essential to the proper course of justice in the judicial department of government. Comp. St. 1929, sec. 30-302.
2. ———: ———: ———: JUDICIAL DISCRETION. In a litigable controversy among heirs over the "legal competency" of the nominee in a will as executor, the probate court may exercise a judicial discretion in determining the issue.
3. ———: ———: ———. A person nominated in a will as executor *held* not "legally competent" to act in that capacity, where his duties as such would require him to prosecute on behalf of adversary litigants a suit which he would defend as an individual.

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

Mockett & Finkelstein, Herman Ginsburg and *Joseph Ginsburg,* for appellant.

E. B. Perry, Hall, Cline & Williams and *John J. Ledwith, contra.*

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

ROSE, J.

This is a controversy over the appointment of an executor to administer upon the estate of Joseph Blochowitz, deceased. In his probated will, Frank J. Blochowitz, a son of testator, was nominated as executor. The county or probate court held that the nominee named in the will was not competent to act in that capacity and appointed his brother, Albert J. Blochowitz, administrator with the will annexed. Upon appeal to the district court the de-

cision was the same as that of the probate court. The nominee, Frank J. Blochowitz, whom both courts declined to appoint executor, appealed to the supreme court.

The appeal presents questions relating to the competency of the nominee named by testator and also to the appointing power of the judiciary. The probate court and the district court declined to appoint Frank J. Blochowitz on the ground that his appointment would place him in an untenable position where his personal interests would conflict with his official duties as executor and trustee.

Testator left surviving him his widow, four sons and two daughters. In a controversy among the children, Albert J. Blochowitz, a son of testator, special administrator appointed by the county court, contended that his brothers, Frank J. Blochowitz, John A. Blochowitz and George Blochowitz, claimed, as their own, personal property exceeding in value $300,000 belonging to their father's estate and sued them for an accounting.

The theory of the special administrator is that the same person is not legally competent to prosecute as executor, and at the same time defend as an individual, a suit to restore to the estate personal property in his hands.

On appeal testator's nominee for executor argued with vigor the following propositions: The provision in the probated will for his appointment can only be defeated by a statutory disqualification. Judicial discretion to depart from a testamentary nomination is limited to disqualifications specified by statute. A nominee in a will, by claiming property as against the estate, is not thus disqualified to act as executor, but must be appointed. The remedy for a statutory disqualification after appointment is removal. Numerous cases are cited in support of the points stated. The statute provides:

"When a will shall have been duly proved and allowed, the county court shall issue letters testamentary thereon to the person named executor therein, if he is legally

competent, and he shall accept the trust and give bond as required by law." Comp. St. 1929, sec. 30-302.

For the purpose of a ruling on the questions presented, it will be assumed that the nominee named in the will for the office of executor is ready and willing to accept the trust and to give the bond required by law; that he is "legally competent," according to his own understanding of those words and his own standards of business and official rectitude; that in the position taken by him he is not prompted by any evil design; that he will obey the orders of the court, if appointed and permitted to act as executor.

The lawmakers did not define the term "legally competent," but left the interpretation thereof to the courts. In a judicial proceeding an executor of a probated will is not only an officer of the court but is a trustee for the persons entitled to share decedent's estate. The legislature recognized the relation of trustee and beneficiary by providing that letters testamentary shall be issued to the person named executor in the will, "if he is legally competent, and he shall accept the trust and give bond as required by law." In the sense used by the lawmakers, the term "legally competent" means fit or qualified to act as officer of the court and as trustee in administering upon the estate of testator according to judicial standards essential to the proper course of justice in the judicial department of government. Courts must not only maintain their purity, impartiality and independence, but must strive to avoid even a suspicion of evil. They cannot be forced by legislators or litigants into a position which would lower the plane upon which justice is administered. The official relation between a court and an executor is intimate and sensitive. An appointment that would necessarily embarrass or impede the court in determining a controversy among heirs and place some of them at an unfair disadvantage should be avoided. A statute directing the probate court to appoint an executor whose official and representative duties would require him

to prosecute on behalf of adversary litigants a suit which he would defend as an individual would encroach on a judicial prerogative—the power of the court to appoint a competent officer. That intent is not expressed or implied. A person who would be placed by appointment as executor in the anomalous position indicated would not be "legally competent" within the meaning of the statute. The legislature wisely left the court free to interpret those words and to exercise a proper judicial discretion on the issue of competency under the circumstances of each particular case. Fully recognizing the right of a testator to nominate a competent executor and the judicial duty to appoint him, the conclusion is that the refusal of the probate court and of the district court on appeal to appoint the person named in the probated will of testator in the present instance was a proper exercise of judicial discretion. The person appointed administrator with the will annexed is in a different situation.

AFFIRMED.

ELLEN O'CONNOR, REVIVED IN THE NAME OF MARY O'CONNOR LYNCH ET AL., ADMINISTRATORS, APPELLEES, V. LORA POWER ET AL., APPELLEES: UNITED STATES NATIONAL BANK OF OMAHA, APPELLANT.*

FILED NOVEMBER 25, 1932. No. 28298.

1. **Mortgages: SUBSEQUENT INCUMBRANCES.** "Under section 20-202, Comp. St. 1929, a 'subsequent incumbrancer' is one who acquires his incumbrance after the statute has run against the prior incumbrance shown on the record." *Bliss v. Redding*, 121 Neb. 69.
2. ———: ———. Evidence examined, discussed in the opinion, and *held*, that the lien of the plaintiffs' mortgage ceased to be a prior lien as against a subsequently acquired mortgage held by a bank, upon the failure of the plaintiffs to have an extension of their mortgage filed of record within a year from the passage of chapter 64, Laws 1925, as therein provided, and that the bank is therefore a subsequent incumbrancer for value within the meaning of section 20-202, Comp. St. 1929.

* Overruled—See opinion on rehearing, p. 594, *post*.

3. Statutes: AMENDMENTS: TITLE. When the title of an act discloses that the act relates "to the time of commencing civil actions for recovery of title or possession of real estate," and covers the same general subject contained in the act as theretofore existing, *held*, that such title fairly indicates the scope and purpose of the act.

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

Morsman & Maxwell, for appellant.

W. H. Herdman and *Wear, Moriarty, Garrotto & Boland, contra.*

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

DEAN, J.

This suit was begun in the district court for Douglas county to foreclose a real estate mortgage which was given as security for a promissory note in the principal sum of $3,000, executed and delivered April 1, 1914, by John Power in favor of John C. Fetzer. By its terms the note became due April 1, 1915, and bears interest at the rate of 8 per cent. per annum. No payment has been made thereon except interest up to April 1, 1923, and it is alleged there is now due on the note the principal sum of $3,000, with interest from that date at the rate of 8 per cent. per annum.

John C. Fetzer sold and transferred the above note to John J. O'Connor, whose widow commenced this action to recover thereon. She died after the institution of the proceedings herein, however, and the action was thereupon revived by her heirs who are designated as the plaintiffs.

John Power died January 7, 1916, leaving him surviving his son Nicholas, and three daughters, namely, Lora, Alice, and Elizabeth Power Thomas. The latter died after the commencement of this action leaving as her only heirs her husband, Frank C. Thomas, and her brother and two sisters, all of whom are named as parties defendant here.

The United States National Bank of Omaha, hereinafter referred to as the bank, filed a demurrer to the plaintiffs' supplemental petition, which was overruled by the court. Thereupon the bank filed an answer and cross-petition alleging that on October 30, 1926, the defendants executed and delivered to the bank their promissory note for $1,860, due one year after date, and bearing interest at the rate of 7 per cent. per annum. As security for the note, it is alleged that the defendants executed their mortgage deed in favor of the bank on the same property designated in the note held by the plaintiffs against the defendants. The bank also alleges that no part of the $1,860 note has been paid except ten payments thereon in the respective sums of $52.50 each, and that $1,335.99 is now due thereon with interest.

Upon submission, the court found that the plaintiffs' lien was superior to that of the bank; that none of the indebtedness had been paid thereon by the defendants, except interest up to April 1, 1923, and that $3,000, with interest from that date at the rate of 8 per cent. per annum was due the plaintiffs; and that the property in question should be sold to satisfy such judgment. The bank has appealed.

Section 1, ch. 64, Laws 1925, now section 20-202, Comp. St. 1929, so far as applicable here, provides:

"An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued. * * * Provided, however, if the mortgage creditor shall, before the mortgage is barred under the provisions of this act, refile in the recorder's office the mortgage, or a sworn copy thereof for record, then said cause of action shall not be barred until the expiration of ten years from the date of said refiling; Provided further, that the time within which an action may be brought upon a mortgage having no date of maturity stated therein shall not be more than ten years from the maturity of the debt se-

cured thereby. At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid, and the mortgage and the record thereof shall cease to be notice of the mortgage as unpaid and the lien thereof shall then cease absolutely as to subsequent purchasers and incumbrancers for value; said period of ten years shall not be extended by nonresidence, legal disability, partial payment, or acknowledgment of debt. No action for the recovery of the title or possession of lands, tenements or hereditaments; or for the foreclosure of a mortgage thereon shall be begun after one year from the passage of this act by any person whose right of action would be otherwise barred hereby, unless within such year, the holder of an existing mortgage which would otherwise be barred hereby shall file for record a duly executed extension of such mortgage and such period of one year shall not be extended by nonresidence or legal disability."

Section 20-216, Comp. St. 1929, upon which the plaintiffs rely, contains the following provision:

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

The bank contends that it was the intention of the legislature by chapter 64, Laws 1925, that section 20-202, Comp. St. 1929, as it now appears, was no longer to be read in connection with section 20-216 under circumstances like those in the present case.

Plaintiffs, on the other hand, contend that the 1925 amendment did not repeal or modify section 20-216, but that, if such section was repealed, the repeal or amendment was by implication only, and that the payment of

interest up to April 1, 1923, under such section, tolled the limitation period.

The plaintiffs' mortgage was executed and delivered April 1, 1914, and became due and payable April 1, 1915, the last payment of interest having been made thereon April 1, 1923. Foreclosure proceedings were commenced January 29, 1927. It was stipulated that the plaintiffs' mortgage was never extended, nor was it refiled of record within one year after chapter 64, Laws 1925, became effective.

The mortgage held by the bank was executed October 30, 1926, more than one year after chapter 64, Laws 1925, became effective.

In *Bliss v. Redding,* 121 Neb. 69, in an opinion by Goss, C. J., we held:

"Under section 20-202, Comp. St. 1929, a 'subsequent incumbrancer' is one who acquires his incumbrance after the statute has run against the prior incumbrance shown on the record."

The plaintiffs rely on the above cited *Redding* case for an affirmance of the judgment herein. In that case Redding and his wife, on March 31, 1915, executed and delivered their promissory note for three years, secured by a mortgage, to a certain bank. The indebtedness matured March 31, 1918, and the 10-year statutory limitation period expired March 31, 1928. The note was assigned in April, 1915, by the bank to another party. The Reddings executed another note in favor of the bank, in February, 1924, secured by a mortgage on the same land as that designated in the 1915 mortgage. The judgment of the trial court, holding that the 1924 mortgage had priority over the 1915 mortgage, was reversed upon appeal to this court. In that case, however, the second mortgage was executed in 1924, more than a year before the enactment of chapter 64, Laws 1925, and we there held that the provisions of such law were intended to operate prospectively and not retroactively. In the present case, as noted above, the bank's mortgage was executed in its fa-

vor by the defendants more than a year after chapter 64, Laws 1925, became operative.

Under the provisions of section 20-202, it appears that, if the plaintiffs had refiled their mortgage of record within a year after chapter 64, Laws 1925, became effective, and as therein provided, the 10-year statutory limitation period might have been available to them by reason of the last payment of interest, April 1, 1923, on their note. But this they failed to do.

It seems fairly to appear that it was the intention of the legislature that, at the expiration of 10 years from the date a cause of action may accrue on a mortgage, such mortgage shall be presumed to have been paid, and the record thereof shall cease to be notice of the mortgage as unpaid, and that "the lien thereof shall then cease absolutely as to subsequent purchasers and incumbrancers for value." The legislature further provided that the period of 10 years shall not be extended by partial payment or by acknowledgment of the debt. And, as notice to those who held a mortgage upon which a payment of interest had been made, section 20-202 provided that no action to foreclose a mortgage should be begun within one year from the passage of the act in question, unless, within such year, the holder of such mortgage, which otherwise would be barred, shall file for record a duly executed extension of the mortgage within such period of one year.

Under the provisions of section 20-202, Comp. St. 1929, the lien of the plaintiffs' mortgage ceased to be a prior lien as against the mortgage held by the bank upon the failure of the plaintiffs to have an extension of their mortgage filed of record within a year from the passage of chapter 64, Laws 1925, as therein provided. And we think the bank is therefore a subsequent incumbrancer for value within the meaning of section 20-202, Comp. St. 1929.

Plaintiffs contend that chapter 64, Laws 1925, is void for the reason that the subjects contained therein are not germane to section 8507, Comp. St. 1922 (now section 20-

202, Comp. St. 1929) as theretofore existing, and of which it is amendatory, and that such subjects are not set out in the title of the act. The title discloses that it is an act to amend sections 8507 and 8519, Comp. St. 1922, relating "to the time of commencing civil actions for recovery of title or possession of real estate," and to repeal such sections. And where the title in question relates to and covers the same general subject contained in the act as theretofore existing, we think such title fairly indicates the scope and purpose of the act.

The judgment is reversed, with directions that the mortgage of the bank be entered as a prior lien superior to that held by the plaintiffs.

REVERSED.

JAMES D. SHAW, APPELLANT, V. DIERS BROTHERS & COMPANY ET AL., APPELLEES.

FILED NOVEMBER 25, 1932. No. 28367.

1. **Bill of Exceptions:** ALLOWANCE BY CLERK. A clerk of the district court has no power to settle and allow a bill of exceptions, unless it is within the exceptions noted and provided for in section 20-1140, Comp. St. 1929.
2. ———: ———. When, solely because of absence from his district, the trial judge is prevented from settling a bill of exceptions, and no stipulation of the parties interested has been entered into providing therefor, the clerk of the district court is clothed with the power to sign and allow a bill of exceptions, only when it is made to appear by affidavit that the trial judge is absent from his district.
3. **Appeal:** BILL OF EXCEPTIONS. Bills of exceptions transmitted to this court, as part of proceedings on appeal or in error, import absolute verity, and affidavits filed in this court may not vary or contradict their recitals nor supply deficiencies or omissions therein.
4. **Bill of Exceptions:** ALLOWANCE. It appearing that the 100 days which the orders of the district court authorize as, and to which the limitation of statute restricts, the time for presentation of the proposed bill of exceptions had expired in the instant case prior to the tender thereof, together with the necessary affidavit, to the clerk of the court, his action in

purporting to settle and allow the bill is void, and such bill will, on motion, be quashed.

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

J. M. Fitzgerald, for appellant.

Hall, Cline & Williams and *Clarke & Patterson, contra.*

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

EBERLY, J.

This is an appeal from a judgment of the district court for Scotts Bluff county denying a recovery under the terms of the workmen's compensation law. The immediate question before the court is the vulnerability of the bill of exceptions, filed by the appealing plaintiff, to defendants' motion to quash, based on the contention that it was not presented to the proper officer for settlement and allowance within 100 days "from the adjournment *sine die* of the term of court * * * at which the motion for a new trial was ruled on." Comp. St. 1929, sec. 20-1140. In the consideration of this question, the following chronology is important: Judgment appealed from was rendered March 3, 1932; motion for new trial was overruled March 12, 1932. Both of these dates were days of the regular October, 1931, term of the district court for Scotts Bluff county. Transcript on appeal was filed in this court on April 9, 1932, and, also, the bill of exceptions attacked, containing the evidence adduced at the trial and purporting to have been allowed and settled and filed by the clerk of the district court for Scotts Bluff county on July 12, 1932, appears to have been filed in this court on August 29, 1932. On September 2, 1932, defendants (appellees) filed in this court a motion to quash this bill of exceptions, based on the fact that the October, 1931, term of the district court adjourned *sine die* on March 26, 1932, and that said proposed bill of exceptions "was not presented to the clerk of the district

court for Scotts Bluff county, Nebraska, within one-hundred days after March 26, 1932, nor until the 12th day of July, 1932, and was not signed, settled or filed in the office of said clerk until said 12th day of July, 1932." The service of notice of this application, and that it would be presented to this court on September 19, 1932, at 9 o'clock a. m., etc., was accepted by appellant's attorney on August 31, 1932. On September 2, 1932, written "suggestion of diminution of the record" was likewise filed in this court, with acceptance of service of the same by appellant's attorney on August 31, 1932. In accordance therewith, it was presented to this court on September 19, 1932, and, after argument of counsel, this court sustained an application for a continuance made on behalf of defendants, and, on the record then before it, overruled the motion to quash the bill of exceptions, and sustained the motion of defendants for leave to supply, as omitted from the transcript, a certified copy of the order of the district court for Scotts Bluff county disclosing the adjournment of the October, 1931, term thereof *sine die* on March 26, 1932. A duly certified copy of this order of final adjournment was thereupon filed on September 19, 1932. On October 12, 1932, defendants filed a motion in this court to reconsider their motion to quash the bill of exceptions, accompanied by affidavit, and based upon the certified copy of the order of final adjournment referred to. This motion was argued and submitted at the time of the submission of this appeal on its merits.

Section 20-1140, Comp. St. 1929, covering the subject of the allowance and settlement of bills of exceptions, provides in part: "When it is shown by affidavit that the judge is prevented by * * * absence from his district, * * * it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is required to do; and shall thereupon be filed with the papers in the case, and have the same force and effect as though signed by the court."

In reference to the exercise of these statutory powers

by the clerk of the district court, we are committed to the view that "A clerk of the district court has no power to settle and allow a bill of exceptions unless it is within the exceptions noted and provided for in section 311 (section 20-1140, Comp. St. 1929) of the Code of Civil Procedure." *Nelson v. Johnson,* 44 Neb. 7. And also: "The clerk of the district court is clothed with the power to sign and allow a bill of exceptions, when it is made to appear by affidavit that the trial judge is absent from his district." *Chicago, B. & Q. R. Co. v. Hyatt,* 48 Neb. 161.

The bill of exceptions in this case discloses by the certificates attached thereto that on June 13, 1932, the draft of the proposed bill of exceptions was received for "examination and amendment." On June 20, 1932, it was returned to appellant's attorney with certain proposed amendments by interlineation, which all parties agreed to. It is also certified to by the court reporter as containing all the evidence offered in the trial of the case. Then follows an affidavit, made a part of such bill of exceptions, executed by appellant's attorney on July 12, 1932, setting forth that at all times subsequent to June 20, 1932, the district judge, who tried this action, was absent from the seventeenth judicial district, and as such unable to settle and sign the bill of exceptions. Following this affidavit is the certificate of the clerk of the district court, bearing date July 12, 1932, approving, signing and settling the proposed draft "as the bill of exceptions of said cause in said court." There also appears the indorsement of the filing of said bill of exceptions in the office of the clerk of the district court for Scotts Bluff county, under date July 12, 1932, and the certificate of this official likewise attached to this record, "that this is the original bill of exceptions filed in the office of said clerk," etc., dated July 12, 1932.

Supporting appellees' motion to quash this bill of exceptions are two affidavits of the clerk of the district court to the effect that said bill of exceptions had never been presented to him, nor had he been requested to sign

the same, prior to July 12, 1932. The affidavit of appellant's attorney, presented on the hearing in this court, is a substantial contradiction of all the facts set forth in these affidavits. We do not find it necessary or proper to determine the issues of fact thus made.

We are committed to the view that a bill of exceptions, including the record of the statutory steps necessarily taken in its settlement and allowance, constitutes a record of the district court. This record, to be available in proceedings on appeal and error, must be certified by the clerk of the district court as either the original bill of exceptions or as a transcript thereof, and that the same has been duly filed in his office as one of the records in the case presented for review. *Crawford v. Smith,* 57 Neb. 503; *Palmer v. Mizner,* 2 Neb. (Unof.) 903; *Stanser v. Cather,* 82 Neb. 136.

It is likewise true that the trial court is the only tribunal possessing jurisdiction to modify, correct, and supply omissions in its own records; and when such records, or properly certified transcripts thereof, are filed in this court, duly authenticated, they impart absolute verity. *Edwards v. Kearney,* 14 Neb. 83; *Hoagland v. Van Etten,* 23 Neb. 462; *In re Estate of Getchell,* 98 Neb. 788.

It follows that the affidavits filed in this court by the parties for the purpose of supplying alleged omissions will be wholly disregarded, and the questions determined exclusively from the records as authenticated by the certificate of the clerk of the district court.

According then to the record now before us, as thus restricted, the term of the district court at which the motion for a new trial was denied adjourned *sine die* on March 26, 1932. The 100 days, which the orders of the district court authorized and to which the limitation of the statute restricted the presentation of the proposed bill of exceptions in this case for settlement and allowance therefor, fully expired prior to the date of the making of this affidavit (July 12, 1932), as to the continued absence of the district judge of this district, in reliance upon

which the clerk on the same date purported to "settle and allow" the proposed bill of exceptions, and thereupon filed the same in his office as such. Under the circumstances of this case, the presentation of this affidavit of the judge's continued absence was a prerequisite to the exercise of this power of settlement and allowance by the clerk. *Nelson v. Johnson,* 44 Neb. 7. So, too, the bill of exceptions to be settled by the clerk upon presentation of the affidavit as to the judge's absence must be, together with such affidavit, completed, presented to, and acted upon by such clerk within the time fixed by statute or within the time allowed by the court or judge for settlement of such bill of exceptions. *Reynolds v. Dietz,* 39 Neb. 180. The time thus limited cannot exceed 100 days from the final adjournment of the term at which a judgment was rendered or the motion for new trial ruled on, and a bill allowed in violation of this statute will be quashed. *Walker v. Burtless,* 82 Neb. 211; *Lincoln Land Co. v. Commonwealth Oil Co.,* 109 Neb. 652; *Conway v. Grimes,* 46 Neb. 288.

In view of the facts of the present record, the accepted doctrine of this court is that the time for settling a bill of exceptions will not be extended beyond the 100 days provided by statute, although appellant was diligent, and the delay was not caused by his fault. His remedy, if any, is a new trial in the court of original jurisdiction. *Horbach v. City of Omaha,* 49 Neb. 851; *Mathews v. Mulford,* 53 Neb. 252.

We are also committed to the view that workmen's compensation cases are in no manner exempted from the provisions of the statute heretofore quoted in reference to settlement and allowance of bills of exceptions. *Hanley v. Union Stock Yards Co.,* 100 Neb. 232.

It follows that we are now required to quash the bill of exceptions filed in this case. Further, plaintiff's appeal presenting only questions of fact which require an examination of the evidence, and the pleadings supporting the judgment of the trial court, it is

AFFIRMED.

IN RE ESTATE OF BENJAMIN F. RAYMOND. FRANK M. JOHNSON, EXECUTOR, APPELLANT, V. HENRY RAYMOND ET AL., APPELLEES: YORK & YORK, INTERVENERS, APPELLANTS.

FILED NOVEMBER 25, 1932. No. 28554.

1. **Descent and Distribution:** AGREEMENT TO SETTLE ESTATE. An agreement to settle an estate between the members of a family is favored in law. If fairly made, and the rights of creditors are not affected, such an agreement should not be disturbed.
2. **Appeal:** EXECUTORS. As the will is the only source of the executor's power, and as the letters testamentary are the only evidence of his authority, it must follow that, when the will is denied probate, and letters are not issued, one who was so named cannot appeal from a judgment of the district court approving the action of the sole beneficiary in renouncing all claim under the will and thereby canceling the same.

APPEAL from the district court for Dawson county: J. LEONARD TEWELL, JUDGE. Motion to dismiss appeal. *Appeal dismissed.*

Frank M. Johnson, York & York and *Craft, Edgerton & Fraizer,* for appellants.

T. F. Hamer, H. L. Wilson and *W. A. Stewart, contra.*

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

PAINE, J.

This cause comes on upon a motion to dismiss the appeal of York & York, attorneys and interveners, and also upon a motion to dismiss the appeal of Frank M. Johnson, proposed executor.

The facts may be briefly outlined as follows: Benjamin F. Raymond died October 2, 1931, leaving a last will, which was duly offered for probate in Dawson county, Nebraska. Objections were filed to the probate of the will, and, upon the trial, the county court entered an order refusing to admit the will to probate. Thereupon, Frank M. Johnson, the proposed executor named in the will, with

Winnie May Roudiez, sole legatee and devisee under the will, took an appeal to the district court for Dawson county. That upon April 9, 1932, the said Winnie May Roudiez filed a written dismissal of her appeal in the district court, and upon April 15, 1932, she filed a written withdrawal of said dismissal, claiming therein that the dismissal filed April 9 had been filed by T. F. Hamer, one of the attorneys for the contestants of the will. That upon April 19 a motion was filed to strike from the files the withdrawal of the dismissal. That also on the 19th day of April, 1932, there was filed in the office of the clerk of the district court a notice of an attorney's lien by York & York, who had been given a contract in writing by Winnie May Roudiez to pay them a fee equal to 50 per cent. of any amount they recovered for her in said estate, the said estate having an estimated value of $15,000, and on the same day leave was granted Frank M. Johnson, proposed executor, to file objections to the dismissal of said appeal; and all of said matters came on for hearing before the district court upon April 19, 1932, and, having taken the matter under advisement, the district court, upon May 7, 1932, found that Winnie May Roudiez in open court has requested that her appeal be dismissed, and finds further that York & York have a claim for attorney's lien for services rendered her under said contract, and further finds that the appeal was dismissed by Winnie May Roudiez without the knowledge or consent of her attorneys, York & York, or Frank M. Johnson, executor, and with the intent on her part to defeat York & York of receiving pay for their services rendered in her behalf under said contract. The court further found that the petition of intervention, which had been filed by York & York, should be dismissed, and directed that the objections of York & York and Frank M. Johnson, proposed executor, to the dismissal of the appeal by Winnie May Roudiez should be overruled, and all appeals were thereupon dismissed with prejudice to any further prosecution of the action by York & York, Frank

M. Johnson, or Winnie May Roudiez, but the trial court also held that the judgment entered should be without prejudice to the right of York & York, attorneys, and Frank M. Johnson, proposed executor, to maintain a claim against said estate for services rendered said estate in the application to admit such purported will to probate, and without prejudice to York & York, attorneys, and Frank M. Johnson, proposed executor, prosecuting any claims they might have against Winnie May Roudiez. Supersedeas bond was fixed in the sum of $100. This cause comes on first upon a motion made in this court to dismiss the appeal of York & York, attorneys, for the reason that they filed no supersedeas bond and no bond for costs. This court has held in *Greb v. Hansen,* 123 Neb. 426, and in *Paper v. Galbreth,* 123 Neb. 841, that section 20-1914, Comp. St. 1929, means that an appellant must file such bond within three months from the rendition of a final order in the district court, which he is appealing from, and that, if no such bond is filed, the appeal shall be dismissed, and therefore the appeal of York & York, attorneys, is hereby dismissed.

We will now consider the motion filed by the appellees, asking that the appeal of Frank M. Johnson, executor, be dismissed. We are cited in the brief of Mr. Johnson to the statute, section 30-1306, Comp. St. 1929, which reads: "Any person aggrieved by any order, decree, or denial of a court in pursuance of the provisions of this article may appeal therefrom as provided for in other cases." We are also cited to several Nebraska cases.

In re Estate of Gunderman, 102 Neb. 590, Aubrey A. Smith filed a petition to probate the will, which was contested, and the county court admitted the will to probate, and the contestant upon appeal won in the district court. Thereupon, the executor, who had been appointed by the county court, appealed to this court, and it is held that, when a contestant appeals to the district court, an executor may appeal to this court.

In re Estate of Creighton, 88 Neb. 107, there was a

provision in the will of Creighton which bequeathed $50,000 to his executors, to be held by them in trust for establishing a home for poor working girls, and upon the county court declaring this paragraph invalid, it is held that the duly appointed executors have the right to appeal therefrom.

In *Gannon v. Phelan,* 64 Neb. 220, it was specifically held that whether Thomas Gannon as administrator had the right to appeal was not determined in that case.

The appeal of Johnson, proposed executor, is for the purpose of allowing him to be given the right to prosecute the will contest in the district court, which has already been dismissed by the sole and only legatee and devisee under the will. It may be admitted that all of the cases cited above show that an executor, who has been duly appointed, has the right to make such an appeal, but do these cases sustain the proposition that a proposed executor, who has been denied appointment by the county court, which action has been affirmed by the district court, has the right to appeal a controversy between the sole beneficiary under a will and the contestants under that will, when the sole beneficiary has dismissed the action and no controversy now exists?

Agreements to settle an estate between the members of the family are favored in law, and when fairly made, and the rights of creditors are not affected, such agreements and settlements are usually not allowed to be disturbed by the parties, or by any others for them. 11 R. C. L. 29, sec. 15.

In *Lehr v. Switzer,* 213 Ia. 658, it was held that a beneficiary under a will had a right to file an unconditional renunciation of all benefits under the will, and that his creditors could not complain of such renunciation, and, by such renunciation, the property renounced became intestate property and passed to the heirs of the testator.

"From the nature of the answers of the two defendants who unite in the prayer of the petitioner, they are not injuriously affected by the decree. The cause as to them

is at an end; the decree does not aggrieve them. The same may be said of the administrator, who is a mere trustee, and as such must stand indifferent as to how the decree goes, or as to who gets the money." *Porter's Heirs v. Porter*, 7 How. (Miss.) 106, 40 Am. Dec. 55.

As the heirs in this estate have settled all matters between them, how can the proposed executor have any controversy with them?

In *Merrick v. Kennedy*, 46 Neb. 264, it holds: "The executor of an estate, as such, cannot prosecute an appeal from a final order of distribution made by the county court, where he is not pecuniarily affected by such order." In the text it states that the executor could not have been aggrieved or injuriously affected by the order in question, and hence has no such standing in the case as to authorize him to prosecute an appeal.

In re Estate of Creighton, 88 Neb. 107, it holds that, as the executors, who had been duly appointed, were charged with the duty of administering a trust, they would have the right to appeal, but in the case of *Merrick v. Kennedy, supra*, the will created no trust for an executor to administer, and his entire duty would be performed by delivering to the legatees and devisees the property described in the order of distribution.

In re Estate of Craig, 101 Neb. 439, it was held that an administrator who, in paying out money in the estate, had ignored one heir, cannot in his representative capacity appeal from the final order directing distribution to other persons, for it is held that the law does not permit the person who represents the estate to use it for individual purposes, that is, seeking to protect his own individual interests.

In a New York case, the court stated as legal aphorisms: "1. There can be no executor where there is no will. 2. Unless a will is admitted to probate there can be no letters testamentary. 3. Until letters testamentary or of administration are issued upon an estate of a decedent, there is no legal representative of the estate. 4.

Although a person is nominated as executor in a paper purporting to be a will, he is under no legal obligation to accept." *Dodd v. Anderson,* 197 N. Y. 466, 18 Ann. Cas. 738.

It stands to reason that, as the will is the only source of the executor's power and the letters testamentary are the only evidence of his authority, if the will is denied probate and the letters are never issued, he who assumes to act as executor is merely a volunteer, who assumes the risk of having all his acts repudiated by a court of competent jurisdiction.

In the case of *Kelly v. Kennedy,* 133 Minn. 278, Ann. Cas. 1918D, 164, it states that an executor, ultimately unsuccessful, though he acts in good faith, is not entitled to payment out of the fund, and this notwithstanding the will was admitted to probate in the first instance.

"Until a decree is entered invalidating a will, the executor named therein is clothed with the authority and burdened with the duty to represent the deceased and carry the will's provisions into effect, but if the will is declared invalid by the decree of a court of competent jurisdiction, until such decree is reversed the situation is as if no will had been made." *In re Estate of Crumbaker,* 217 Ill. App. 411.

In 3 Woerner, American Law of Administration (3d ed.) 1786, we find stated that, if the executor assumes the burden of a contest which properly belongs to the legatees or devisees, he must look to them, and not to the estate, for reimbursement. But, in the case at bar, he is assuming authority to contest a matter which the only legatee has entirely settled.

One named as administrator cannot appeal from a decree revoking his letters on account of the subsequent probate of a will of his decedent, for his only interest in the estate is for reimbursement for the expenses he has incurred while acting under the letters granted to him. *Cairns v. Donahey,* 59 Wash. 130.

In the case at bar, the sole beneficiary renounced all

of her claims under the will. This had the effect of canceling the will, and the property became the property of an estate which was intestate, and would thereby pass to the heirs under the general laws of descent. The proposed executor cannot secure any relief against the sole beneficiary for dismissing her appeal. The contestants or heirs have no longer any controversy with the sole beneficiary, and have no controversy with the proposed executor, who has never received letters of administration under the will.

The appeal from the denial of probate in the county court to the district court, and the appeal from the district court to this court, would be for the purpose of determining finally whether there was a valid will, but the sole beneficiary under that will has dismissed the appeal. Is there any controversy left to be tried out by an appeal to this court? If we should retain this appeal of the proposed executor, even though no controversy exists and no substantial rights of the heirs are affected, what would be gained? Even if it was eventually decided that the instrument was the last will of the deceased, it would pass no property, for the sole beneficiary has renounced all rights thereunder, and the property is being distributed as an intestate estate. What purpose can be served by further prolonging this litigation? We see none, and therefore sustain the motion to dismiss the appeal of Frank M. Johnson, the proposed executor.

APPEAL DISMISSED.

MINNIE I. ASHBY, APPELLANT, V. RICHARD C. PETERS ET AL., APPELLEES.

FILED NOVEMBER 25, 1932. No. 28264.

1. **Trial:** DIRECTION OF VERDICT. A trial court should not direct the verdict of a jury, unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion.
2. **Property.** Save for the purposes of conveyancing, a lease of more than one year is not real estate.

3. **Corporations: ACTION FOR FRAUD: PARTIES.** The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant.
4. **Fraud.** The purchaser of a bond has a right to rely upon the representations on the face of the bond as to the security for the bond, unless, as a matter of fact, he has actual knowledge to the contrary. That question of fact is for the jury to determine.

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

Howard Saxton, John E. Eidam and *Allen & Requartte,* for appellant.

Rose, Wells, Martin & Lane, Woods, Woods & Aitken and *Virgil Haggart, contra.*

George I. Craven, amicus curiæ.

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

RYAN, District Judge.

The plaintiff began this action in the district court for Lancaster county to recover damages from the defendants because of alleged fraud in the issuance and sale of certain bonds purchased by the plaintiff from the defendants, which bonds were designated "Peters Trust Building Refunding First Mortgage Real Estate Gold Bond," and purported on their face to be secured by a trust deed conveying the real estate known as the Peters Trust Building (formerly Bee Building) Omaha, Nebraska, to the Peters Trust Company, as trustee. The plaintiff purchased bonds in the amount of $1,600 during the years 1923 and 1924.

These bonds were issued on May 17, 1923, by the Keystone Investment Company, a corporation, which held a ninety-nine year lease upon the real estate known as the Peters Trust Building, Omaha, Nebraska. The bonds

were issued to take up a former issue of $400,000 of similar bonds, which would mature June 1, 1924, and these were to mature June 1, 1933, bearing interest at 6 per cent. from June 1, 1923.

The entire stock of the Keystone Investment Company, except directors' qualifying shares, was owned by the Peters Trust Company. The Peters Trust Company was a corporation organized as a trust company under the laws of the state of Nebraska and had been doing a general trust business for many years. The defendants are the directors of the Keystone Investment Company. The building known as the Peters Trust Building is a seven story office building, located on the northwest corner of Seventeenth and Farnam streets, in Omaha, Nebraska. The Keystone Investment Company held a ninety-nine year lease on said building, dated February 1, 1917, and expiring ninety-nine years from March 1, 1917. The fee of the said building was incumbered by a first mortgage lien in favor of the New York Life Insurance Company in the sum of $250,000. The fee to the real estate was vested in the Bee Building Company, subject to said mortgage and to certain party wall agreements with certain adjoining property owners.

On December 10, 1929, the Peters Trust Company filed a voluntary petition in bankruptcy and on the same date was adjudicated a bankrupt. Herbert S. Daniel was appointed receiver on the same date and on March 26, 1930, qualified as trustee in bankruptcy of said bankrupt. On October 1, 1930, the Bee Building Company commenced an action in forcible entry and detainer against the Keystone Investment Company and others in the municipal court of the city of Omaha to secure possession of said real estate, alleging default in the rentals provided for in the ninety-nine year lease, and on October 15, 1930, obtained judgment for possession and restitution of said premises. On November 4, 1930, the Bee Building Company filed a petition in the district court for Douglas county, Nebraska, against the Keystone Investment Com-

pany and others, alleging nonpayment of the rentals covenanted to be paid in the ninety-nine year lease and pleading the judgment of the municipal court of the city of Omaha and its possession under said judgment of restitution, and praying that said ninety-nine year lease be canceled and set aside and that title in and to the real estate be quieted in the plaintiff. Answers were filed on the same date and on November 5, 1930, decree was entered, canceling the ninety-nine year lease and quieting title to the real estate in the plaintiff. Interest was paid regularly upon said bonds as it fell due at the offices of the Peters Trust Company, up to and including June 1, 1929. The interest coupons due December 1, 1929, and thereafter were not paid and the bonds thereupon became worthless.

In her petition plaintiff alleges that the defendants Peters, Claassen, Cameron, Potter and Weston, who were the directors of the Peters Trust Company and Peters National Bank, and the defendant Kennedy, who was the secretary of the Keystone Investment Company, conspired and agreed together and with one Paul E. Armstrong and Ralph E. Smith to cheat, wrong and defraud the plaintiff and other persons who might be induced by means of fraudulent representations to become purchasers, owners and holders of the bonds of the Keystone Investment Company.

The alleged fraudulent representations claimed by the plaintiff are: (1) That said bonds were first mortgage real estate gold bonds, secured by trust deed of even date therewith, conveying certain real estate known as the Peters Trust Building (formerly Bee Building), Omaha, Nebraska; (2) that the deed of trust was a first mortgage lien upon said real estate; (3) that the security for said bonds was sufficient to cause and would cause the bonds and interest coupons attached to be paid at maturity; and (4) that the said defendants each assumed the obligation of said bonds as principal and they each consented to charge and did charge their separate estates for the payment thereof.

The amended answer of the defendants admits the identity of the Keystone Investment Company and the Peters Trust Company and their relationship to each other, their general business activities as alleged in the petition, and that the Keystone Investment Company owned and held a ninety-nine year leasehold on said Peters Trust Building under a lease from the Bee Building Company, dated February 1, 1917, and that said leasehold interest was subject to a mortgage lien on said premises in favor of the New York Life Insurance Company in the amount of $250,000. Defendants further admit that on or about May 17, 1923, the Keystone Investment Company executed its bonds in the principal sum of $400,000 secured by a trust deed on the leasehold interest of said company. The defendants also plead that plaintiff's cause of action, if any, is barred by the statute of limitations. At the close of all the evidence the learned trial judge instructed the jury to return a verdict in favor of the defendants. This action is assigned as error.

Plaintiff testified that her dealings were with Ralph E. Smith, who was employed as a salesman of securities for the Peters Trust Company; that she told him she had some bonds that had matured and also a little money that she wished to invest and wanted to be sure and place it in an investment that was perfectly safe, and that she was going to rely on him to place it where it would be safe; that he said he would advise her to buy Keystone Investment Company mortgage bonds, that there was nothing better; that it was a first mortgage real estate gold bond, secured by a first mortgage on the Peters Trust Building, and that they were perfectly safe. Plaintiff further testifies that she relied on the statements made to her by Ralph E. Smith and that she relied upon the integrity of the Peters Trust Company by whom he was employed; that she believed the statement on the face of the bond, wherein it is recited that it is a first real estate mortgage gold bond; and that she did not learn of the falsity of said statements until the fall of 1930. Other

witnesses for the plaintiff, who were also purchasers of Keystone Investment Company bonds, testified that substantially the same representations were made to them by other employees of the Peters Trust Company. A. C. Heine, secretary of the Plaat Deutscher Verein, testifies that he and another officer of this society went to the defendant Claassen, at his offices in the Peters Trust Building, and stated that they had some money of the society to invest in real estate first mortgage bonds, and that Mr. Claassen referred them to one of their salesmen, who recommended and sold them Keystone Investment Company bonds.

Plaintiff further relies on the resolution passed at a special meeting of the board of directors of the Keystone Investment Company on May 17, 1923, as evidence of the conspiracy alleged, wherein it is recited that "the Keystone Investment Company First Mortgage Real Estate Gold Bonds, executed by the Keystone Investment Company, secured by a trust deed on its leasehold interest on the property known as Peters Trust Building formerly the Bee Building * * * will mature June 1, 1924, and it is for the best interest of this company to issue refunding bonds in like amount, due June 1, 1933, bearing interest at 6 per cent. from June 1, 1923; said bonds to be used only for the purpose of retiring the above described bonds.

"Therefore, be it resolved that the Keystone Investment Company execute bonds aggregating four hundred thousand dollars due June 1, 1933, bearing interest from June 1, 1923, at the rate of 6 per cent., payable semiannually, with an option of paying any portion or all of the principal on any interest payment date at par by giving thirty days' notice, and secure the same by a trust deed on the above property in favor of Peters Trust Company, trustee; said bonds to be known as Peters Trust Building Refunding First Mortgage Real Estate Gold Bonds and to be used only for the purpose of retiring said Keystone Investment Company First Mortgage Real Estate Gold

Bonds; and for the purpose of carrying out this resolution, the president and secretary are authorized and directed to execute, in the name of the company, all bonds, trust deeds and other papers necessary and proper to execute said loan."

The evidence of the defendants is that the bonds were sold by circular only. Two different circulars are included in the record as exhibits 29 and 34. These exhibits both state clearly the nature of the security in these words: "These bonds are secured by a first lien on the leasehold of the Peters Trust Building." As to the value of the security, exhibit 29 states: "The leasehold is considered to be very valuable." Exhibit 34 states: "The value of the leasehold, as determined by the earning power of the property, is in excess of twice the amount of this issue." Mr. Smith also testifies that he wrote a letter to the plaintiff, a copy of which is in the record, in which he caused to be inclosed one of these circulars.

There is also testimony tending to show that these bonds sold on the open market in Omaha at from 98 to 101; that they were much in demand and frequently bond brokers could not find these bonds for their customers. The plaintiff appears to be a very intelligent woman, and her husband, though not a practicing lawyer, was admitted to the bar and was employed as a law clerk in the Union Pacific offices in Omaha. While not pleaded as a defense, the defendants were permitted to prove, over the objections of the plaintiff, that the phraseology of these bonds was left to a competent attorney in the employ of the Peters Trust Company, and this was urged as a defense.

It is contended in the briefs of the appellant that the basis for the direction of the verdict in favor of the defendants was upon the seventh ground of the motion, to wit: "The evidence shows without contradiction that the defendants committed the preparation of form of the bonds in controversy to a competent attorney and that he prepared the same in the exercise of his honest judg-

ment without any attempt on the part of any of the defendants to dictate or control the language used in said bonds, and thereafter the bonds were executed on behalf of the Keystone Investment Company, and were sold by the Peters Trust Company in reliance on the language thus employed by the said attorney." This is denied by the appellees, who contend that the appellant's charges of fraud and conspiracy were not supported by sufficient evidence to warrant the case being submitted to the jury. The record does not purport to show upon what ground the motion was sustained. However, we think that the seventh ground of the motion would be insufficient to warrant the direction of a verdict.

The case relied upon by the appellees in this record is that of *Slater Trust Co. v. Gardiner,* 183 Fed. 268. In that case the defendants were residents of the state of New York and the land was located in Missouri. The corporation had title to 700 acres of the land in fee and owned veins of coal in the lands of an additional 46,300 acres. Gardiner and his associates employed an experienced lawyer in New York, who, in turn, employed experienced counsel in St. Louis. The St. Louis lawyers prepared the trust mortgage and the bonds. In the *Slater* case the court stresses the fact that Gardiner did not employ the lawyers. "It must be remembered that Gardiner did not employ the lawyers who drew up these papers, and is not responsible for them as his agents." Moreover, this was an action in equity and the decision is based upon the principle of law that in suits in equity for alleged fraud lack of knowledge is a defense.

The case of *Peters v. Lohman,* 156 S. W. 783 (171 Mo. App. 465) a Missouri case, is also relied upon by the appellees. In that case it was held: "Directors of a corporation who make representations inducing a purchase of unissued stock are not liable at law for fraud where the representations are in accordance with information obtained from a reliable source, and are honestly believed to be true by the directors, whether the representations

are oral or are made in a prospectus." That case is distinguishable from the case at bar for the reason that it is not claimed that the defendants in this case obtained their information from any outside source. They were familiar with the business of both corporations and had first-hand knowledge of the securities back of the bonds in question. Moreover, in the case of *Peters v. Lohman, supra,* the evidence was held not to show the falsity of the representations as to the corporation holding leases on natural coal and gas lands.

The case of *Myers v. Union Nat. Bank,* 115 Neb. 49, is also relied upon by the appellees. In that case the trial court directed the jury to return a verdict for the defendants on the theory that it was an *ultra vires* act for the bank to become a trustee, and therefore, in no event, could the bank be held liable. The plaintiff brought the action to recover the sum of $9,400 from the defendant, by reason of alleged false and fraudulent representations in the purchase of securities. The representations were claimed to have been made by the Fidelity Trust Company and the First National Bank of Fremont, both of whom had failed and whose affairs were being wound up by a receiver. The defendant Union National Bank entered into a contract with the receiver of the First National Bank, whereby it took over the assets of the failed bank, with certain exceptions, and in consideration thereof agreed to assume and carry out all the liabilities and obligations of the failed bank, with certain exceptions. So, it will be seen that the action was brought solely against the defendant, and its liability, if any, rested upon the contract by which it was claimed it assumed the tort liability of the First National Bank. The court say: "An examination of the evidence fails to disclose that any actual representation was made by the bank, as an inducement to the plaintiff to invest his money in the debenture bond. The plaintiff's own testimony is to the effect that at no time did he talk to any officer of the bank. It is true that there was an interlocking of

directors in each institution. In 1921 there were nine common directors out of a total of fifteen. In 1920 the record as to who constituted the directors of the trust company is not entirely clear. At the time of the transaction there were no common officers in the two institutions. The trust company kept an account with the bank and there was frequent interchange of business between them." The court further said: "From an examination of the record, we conclude that the proof fails to establish any misrepresentation on the part of the bank which induced the plaintiff to purchase the debenture, and that no conspiracy between the bank and the trust company has been proved, so that the bank became answerable for the wrong-doing of the trust company." Having so concluded, the court found it unnecessary to discuss the legal question as to whether or not the act was *ultra vires*.

In the case of *Clark v. Edgar*, 12 Mo. App. 345, affirmed 84 Mo. 106, the court held:

"A declaration that certain bonds are 'first mortgage bonds' is untrue if there is a prior mortgage upon the property to secure promissory notes.

"A statement made by directors of a corporation, in print, across the face of bonds issued by them that the bonds are 'first mortgage bonds,' if untrue, will render the directors liable to an action of deceit at the suit of one who, on the faith of such statement, bought the bonds on the market." See *Bank of Atchison County v. Byers*, 139 Mo. 627.

It appears clearly from the record that there was a first mortgage of $250,000 upon the Peters Trust Building, and that the Keystone Investment Company was the owner of only a leasehold interest in the real estate, and while it is true that the bonds as issued contain the statement, "Reference being hereby made to said trust deed for a statement of the terms and conditions upon which the said bonds are issued and secured, and for a detailed description of the security therefor, and the rights of the said trustee and bondholders with respect to such se-

curity," still, had the purchaser taken the trouble to examine the trust deed, while she would have learned that the security was a leasehold interest for ninety-nine years, she would not have discovered the important fact that the fee of the premises as incumbered by the mortgage to the New York Life Insurance Company.

The question as to whether or not a leasehold for a term of ninety-nine years is real estate is discussed at length in the briefs, and while it is true that for the purposes of conveyancing a lease of more than one year is termed real estate and may be referred to as real estate in a highly technical sense, still it cannot be said that a lease for more than one year is real estate in the common acceptation of the term. In fact, this court has expressly stated the contrary. *Mulloy v. Kyle,* 26 Neb. 313; *Nelson v. Radcliffe,* 110 Neb. 54; *Zabriskie v. Greater American Exposition Co.,* 67 Neb. 581; *Lindburg v. Bennett,* 117 Neb. 66.

The testimony in the record is in direct conflict on many material points. This court has repeatedly held, and it is the settled law in this state, that the trial court should not direct the verdict of a jury, unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion. *Bank of Cortland v. Maxey,* 102 Neb. 20; *Continental Lumber Co. v. Munshaw & Co.,* 77 Neb. 456; *Westover v. Lewis,* 36 Neb. 692.

We conclude, therefore, that this case should have been submitted to the jury for determination of the issues of fact involved. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

F. H. BAUERMEISTER, TRUSTEE, ET AL., APPELLEES, V. C. B. MCDONALD, SHERIFF, ET AL., APPELLANTS.

FILED NOVEMBER 25, 1932. No. 28271.

1. **Descent and Distribution.** Where the vendor of real estate executes to the vendee a contract for a deed, reserving the legal title in himself, and where no deed has been executed by him, upon the death of such vendor testate, the legal title vests in his devisees if such were designated in his will.
2. **Judgment: LIEN.** The lien of a judgment, obtained against a devisee of such vendor, attaches to the extent of the share of the unpaid purchase money on that share of the contract devised to such devisee by the vendor.
3. **Wills: TRUSTS.** In order to create a trust in a will, appropriate language to indicate such an intention on the part of the testator must appear in the will.

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

Votava & McGroarty, for appellants.

B. N. Robertson, contra.

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

RYAN, District Judge.

This is an action brought by the appellees to enjoin the defendant sheriff from selling on execution the alleged interest of Henry C. Glissmann and Tena E. Glissmann in certain real estate in Douglas county, Nebraska. The judgment levy was made on July 17, 1931.

The material facts in the case may be briefly stated as follows: The appellant George Boland is the owner of a judgment secured by the Bank of Benson against Henry C. Glissmann and Tena E. Glissmann, his wife, on March 8, 1927, in the district court for Douglas county, Nebraska. Hans C. Glissmann, the father of the judgment debtor Henry C. Glissmann, in his lifetime had been the owner of the real estate in question. On June 22, 1922, he sold this land, consisting of approximately 108 acres,

to the Happy Hollow Club upon contract for the sum of $85,000. The last payment on this contract was due July 1, 1932. Possession of the premises was delivered on March 1, 1923. The Happy Hollow Club has been in possession of the premises since that time and had made all of the payments due under the contract up to the time of the levy and the institution of this action. The contract provided that upon payment in full of the purchase price a warranty deed be executed and delivered to the Happy Hollow Club.

Hans C. Glissmann died testate on June 15, 1928. At the time of his death there remained unpaid on the purchase price of said real estate the sum of $42,000. Objections to the probate of the will of the deceased were filed by the judgment debtor, Henry C. Glissmann. A settlement of this contest was effected on October 1, 1928, and the objections were withdrawn. Henry C. Glissmann was at the time of his father's death indebted to him in the sum of $12,000. On October 15, 1928, Henry C. Glissmann executed a written assignment to his wife, Tena E. Glissmann, in which, for a consideration of $11,000, he assigned to her all his right, title and interest in the estate of Hans C. Glissmann, deceased, which assignment was filed in the office of the county judge of Douglas county, Nebraska, on October 16, 1928.

The will of Hans C. Glissmann was admitted to probate and the estate was finally closed on March 9, 1929. After the estate had been closed, the interested parties by contract designated F. H. Bauermeister, one of the plaintiffs in this action, as trustee to collect the balance due on the Happy Hollow Club contract, and he accepted this trust and is now acting in the capacity of trustee. It is stipulated that he was a proper party to bring this action.

The material parts of Hans C. Glissmann's will are as follows:

"Second. I give, devise and bequeath that part of my estate which consists of my contract with the Happy Hollow Club, after the payment in paragraph number 'First'

hereof shall have been made, and after the amount of the costs of administration of my estate shall have been deducted therefrom, as follows: To my wife, Catherine Glissmann, three-eighths. * * * To my son, Henry Christian Glissmann, one-eighth. Subject, however, to any advancements which I have heretofore made to any of my said children. * * * The foregoing bequests to my children, however, are subject to the following conditions: Whereas, I have become surety for debts and obligations assumed by some of my children; and whereas, it is my desire to treat them all alike in the disposition of my estate, it is my will, and I hereby direct that if my estate should at any time become charged with and compelled to pay any of the obligations which I have assumed for any of my said children, that then the amount so chargeable to my estate shall be considered as an advancement to the child on whose account the obligation was originally incurred by me and shall be deducted from the share of said child in and to my estate."

"Fourth. All the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situated, I hereby devise and bequeath to my wife, Catherine Glissmann, to be hers absolutely and forever."

On June 19, 1931, execution was issued upon the judgment herein referred to, and the defendant sheriff levied on "all the interest of Henry C. Glissmann and Tena E. Glissmann" in the real estate in question, subject to the rights of the vendee. The trial court entered a decree December 4, 1931, finding that the judgment debtors, Henry C. Glissmann and Tena E. Glissmann, had, at the time of the levy and execution upon the premises and at the time of the trial, only an equitable interest in said real estate, that such interest was not subject to sale on execution, and enjoined the sale of the same. From this decree the defendants appeal.

The main question presented for determination in this case is whether or not Henry C. Glissmann was by the will of his father given an interest in the real estate

which is subject to levy and sale on execution. The material part of the settlement entered into between Henry C. Glissmann, the judgment debtor, and Catherine Glissmann, the executrix named in the will of deceased, entered into on October 1, 1928, is as follows:

"For value received, the receipt whereof is hereby acknowledged by both parties, each to the other, the parties hereto settle all their controversy and all claims and obligations existing in favor of one and against the other, between themselves, as affects their personal affairs or the affairs of the estate of Hans C. Glissmann, deceased; and the second party (Catherine Glissmann) hereby surrenders to the first party (Henry C. Glissmann) all promissory notes and other evidence of indebtedness due or to become due to the estate of the said Hans C. Glissmann, deceased, or in favor of second party, as executrix or otherwise."

It follows, from this agreement, any claim of the estate against Henry C. Glissmann for an advancement or an indebtedness to the estate was canceled and he received his full share of the estate under the will of his father. At the time of his death Hans C. Glissmann retained the legal title to the real estate in question. The legal title to the real estate, which he held as security for the payment of the balance of the purchase price, would follow the disposition of the contract, and would vest, as a matter of law, in the beneficiaries named in the second paragraph of the will. *First Nat. Bank of Falls City v. Edgar,* 65 Neb. 340.

The judgment under which the levy was made was secured on March 8, 1927. Unquestionably, any judgment that might have been recovered against Hans C. Glissmann in his lifetime would have been a lien upon this real estate to the extent of the unpaid purchase price due from the Happy Hollow Club. *Courtnay v. Parker,* 16 Neb. 311; *Olander v. Tighe,* 43 Neb. 344; *Wehn v. Fall,* 55 Neb. 547. In this last case it was said: "A judgment of the district court, against a vendor of land, who re-

tains the legal title, attaches as a lien to such land, and, as against a vendee in possession with actual notice, may be enforced to the extent of the unpaid purchase price." After the judgment, at the time Henry C. Glissmann settled the controversy with reference to the will contest and his indebtedness to his father with the executrix, he received his full share of the estate under the will of his father. The testator was vested with the legal title to this land at the time of his death, and there appears to be no reason why a judgment creditor of Henry C. Glissmann would not have the same rights with regard to his interest in this real estate as a judgment creditor of the testator would have had during the lifetime of Hans C. Glissmann.

The appellees contend, and this probably was the view taken by the learned trial court, that the legal title to the real estate in question vested in Catherine Glissmann, in trust for the Happy Hollow Club when it should have completed the payments due under this contract. An examination, however, of the fourth paragraph of the will of the testator fails to disclose the expression of any such intention. There is no language whatever in that paragraph which indicates any intention on the part of the testator to create such a trust. The language used shows that it was the absolute and express intention of the testator that his widow should take such property as would vest under that clause absolutely as her own.

Under the decisions of this court above cited, we conclude that the judgment debtor, Henry C. Glissmann, had, at the time of the levy, such an interest in the real estate in question as could properly be levied upon and subjected to the payment of the judgment of the defendant Boland, subject to the rights of the other heirs and of the Happy Hollow Club under its contract.

The decree of the district court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

The following opinion on motion for rehearing was filed March 10, 1933. *Rehearing denied.*

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

PER CURIAM.

On consideration of motion for rehearing filed in this case, the court is satisfied that the opinion heretofore adopted, *ante*, p. 142, is, in all respects, substantially correct, and it is adhered to. However, it appears that inadvertently there has been an unimportant confusion of terms employed therein, and that the word "heirs" was used when the term "devisees" should have been employed. Accordingly, the first and second paragraphs of the syllabus of this case will be corrected to read as follows:

"1. Where the vendor of real estate executes to the vendee a contract for a deed, reserving the legal title in himself, and where no deed has been executed by him, upon the death of such vendor testate, the legal title vests in his devisees if such were designated in his will.

"2. The lien of a judgment, obtained against a devisee of such vendor, attaches to the extent of the share of the unpaid purchase money on that share of the contract devised to such devisee by the vendor."

REHEARING DENIED.

RUSSELL D. RHODES V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1932. No. 28330.

1. **Automobiles: INTOXICATION: PROOF.** In a prosecution against defendant for intoxication and for driving a motor vehicle while intoxicated, evidence of odor of whiskey on his breath, of staggering, of impaired control of mental faculties and of disregard of danger resulting in accidents, and opinions by witnesses testifying from observation that he was intoxicated at the time and place charged, may be sufficient to sustain a conviction.
2. **Criminal Law: EXCLUSION OF EVIDENCE.** In a criminal prosecution, it is not error to exclude as evidence photographs which do not tend to prove or disprove any issue in the case.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

C. L. Stewart, for plaintiff in error.

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

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

ROSE, J.

In the first count of an information, it was charged that Russell D. Rhodes, defendant, was found in a state of intoxication in Clay county, and in the second count that he drove a motor vehicle on public highways therein while intoxicated, the date of each offense being May 29, 1931. He pleaded not guilty and upon a trial was convicted on both counts. On the first he was fined $50. On the second he was sentenced to serve a term of 30 days in the county jail and forbidden to drive a motor vehicle for a year. As plaintiff in error, defendant presented for review the record of his conviction.

One ground of assigned error is insufficiency of the evidence to sustain the conviction. Defendant resided near Spring Ranch, Clay county. During the night of May 29, 1931, he left home in an automobile and drove to Edgar, from whence he took a northward course toward Clay Center. On the way he went into a ditch four miles north of Edgar, could not get out without help, went to a farm house a few rods distant and aroused the farmer from his bed. Two men who saw the car in the ditch followed defendant to the farmhouse and offered help. All four went to defendant's automobile and one of them pulled it with his own car onto the highway. Whether defendant was in a condition to drive was a subject of conversation. His car was headed the wrong way and he was not permitted to turn it toward Clay Center. Another man turned it for him. After a little delay defendant was permitted to take the wheel. Two

of the men present attempted to follow him for a distance to see if he could manage his car. There is testimony that they drove at the rate of 45 miles an hour without keeping in sight of defendant and that he disregarded a stop signal; that there was the odor of whiskey on his breath at the farmhouse and at the place where he went into the ditch; that he staggered; that a quart jar which smelled of whiskey was found next morning near the place where his car left the highway after 10 p. m.; that he drove to Clay Center and started home; that on the way he collided with another car about 12:30 the same night; that both cars were wrecked; that after the second accident his tongue was thick and that he staggered. Two witnesses who observed him at the scene of the first accident expressed the opinion that he was intoxicated. This is a mere outline of the state's case. While the evidence was conflicting, the circumstances, the testimony of eye-witnesses and their opinions, based on what they observed, were sufficient to sustain the verdict.

Another assignment of error is directed to the exclusion of photographs as evidence. They were taken by defendant at his home a week or two after the accident and are pictures of his car after it was wrecked. They were properly excluded as not tending to prove or disprove any issue in the case. Prejudicial error has not been found.

AFFIRMED.

IN RE ESTATE OF HENRY J. STUERTZ. CASPER STUERTZ ET AL., APPELLANTS, V. PAULINE C. STUERTZ, APPELLEES.

FILED DECEMBER 1, 1932. No. 28308.

1. **Descent and Distribution:** HEIRSHIP. Although a child, after birth, at no time voluntarily breathed, made no sound, and moved no muscle of its own volition, where the heart tones were heard for 20 or 30 minutes in response to artificial respiration and the pulsation of the umbilical cord, independent of the mother's circulation, was noticed for 15 or 20 minutes after it was severed, such child was alive at birth.

2. ———: ———. Where the vital functions of a child had not irrevocably ceased, it could not lawfully be pronounced dead at birth, and, for every legal purpose, such child was alive at birth.

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

Max Kier, for appellants.

Chambers & Holland, contra.

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

DEAN, J.

This is an appeal from the district court for Lancaster county in a proceeding to determine the right to heirship in the estate of Henry J. Stuertz, who died intestate September 19, 1929. The estate consists of about $1,000 in a savings bank, and a judgment of approximately $10,000 which was obtained in an action for the wrongful death of the decedent. Surviving Stuertz at the time of his death were his wife, Pauline C. Stuertz, and his father and mother, Casper and Elizabeth Stuertz, who are the petitioners herein.

On May 23, 1930, a baby girl was born to the widow of the decedent, and the question for determination is whether the child was alive at birth or whether it was dead when it was born. A motion for a directed verdict was sustained in favor of the respondent Pauline C. Stuertz and, pursuant thereto, the jury, as directed, found that the child was alive at birth and that the widow and the child were the heirs of the estate of Henry J. Stuertz. The petitioners have appealed.

Dr. J. J. Loomis, the attending physician at the birth of the child, testified that "it was an unusually long, hard delivery," requiring almost two hours to deliver the head, and that the usual time was 10 or 15 minutes; and that, because of a projection in the lower part of the spine, obstruction to the passage of the baby's head was offered,

making it necessary to employ forceps to the head of the child for approximately an hour and a half or two hours before the child could be delivered. The record discloses that the baby was "blue" at birth, due to interference of circulation or occasioned by pressure on the cord or to the long delivery. It is also disclosed that there were certain bruises on the head of the child from the forceps. There was no spontaneous breathing by the child at any time, nor did the doctor notice any voluntary movement of the muscles except a pulsating of the cord. The child, however, reacted toward artificial respiration and the heart tones responded to such stimulation and diminished when it was discontinued.

From the evidence of Dr. Loomis it also appears that after the birth of the child the cord was tied and injections of lobelia were administered to stimulate breathing and that artificial respiration and other usual methods were employed to revive the newly-born infant. The doctor also employed mouth insufflation or mouth to mouth breathing for 20 to 30 minutes during which time he could feel the chest of the child expand. The heart beats continued up to within three or four minutes before the mouth insufflation was discontinued. This physician testified that, in his opinion, the heart tones were audible for too long a time to have been due to stimulation of the fœtal heart and he concluded that it was worth while to make an attempt to bring about respiration as long as the heart beats continued.

An examination of the child was made before its delivery to determine the general condition, and the fœtal heart tones were heard by means of a stethoscope and appeared to be normal. The stethoscope was also employed during the delivery and the heart tones were found to be slower just before the delivery was completed. It is disclosed that the child made no sound of its own volition except during the artificial respiration or the mouth insufflation when, according to the doctor's evidence, there were two or three "grunts" when the air was being

pressed out of the child's chest. The doctor also testified that the pulsating of the cord was noticeable for 15 to 20 minutes, which indicated that the blood was circulating. He also expressed the opinion that the circulation and the beating of the child's heart were independent of the impetus given to it by the mother's circulation, and that the fœtal circulation is entirely separate from the mother's circulation before birth.

Dr. Covey, a specialist in internal medicine and diagnosis, testified on the part of the respondent that, in his opinion, the child was born alive. He based his opinion on the full-term pregnancy, the pulsating cord, the heart tones, and also the fact that the heart responded to artificial respiration. Dr. Covey testified that the pulsation in the umbilical cord was due to the beating of the child's heart, and not to stimulation from placental circulation. The hospital record shows that the following notation was made there, namely: "Fœtal heart tones discernible for ten minutes following delivery."

According to the state director of public health, a child that makes no outcry at birth, never breathes, and does not voluntarily move a muscle is properly reported as a stillbirth and, in a case where heart tones are detected by means of a stethoscope after delivery, such a child also is classified as stillborn.

It appears that the child in question was reported on the birth certificate as having been "stillborn," and on the certificate of death the cause of death is reported as toxemia. Dr. Loomis testified that the birth of a dead fœtus, after the 28th week of pregnancy, he considered as "deadborn," while the birth of a child which lives for a half hour was considered as "stillborn," the difference being that the "deadborn" show no vital function, while the "stillborn" display vital functions, but do not live.

On the part of the petitioners, the evidence of a physician was introduced who was of the opinion that the use of the instruments during the delivery caused an injury to the head of the child and that it was not alive at

birth. And certain of the petitioners' relatives testified that they viewed the body of the child and noticed bruises and other disfigurations on its head. The physician, called by the petitioners, also testified that the heart is an automatic organ and that the fœtal heart has been known to beat after the delivery of an infant without respiration and even where there is no independent life. From his own experience he testified that he had applied artificial respiration to a child for an hour and a half or two hours before the child responded and started breathing.

In Herzog, Medical Jurisprudence, sec. 32, it is stated: "A person is dead at the moment heart action, respiration, and the action of the central nervous system permanently cease." The pulsation in the umbilical cord is due to the action of a child's heart and "such pulsation indicates that the heart was contracting, and contractility of the heart muscles is as good a proof of life (if it be not a better) as contractility of the diaphram or of the intercostal muscles." Tidy, Legal Medicine, part II, p. 252. In the last cited work it is also stated that, even if a child had never cried, never breathed, and never moved, the medical jurist would be justified in declaring the child to be living if the heart was heard to beat. In *Brock v. Kellock,* 30 L. J. n. s. 498, where a child was not seen to breathe, but a pulsation in the funis was observed, such pulsation was held to be a sign of life and it was held that proof of breathing was unnecessary. And in *Goff v. Anderson,* 91 Ky. 303, it was likewise held that a child was born alive when it made an effort to breathe after independent circulation and delivery, and by "independent circulation" it was meant a circulation that was maintained by the child's own vitality independent of that of the mother.

In *Doe d. Cannon v. Killen,* 5 Houst. (Del.) 14, where a baby was found to be alive before delivery and thereafter the beating of its heart was felt, and the pulsation of the umbilical cord was strong, and the heart continued

to beat for five minutes after the cord was severed, it was held that circulation was established and that the baby was alive at birth. "A child never heard to cry, and who did not live, but whose heart beats were perceptible and could be heard, though no respiration could be induced, was 'born alive,' and was 'issue,' within a will." *In re Union Trust Co.*, 151 N. Y. Supp. 246. See, also, *Fleming v. Sexton*, 172 N. Car. 250.

To recapitulate: The evidence establishes that the child at no time voluntarily breathed; that it made no sound; and that it made no movement of any muscle of its own volition. And it is also established that the child was well developed and its heart tones were discernible by means of a stethoscope before delivery; that the heart tones were heard 20 or 30 minutes after birth, according to the doctor's evidence, and, according to the hospital record, the heart tones were noticeable 10 minutes following birth. There was a pulsation of the umbilical cord for 15 or 20 minutes after it was severed and, under the authorities and the evidence, such pulsation appears to have been independent of the mother's circulation. We think it clearly appears that the vital functions of the child had not irrevocably ceased and it could not be pronounced dead at birth, and therefore for every legal purpose the child was alive at birth.

In view of the facts disclosed by the record, and the law applicable thereto, we conclude that the court did not err in directing a verdict for the respondent. The judgment is

AFFIRMED.

FRANK PSOTA, APPELLANT, V. SHERMAN COUNTY, APPELLEE.

FILED DECEMBER 1, 1932. No. 28306.

Eminent Domain: DAMAGES. All damages, immediate or prospective, which may flow from a proper construction, improvement or maintenance of a highway, including cuts, fills and change of grade, must be compensated in the original condemnation proceedings. A subsequent change in the grade to facilitate

public travel will not give rise to an action for additional damages.

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

Clark J. Mingus and *Robert P. Starr*, for appellant.

W. H. Line, contra.

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

GOOD, J.

This is an action for damages alleged to have been caused by the lowering of the grade of a county road, adjacent to plaintiff's farm. A general demurrer to plaintiff's amended petition was sustained. On plaintiff's refusal to further plead, a judgment of dismissal was entered. Plaintiff has appealed.

The following is a summary of the pertinent facts alleged in the petition: In 1916 plaintiff constructed his dwelling and farm buildings on the land, about 200 feet from the road. The buildings were constructed on or near the crest of a hill, and the roadway was practically on the same level as the ground on which the buildings were erected. In 1929 the county caused the roadbed at the crest of the hill in front of plaintiff's dwelling to be lowered to the extent of from 17 to 20 feet. Plaintiff's ingress and egress to and from his farm were materially impaired, his premises left unsightly, and plaintiff claimed other elements of damage as the result of lowering the road grade. No negligence is charged in the manner in which the improvement was made; nor is it charged that the improvement was not necessary and proper for the use of the public. There is no claim that the county appropriated any land outside the boundaries of the established road.

Plaintiff contends that his property has been damaged and decreased in value for a public purpose, and that, by virtue of section 21, art. I of the Constitution, which

reads: "The property of no person shall be taken or damaged for public use without just compensation therefor," he is entitled to recover the damages sustained, regardless of any negligence in making the improvement.

We quite agree with the proposition that if his property has been taken or damaged for a public use plaintiff is entitled to compensation therefor, unless such compensation has been previously waived or paid, and that it is immaterial whether there was any negligence in the manner of making the improvement. Defendant contends that, when the land was originally appropriated for a highway, the owner then received or waived any and all compensation to which he was entitled by reason of a proper construction or improvement of the highway, and that, therefore, no cause of action arose by reason of the subsequent lowering of the grade, unless it was negligently done. Plaintiff, however, contends that the compensation awarded when the land was appropriated for a highway does not include the damage which he suffered by the later improvement in the change of grade. He cites and relies upon *Harmon v. City of Omaha,* 17 Neb. 548, *Douglas County v. Taylor,* 50 Neb. 535, and *Pillings v. Pottawattamie County,* 188 Ia. 567.

An examination of the first mentioned case indicates that it clearly supports plaintiff's contention. *Douglas County v. Taylor, supra,* is readily distinguishable. In that case plaintiff sued to recover damages occasioned by a change in the grade of a highway, but the facts there were essentially different. There the county went outside of the boundaries of the highway, took other land of plaintiff, cut his trees and made a fill in the lower land which spread out over plaintiff's land outside the highway. In that case it was properly held that he was entitled to recover. In the opinion there are some expressions that seem to lend countenance to the claim made by plaintiff, but the disposition of the case hinges on the proposition that land outside the highway was taken and damaged. That case, therefore, is really not an authority supporting

plaintiff's contention. The Iowa case, so far as applicable to the present situation, is an authority against the plaintiff's contention, further reference to which will be made later in this opinion.

On the other hand, defendant cites and relies upon *Churchill v. Beethe,* 48 Neb. 87. In that case it was held: "The proceedings by which a highway is opened call for a settlement and payment of all damages which may arise from such proper construction and maintenance of the highway, taking into consideration such fills, cuts, ditches, and culverts as a proper construction and maintenance may require." In the body of the opinion it was said (p. 90): "It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. *Omaha & R. V. R. Co. v. Moschel,* 38 Neb. 281; *Omaha S. R. Co. v. Todd,* 39 Neb. 818; *Fremont, E. & M. V. R. Co. v. Bates,* 40 Neb. 381; *Chicago, B. & Q. R. Co. v. O'Connor,* 42 Neb. 90. * * * The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance. Applying these principles to the present case, it would seem that the fill and culvert are not only a proper, but apparently a necessary improvement, for the purpose of properly maintaining the highway; and while, if plaintiff's lands will suffer an injury thereby, he was entitled to compensation therefor, it must be presumed that he received such compensation, or at least had an opportunity to receive it, when the highway was originally constructed."

In *Pillings v. Pottawattamie County, supra,* it was held: "The right acquired by the public in the road in question

by condemnation, purchase, or consent was not simply the right to travel, but included the right to improve the grades by cuts upon the elevations and fills upon the low lands.

"That public acquired right to improve road in question by means of cuts and fills must be presumed to have been contemplated, and their effect, if any, upon the value of the land over and along which the road was laid taken into consideration, in assessing damages for original taking.

"In the absence of statute, no right of action for damages will accrue to the adjacent owner from the mere fact that an improvement of the grade in established highway has rendered the use of his land less convenient.

"The owner of land adjacent to an improved highway cannot, in an action against the county and its officers or agents, recover consequential damages for injury resulting to his property by reason of such improvement." (176 N. W. 314.)

In 29 C. J. 544, it is said: "Upon the laying out of a highway the public acquire not only the right of way, but also the powers and privileges incident to that right, among which is the right to keep the highway in proper repair. To accomplish this purpose the proper officers may do any act in the highway that is necessary or proper to make and keep the way safe and convenient for the public travel. They may raise or lower the surface, dig up the earth, cut down trees, and use the earth, stone, and gravel within the limits of the highway in a reasonable and proper manner." At page 545 it is said: "The general easement in the public, acquired by the location of a highway, extends to the limits of the highway as located, and consists in the privilege of passage, with the powers and privileges which are incident to such a right, such as the right to construct and maintain a safe and convenient roadway, * * * and do any other acts which tend to facilitate travel, and are in furtherance of the purpose for which the easement was acquired."

As above noted, the decision in *Harmon v. City of Omaha, supra,* was, in effect, overruled in *Churchill v. Beethe, supra,* and we think the rule adopted in the latter case is based on reason and is supported by the weight of authority. When the public acquire either title to, or permanent easement in, a strip of land for a highway, the owner of the land is not only entitled to receive compensation for the value of the land actually taken, but such consequential damages to the remainder of his land as may result from a proper construction and maintenance of the highway, and if that proper construction for public use and travel requires cutting down a hill or filling in low places, such matters must have been within the contemplation of the parties at the time of the original taking, and the landowner either received, at that time, full compensation, or waived the right thereto.

We are aware that, in cities where the grade has been established and buildings have been constructed with reference to the established grade, the adjacent landowner may recover for any damage occasioned by the change in the grade, but, in the instant case, there is no allegation that any grade had been previously established. When plaintiff constructed his buildings on the site, he was required to take notice of the rights of the public, and that, if their rights and convenience required the cutting down of the hill and making fills in low places, they had acquired the right so to do, and plaintiff may not recover damages for any proper construction or improvement subsequently made in the highway.

The judgment of the district court is in accordance with established rule of law, and is

AFFIRMED.

GEORGE S. BAXTER, APPELLEE, V. THE MACCABEES, APPELLANT.

FILED DECEMBER 1, 1932. No. 28278.

1. Courts: APPEAL: PLEADING: AMENDMENTS. In all cases of appeal from municipal court to district court, such district court, for the purposes of supplying deficiencies and omissions in pleadings before it, is empowered by statute to permit amendments thereto, when substantial justice is promoted thereby, to the same extent and in the same manner as though the action had been originally instituted in such court.
2. Evidence examined, and *held* to sustain the action of trial court in directing verdict for plaintiff.

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

Rexford C. Rankin and *Ellery H. Westerfield,* for appellant.

William Niklaus and *John E. Mockett, contra.*

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

EBERLY, J.

This is an appeal in a law action from the order of the district court directing a verdict for the plaintiff and judgment entered thereon. As now submitted, the appeal presents two questions: (1) The correctness of the order of the trial court permitting an amendment to the petition; and (2) whether the court's instruction to return a verdict for plaintiff was justified by the evidence.

The record before us discloses that this action was originally instituted in the municipal court of Lancaster county, Nebraska. We may briefly summarize the petition filed in that court as follows: It set forth the issuance and delivery by defendant to plaintiff of a policy of insurance, number 878-186; that later in March, 1930, the defendant made an oral contract with plaintiff to pay him $475.50 upon the surrender and delivery of this policy to it. The surrender and delivery of the policy

was thereupon made as required by the terms of the oral agreement; and that defendant has wrongfully neglected and refused to pay plaintiff the amount thus due him.

Trial was had in the municipal court upon this pleading and resulted in a verdict and judgment for plaintiff as prayed.

The defendant perfected its appeal to the district court for Lancaster county by filing the statutory transcript therein on the 21st day of August, 1931. Thereafter, according to the transcript duly authenticated by the clerk of the district court for Lancaster county, the plaintiff below filed his petition in the district court on August 24, 1931. This petition thus filed in the district court, according to this transcript, contained additional allegations which we may epitomize as follows: That on May 16, 1930, the plaintiff was then owner and holder of the policy of insurance referred to in his petition, which contained the following clause: "And agrees to pay at the option of the member, one-half of the amount specified to be paid at his death upon the surrender and cancelation of this certificate in the event of permanent total disability after one full year of continuous membership under this certificate before the member attains the age of sixty-five." Plaintiff was entitled to exercise this option, and did make application as required by this provision, and delivered and surrendered the policy issued to him. The defendant accepted the policy and application which were thereafter retained by it, and plaintiff thereby became entitled to receive from defendant $475.50, which defendant thereafter neglected and refused to pay to him.

While the fact of the amendment of plaintiff's petition nowhere appears in the transcript, however the bill of exceptions discloses that the allegations last referred to were incorporated in the petition, pursuant to the oral order of the district court permitting the amendment to be made during the trial of the case; and the correctness of this ruling is the first matter for our consideration.

Appellant insists that this amendment, so made, tendered a different issue, and in fact pleaded a cause of action not covered or embraced in the petition filed in the municipal court on which this case was there tried.

The following authorities are presented for our consideration as sustaining this construction: *O'Leary v. Iskey,* 12 Neb. 136; *Bishop v. Stevens,* 31 Neb. 786; *Lee v. Walker,* 35 Neb. 689; *Darner v. Daggett,* 35 Neb. 695; *Spurgin v. Thompson,* 37 Neb. 39; *Western Cornice & Mfg. Works v. Meyer,* 55 Neb. 440. These cases, it may be said, evidence the fact that it is the settled law of this state that, when an appeal is taken from a justice of the peace, or from the county court, to the district court, the cause is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the trial.

The instant case, however, is not an appeal or a proceeding in error from either of the courts named in appellant's authorities. It is from the municipal court, and, as such, the provisions of the municipal court act relating to appeals are necessarily controlling. We may also accept, as a general principle, that the allowance of amendments on appeal is a proper subject of statutory legislation. 1 Stand. Ency. of Procedure, 887.

The rule supported by the authorities cited by the appellant was evolved by this court unguided by statute. However, the act of 1929 (Laws 1929, ch. 82) entitled "An act relating to courts and to municipal courts in cities of the metropolitan class and in cities of the first class having a population of more than forty thousand," etc., is an act complete within itself, and covers, in part at least, matters of practice and procedure in the new tribunal it creates. The following of its provisions would appear to relate to the present controversy before us:

"The pleadings may be amended by leave of court at any time before trial, or during the trial, *or upon appeal,* to supply any deficiency or omission in the allegations,

when, by such amendments, substantial justice will be promoted," etc. Comp. St. 1929, sec. 22-408. (Italics ours.)

"The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court." Comp. St. 1929, sec. 22-1105.

"In all cases of appeal from the municipal court, the plaintiff in this court shall, within fifty days from and after the date of the rendition of the judgment, file his petition as required in civil cases in the district court and the answer shall be filed and issue joined, as in cases commenced in such appellate court." Comp. St. 1929, sec. 22-1106.

"All provisions of the Code of Civil Procedure and all other provisions of the statutes of the state of Nebraska, not in conflict with the provision of this act and relating to matters for which no specific provision has been made herein shall govern and apply to actions in the municipal court." Comp. St. 1929, sec. 22-1618.

It is to be observed that the provisions quoted are parts of the same act of the legislature, are remedial in their nature, and, as such, are to be construed together and accorded a liberal construction. *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313; *Becker & Degen v. Brown*, 65 Neb. 264; *Williams v. Miles*, 62 Neb. 566; *Morehead v. Adams*, 18 Neb. 569.

In the determination of a somewhat similar question, the supreme court of North Dakota employed the following language: "The appellant contends that the district court erred in permitting the defendant to file a supplemental answer, for the reason that the issues were thereby changed, which he claims is not permissible after an appeal. Section 8509, Revised Codes 1905, provides that: 'The action shall be tried anew in the district court in the same manner as actions originally commenced therein.' This section has been construed by this court as not a bar to an amendment of the pleading after the appeal, if

the amendment does not pertain to a subject-matter that would not be within the jurisdiction of the justice court. *Vidger v. Nolin,* 10 N. Dak. 353." *Erickson v. Elliott,* 17 N. Dak. 389.

It cannot be gainsaid that the provisions of the Nebraska act already quoted herein contemplate that, in appeals from municipal courts, the action shall be tried in the district court in the same manner as actions originally commenced therein. Nevertheless, the question presented by the record before us is more limited than that determined by the North Dakota case. Our acceptance of their doctrine is necessarily limited by the extent of the question we are now to determine. Our Nebraska statutes contemplate a trial *de novo* in this class of appeals in the district court. At such trial in that tribunal, in view of the statutory provisions quoted, the conclusion is inescapable that the trial court is fully empowered, for the purpose of supplying deficiencies and omissions in the pleadings before it, to permit amendments, when substantial justice is promoted thereby, to the same extent and "in the same manner as though the action had been originally instituted in such court." This is a legislative modification, limited to appeals from municipal court, of the rule as to the necessity of the identity of issues on appeal set forth in appellant's authorities heretofore referred to; and it may further be said that the effect of this legislative declaration is to continue in full force and effect, as applicable to appeals from municipal court, the practice as to amendments which now prevails in the district court in cases originally commenced therein, including the provisions of section 20-852, Comp. St. 1929. On this basis, we find no reason to set aside the action of the district court in permitting the amendment of which appellant now complains.

We have carefully considered appellant's challenge to the sufficiency of the evidence. Under the admitted facts, and which appear from undisputed evidence, at the close of the transaction which constitutes the basis of appel-

lee's cause of action, plaintiff was entitled to receive from the appellant the sum of $475.50. This he has not received, and neither is payment pleaded by the defendant. Lawful interest on the amount, together with attorney's fee taxed as provided by statute, make up the balance of the judgment as directed by the trial court. It follows that the action of the district court is correct, and is approved. It is further ordered that an attorney's fee of $100 be taxed for appellee in this court, and the judgment of the district court be, and is hereby,

AFFIRMED.

HOWARD LEE V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1932. No. 28297.

1. Criminal Law: VERDICT: CONFLICTING EVIDENCE. "Where the evidence is conflicting, it is the province of the trial jury to pass upon the testimony, and, unless the finding is clearly wrong, it is final. This rule applies with equal force to the testimony in a criminal prosecution as in a civil suit." *Curtis v. State*, 97 Neb. 397.
2. ———: APPEAL: ARGUMENT OF PROSECUTOR. "An appeal for conviction based altogether upon the evidence, however fervent it may be, is not an abuse of the privilege of advocacy." *Parker v. State*, 67 Neb. 555.
3. ———: ———: ———. It is not misconduct on part of the prosecuting attorney, but is indeed his duty, to comment on the conduct and credibility of defendant's witnesses, based on evidence and facts properly before the court.
4. ———: ———: ———. Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction.
5. ———: REVIEW. Motion for a new trial not preserved and authenticated as a part of the transcript on appeal cannot be considered in this court.
6. ———: ———. Evidence not contained in the bill of exceptions as settled and allowed by the trial judge will not be considered in the appellate court, although physically appended to such bill.
7. ———: ———. Evidence properly in the record considered, and *held* to sustain the action of the trial court in denying the motions of the accused for a new trial.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

L. R. Doyle and *T. C. Gaughan,* for plaintiff in error.

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

Heard before ROSE, DEAN, GOOD, EBERLY and PAINE, JJ.

EBERLY, J.

The information in this case against the defendant, Howard Lee, charged a violation of section 28-537, Comp. St. 1929. The felony created by this statute "lies in the violence of or against the bank" or "putting in fear any person or persons in charge thereof," coupled "with an intent to steal, take or carry away" any of the bank's money or property. *Smith v. State,* 109 Neb. 579.

On this charge a trial to a jury was had, resulting in a verdict of guilty. Thereafter defendant's motion for a new trial was overruled, and a sentence of confinement in the state penitentiary for the period of twenty-five years was imposed. The defendant prosecutes error to this court.

Three grounds for reversal are presented, which we will consider in the following order: (1) Insufficiency of the evidence; (2) misconduct at the trial on the part of the county attorney and his deputy; (3) newly discovered evidence which the defendant could not with reasonable diligence have produced at the trial.

As to the insufficiency of the evidence, it may be said that the crime charged, viz., the violation of section 28-537, Comp. St. 1929, is not only established beyond a reasonable doubt, but is in fact unquestioned. Both the witnesses for the state, as well as the witnesses for the defendant, agree that in broad daylight about 10 o'clock a. m. on September 17, 1930, the banking house of the Lincoln National Bank & Trust Company in the city of Lincoln was raided by an armed band of unmasked and undisguised brigands, and more than two million dollars

of personal property belonging to, or in the custody of, that institution was by them, through force, fear and violence, taken and carried away. So, the actual invasion of, or entrance into, this building occupied by this bank and trust company on the date alleged in the information, by an armed band, "with intent to take, steal and carry away" the moneys, goods and chattels or other property belonging to, or in the care, custody and control of, this institution, is indeed an admitted fact. The *corpus delicti* must therefore be taken as fully proved. Indeed, the only issue of fact tendered in behalf of the defendant was a challenge to the sufficiency of the evidence identifying him as one of this band of marauders who committed the crime.

The record discloses that this crime occurred in broad daylight. Some ten minutes were occupied in its accomplishment. The participants were unmasked and undisguised. Some thirty bystanders were present, witnessed what was done, and, in close proximity, saw who did it. More than seven of these at the trial, as witnesses for the state, positively identify the defendant Lee as present, and as an armed member of this band, actively participating in the robbery. On the other hand, the testimony of defendant's witnesses who were present when this robbery occurred, in the main, substantially limit their testimony to the conclusion that they do not recognize Lee as one of the armed band, and that certain of the bandits who were stationed at particular places at different times during the robbery, in their opinion, could not be identified as Lee. However, no less than four of defendant's witnesses testify to certain facts and conclusions which tend to corroborate the witnesses for the state. One witness testified, in behalf of the defendant, that Lee was in East St. Louis on dates and times that rendered participation in the robbery by him impossible. In the light most favorable to the defendant, the testimony preserved in the bill of exceptions presents merely questions of conflicting evidence, the relative weight of which is neces-

sarily determined by the credibility of the witnesses from whom elicited. So considered, it presents a question solely for the jury, who saw the witnesses and heard the testimony. Their decision is therefore binding on this reviewing court, and their verdict must be deemed to find ample support in the evidence. *Curtis v. State,* 97 Neb. 397; *Smith v. State,* 109 Neb. 579; *Ingoldsby v. State,* 110 Neb. 495; *Osborne v. State,* 115 Neb. 65; *Williams v. State,* 115 Neb. 277; *Cherpinsky v. State,* 122 Neb. 52.

The defendant charges many instances of misconduct by the county attorney and his deputy in their addresses to the trial jury. The speeches of these officers are preserved in the bill of exceptions. Defendant's exceptions on this subject are numerous, too numerous to be separately considered and discussed in this opinion. The record, however, has been examined with care. In view of the evidence as an entirety, the legitimate inferences which portions thereof would naturally and legitimately sustain, and particularly the attitude of the trial judge and the manner in which each objection of the defendant to the remarks of the prosecuting officers was determined by his rulings, we do not find that the conduct complained of operated to deprive the defendant of the fair consideration of his case by the jury, to which he was entitled.

It must always be remembered in this connection that "An appeal for conviction based altogether upon the evidence, however fervent it may be, is not an abuse of the privilege of advocacy." *Parker v. State,* 67 Neb. 555. So, too, it is not misconduct on the part of the prosecuting attorney, but is indeed his duty, to comment on the credibility and conduct of the defendant's witnesses, based on evidence and facts properly before the jury. *Tatum v. State,* 61 Neb. 229; *Dinsmore v. State,* 61 Neb. 418; *Reed v. State,* 66 Neb. 184; *Holmes v. State,* 82 Neb. 406. And, in this connection, it is not improper for the prosecuting attorney to comment on the conduct of the accused and his counsel during the trial or to impute to them characteristics justified by the evidence, even though on

the subject involved the evidence of the state and that of defendant is in direct conflict. 16 C. J. 907; *Dinsmore v. State,* 61 Neb. 418; *Johnson v. Commonwealth,* 24 Ky. Law Rep. 842; *State v. Cameron,* 177 Ia. 379. And while county attorneys owe an imperative duty to the accused, to accord him a fair trial, as well as to the state to see that its criminal statutes are enforced, still remarks in argument, if brought about and made in answer to the argument of the prisoner's counsel, do not necessarily authorize the reversal of a conviction, especially when these arguments of defendant's counsel, though heard by the trial judge, are not preserved in the bill of exceptions. *Cleveland v. State,* 80 Tex. Cr. Rep. 334; *Deisher v. State,* 80 Tex. Cr. Rep. 428; *Rose v. State,* 122 Ark. 509; *State v. Slamon,* 73 Vt. 212; *State v. Busse,* 127 Ia. 318; *Reeves v. State,* 84 Ind. 116. And lastly, misconduct of counsel is never ground for a new trial unless prejudicial. *Rogers v. State,* 93 Neb. 554; *Heyl v. State,* 109 Ind. 589; *United States v. Mitchell,* 136 Fed. 896.

The last proposition for consideration is defendant's contention that the district court erred in overruling defendant's application for a new trial based on the ground of newly discovered evidence, which defendant could not with reasonable diligence have produced at the trial. The brief of defendant recites: "This evidence was set out in an affidavit of Herbert Holmes (B. of Ex. p. 641A) and also in testimony of W. E. Barkley (B. of Ex. pp. 612-640)."

The statute relating to proceedings in error in criminal cases contemplates "the filing (in the supreme court) * * * of a transcript of the record of the proceedings of the district court * * * as in civil cases." Comp. St. 1929, sec. 29-2306. This section assimilates the procedure in the supreme court in criminal cases to the practice in civil cases in that court, and makes the provisions of the Civil Code of proceedings in error applicable to such proceedings in error in criminal cases, except where specific statutes are inconsistent therewith. *Kountz v. State,* 8 Neb. 294; *Kock v. State,* 73 Neb. 354.

On page 24 of the transcript in this case we find set out the "motion to set aside and vacate sentence and order overruling motion for new trial and to grant a new trial," with affidavit of Howard Lee attached forming a part thereof, and all of which was filed January 7, 1932. The sole ground upon which this motion was based appears as newly discovered evidence in possession of and to which one W. E. Barkley would testify in the event of another trial. The transcript also contains an order of the district court entered July 9, 1932, overruling this motion "filed July 7, 1932." The evidence received and considered on this hearing appears on pages 612-640 of the bill of exceptions. It is limited to the oral examination of W. E. Barkley, and the motion heretofore referred to as filed "January 7, 1932," and the supporting affidavit thereto attached. This evidence, fairly considered, fully justifies the action of the trial court in the denial of this motion.

In so far as an application for a new trial based on the affidavit of Herbert Holmes is concerned, no such application is shown in the transcript, and no such affidavit is preserved in the bill of exceptions allowed and settled by the district court. It is to be remembered that the necessity of having a proper record of the action complained of is not merely enforced by the wording of the controlling statute, but emphasizes a jurisdictional fact. This court is given no jurisdiction to correct any errors save those only "appearing in the record." So far as the action of this court of review in a criminal case can be called a trial, it is a trial of the correctness of the lower court's decision, and the evidence of those acts of that court, whose correctness is on trial, can be furnished only by the record, as by its records alone can that court speak. *Barlass v. Braash,* 27 Neb. 212, 219. The cause here must be considered on the record as it is, not what it possibly might be. In the present case the certificate of the clerk authenticating the transcript expressly enumerates what is contained therein, and is in

appropriate and proper form only when used in verifying a part of the record of the trial court which is transmitted to the supreme court, and carries no implication that any proceedings of the trial court in the case, except as expressly enumerated, are to be found in the record which such certificate verifies. No mention is made in this certificate of a motion for a new trial because of newly discovered evidence, based in whole or in part on the affidavit of Herbert Holmes. Neither does this transcript affirmatively show any record of the trial court's ruling on this particular application. It is quite obvious that the one vital and indispensable record essential to the consideration of this question is absent from the transcript in this case. *Romberg v. Fokken,* 47 Neb. 198; *Hake v. Woolner,* 55 Neb. 471.

It appears without question that defendant's proposed bill of exceptions was served upon the county attorney of Lancaster county on February 2, 1932. On the 3d day of the same month it was returned "with no amendments proposed thereto," and on the same day presented to and allowed by the trial judge by a certificate bearing date of February 3, 1932, and on the same day was filed in the office of the clerk of the district court for Lancaster county. Conclusive evidence contained within the bill of exceptions discloses that on or after February 9, 1932, certain written documents, including what purports to be an original "Motion to vacate order, set aside sentence and grant a new trial," with an original affidavit of Herbert Holmes in support thereof, and purporting to have been filed in the case of State v. Howard Lee in the district court for Lancaster county on December 26, 1931, were, without authority, physically attached to the bill of exceptions theretofore allowed, and the original certificate of allowance and settlement of the trial judge bearing date of February 3, 1932, reattached at the end or conclusion of the documents thus physically attached on and after February 9, 1932. Assuming that this motion for new trial based on the affidavit of Herbert

Holmes is the original motion and was inadvertently omitted from the transcript, its appearance here in its present context will not aid the defendant nor support the omission in the transcript. The words "a transcript of the proceedings," as employed in the Criminal Code to designate what shall be filed with a petition in error, include within their meaning duly certified copies of original papers and pleadings in the trial court, which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated and will not fulfil the requirement of the statute. *Royal Trust Co. v. Exchange Bank,* 55 Neb. 663; *School District v. Cooper,* 44 Neb. 714; *Moore v. Waterman,* 40 Neb. 498. So far as these added documents possess the character of evidence, in view of the facts already recited, they are subject to the rule: "Evidence not contained in the bill (of exceptions), nor made a part thereof, will not be considered by the appellate court, even though appended to the bill." 4 C. J. 227. Evidence not embraced in the bill of exceptions, as actually allowed and settled, is not entitled to any consideration whatever by this court. *Crocker v. Steidl,* 82 Neb. 850; *Schmidt v. Village of Papillion,* 92 Neb. 511.

But assuming the question properly before us, the affidavit of witness Holmes, who testified for the state, that he was mistaken in his testimony given at the trial as to the identity of the accused as one of the participants in the robbery, does not bring this case within the principles which are cited in defendant's behalf on this point, so as to justify or require the trial court to sustain a motion for a new trial. The scope of the testimony thus sought to be retracted by this proceeding extends no further than to establish as an ultimate fact that this witness was present as a spectator at the robbery, and there saw Howard Lee, whom he had never previously met, participating therein. The following from his cross-examination may be taken as typical of this man's evidence: "Q. I say you wouldn't want to tell the jury

you positively saw Mr. Lee during the bank robbery? A. Since I went and identified the man I think I would. Q. But you wouldn't want to be absolutely positive about it, would you? A. Well, that is my opinion; yes, sir. Q. Wouldn't you say, Mr. Holmes, to be fair and to be absolutely honest with yourself, that you saw a man there that looked like Lee? A. Such a close resemblance, Mr. Doyle, that I could hardly say he wasn't Mr. Lee. Q. But it is not absolutely close enough to say positively in your mind that it was, you couldn't positively say that? A. Well, I don't know whether my opinion was positive or not."

Six other witnesses for the state, likewise present as spectators at the commission of the crime and whose credibility does not appear to have been successfully attacked, positively identify the accused as one of these robbers.

In this situation defendant cites *State v. King,* 27 Utah, 6, where a new trial was directed by the reviewing court. In this case King was charged with the murder of one Prowse. William Wittenberg, a state witness, testified he saw two men "coming around from the Sheep Ranch" where Prowse was killed, immediately after the murder had been committed, with handkerchiefs over their faces, who he then followed and kept in sight until they entered a lighted room and removed their masks, where he recognized the defendant as one of the masked men. No others witnessed this incident, and none were present at the killing of Prowse. Wittenberg was thus the sole witness to the facts detailed in his evidence, and the reviewing court was of the opinion that without this evidence it was extremely doubtful whether conviction could be had.

Defendant also cites *Green v. State,* 49 Tex. Cr. Rep. 204. In this case but two witnesses testified as to the alleged criminal act. "Taylor swore positively that he bought the whisky from appellant (Green). Appellant swore directly and positively that he did not sell him

(Taylor) any." Supporting the motion for a new trial on the ground of newly discovered evidence is the affidavit of Taylor: "I am now satisfied that I am mistaken in the identity of said defendant, Tom Green; and I hereby solemnly swear that defendant, Tom Green, mentioned herein and tried and convicted, * * * is not the person who sold me said intoxicants." Here again it was the retraction by the sole and only witness of the state to the disputed fact that caused the court to grant a new trial.

Defendant also cites *Bailey v. State,* 36 Neb. 808. While a new trial was directed by this court in that case, the reasoning of the opinion appears opposed to accused's contentions. Irvine, C., in the opinion in that case states: "This court has stated the doctrine as to cumulative evidence to be that a new trial will not be granted unless such evidence be of so controlling a character as to probably change the verdict. *Flannagan v. Heath,* 31 Neb. 776; *Keiser v. Decker,* 29 Neb. 92. The same principle should apply here. The only direct evidence of the fact of marriage was the testimony of the prosecuting witness. While the jury were justified in believing it, there are many facts tending to its discredit. The evidence of Woodward as to a contrary statement made to him before this prosecution was begun would be a very material fact for the consideration of the jury in weighing her testimony and would very probably have led to a different result. Moreover, this testimony would not be entirely in the nature of impeachment. The question of marriage depended largely upon the intention of the parties, and this testimony tends to show that Mrs. Bailey had not in fact regarded their relations as those of husband and wife. Under the circumstances of this case a new trial should have been allowed." It is obvious that, in view of the essential difference in the facts, the principles announced in the *King* and *Green* cases can have no application to the facts here presented, and the reasoning in the *Bailey* case tends to support the action of the trial judge in the instant case.

It seems a principle almost universally accepted by the courts of this nation that the granting or refusal of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. And, also, in the exercise of this discretion the courts have always listened distrustfully to the claim of newly discovered evidence, and as a ground for new trial it is not favored. 16 C. J. 1181; *Riley v. Missouri P. R. Co.*, 69 Neb. 82; *Davis v. State*, 51 Neb. 301; *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 245.

So, too, we have repeatedly held that the positive testimony of one credible witness, identifying the defendant as perpetrator of the crime, is sufficient to support the conviction. *Buckley v. State*, 79 Neb. 86; *Schultz v. State*, 88 Neb. 613; *Cherpinsky v. State*, 122 Neb. 52. As we have already seen, this court will not interfere and direct the granting of a new trial because of absence of sufficient proof, where there is material evidence tending to support the verdict.

It therefore necessarily follows that in the instant case the refusals of the trial court to sustain defendant's various motions for a new trial are not suggestive of an abuse of discretion, but were fully justified by the record. The judgment of the district court is, therefore,

AFFIRMED.

MARY JANE SKEFFINGTON, APPELLEE, V. KEARNEY SAVINGS & LOAN ASSOCIATION, APPELLANT.

FILED DECEMBER 9, 1932. No. 28614.

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

Drake & Drake, for appellant.

Miller & Blackledge, contra.

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

PER CURIAM.

This is an appeal in an action at law from a refusal of the district court to retry a cross-petition after mandate from this court.

It is necessary to make a brief statement of the original case, known as No. 27572. The appellee held five certificates in appellant association, upon which she had been making payments for a number of years. Having filed a withdrawal notice, she filed an action at law against the association to recover the amount due her.

The defendant association set up in its answer that the payments made on instalment stock were made according to the laws of Nebraska and the articles and by-laws of the corporation; that proper written notice had not been given, nor was the consent of the board of directors obtained, and judgment could not be so obtained. *Heinbokel v. National Savings, Loan & Bldg. Ass'n,* 58 Minn. 340. For a counterclaim and set-off, defendant alleged in its cross-petition that appellee had purchased an additional 23 shares of stock and used the same as collateral security for a first real estate loan of $2,300 on Kearney property; that she deeded said property and abandoned it, and that, while the association secured a deed from the purchaser, it had never released appellee from her bond and mortgage, and asked judgment thereon.

The trial court rendered judgment for appellee upon March 18, 1930, and rendered judgment against appellant association on its counterclaim. Upon appeal to this court, the case was heard before the commission, and in the opinion entered by Commissioner Thompson it was held that the district court erred in overruling appellant's demurrer *ore tenus;* that the judgment must be reversed.

After mandate had been received in the district court, the appellee dismissed her petition, and the appellant association demanded trial upon its cross-petition. The trial court denied this application for retrial, holding that

the supreme court had failed and refused to pass upon the trial court's judgment dismissing the cross-petition, and for that reason the judgment of dismissal of the trial court was still in full force and effect.

The judgment entered by the commissioner is not as complete as it might have been; still, it is the settled rule of this court that the determination of questions presented to it in review, whether touched upon in the opinion or not, become the law of the case. This is true as to all questions raised by the record and necessarily involved in the decision. *Oldig v. Fisk,* 1 Neb. (Unof.) 124.

When, in an error proceeding, the judgment of a trial court has been reversed, that court should retrace its steps to the point where the first material error occurred; from that point the trial should progress anew. *Missouri, K. & T. Trust Co. v. Clark,* 60 Neb. 406.

The judgment was a reversal, and the case was remanded, which means a retrial. It is held that the judgment of reversal covered the erroneous action upon the cross-petition, and that the mandate of this court sent the case back for retrial in all respects. Reversed in accordance herewith.

REVERSED.

FRANK WILCH, APPELLEE, V. WESTERN ASPHALT PAVING CORPORATION, APPELLANT.

FILED DECEMBER 9, 1932. No. 28122.

1. Trial: INSTRUCTIONS. Where the trial court in an instruction to the jury stated the facts as pleaded by the plaintiff but omitted therefrom the words "it is alleged," such instruction is erroneous in that it assumes as established facts concerning which the evidence is in conflict, thereby reflecting the opinion of the trial judge and invading the province of the jury.
2. ———: ———. An error in an instruction is not cured by the giving of other instructions, where such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered with the other instructions, tends to confuse the jury.

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

Milchrist, Schmidt, Marshall & Jepson and *Courtright, Sidner, Lee & Gunderson,* for appellant.

J. C. Cook and *George W. Wertz, contra.*

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

DEAN, J.

On or about April 10, 1930, Frank Wilch, the plaintiff herein, entered into a contract with the Western Asphalt Paving Corporation, the defendant, for certain road grading by the plaintiff on a certain highway preparatory to the paving thereof by the defendant under another contract between the defendant and the state department of public works. On the part of the plaintiff it is alleged that, on June 10, 1930, the defendant unlawfully and with the deliberate intention of preventing the plaintiff from performing and fulfilling his contract caused a notice to be served upon the plaintiff charging him with having defaulted in his work. The plaintiff alleged that any failure to perform his work was due to the wrongful and fraudulent acts of the defendant and his agents in directing the plaintiff in his work and hindering him so that he could not follow the plans and specifications involved in the contract, and that, in view thereof, he has been damaged in the sum of $11,000 by such wrongful acts of the defendant.

The defendant denied the allegations of the plaintiff in part, and alleged that he was induced to enter into the contract with the plaintiff through false representations made to him, wherein the plaintiff alleged that he was fully equipped to perform the work and that he was familiar therewith; that the plaintiff did not perform his work according to the plans and specifications of the contract, by reason of which the notice of default was served upon him by the defendant; and that the work

was thereafter completed by the plaintiff's surety company.

The plaintiff denied the allegations of the defendant's answer, and alleged that he was at all times familiar with the work to be performed, but that he was prevented from the performance thereof by the defendant, and that he ceased work under the direction of the defendant.

Upon submission of the facts, the jury found for the plaintiff in the sum of $8,000, and the motion for a new trial was overruled by the court upon the filing of a remittitur of $1,700 therefrom by the plaintiff. Judgment was thereupon entered for the plaintiff for $6,300, from which the defendant has appealed.

As grounds for reversal, the defendant relies upon 17 assignments of alleged error which relate almost entirely to the giving of certain instructions by the court and to the refusal of certain instructions tendered by the defendant. Instruction No. 1 given by the court is as follows:

"On April 10, 1930, plaintiff and defendant entered into a contract for road grading, which is exhibit F, and which is in evidence here. That defendant conceived and consummated a scheme with the deliberate and fraudulent purpose of defrauding plaintiff from receiving the profits thereof, and that, in pursuance of this scheme, hindered and delayed the plaintiff in various ways so that it was impossible for him to perform the contract in every detail, although he was always ready, willing, and able to do so. That on June 10, 1930, in furtherance of this scheme defendant required plaintiff to quit work, although he was half a mile ahead of the mixer at that time, and was keeping up in every detail with the full performance of his contract. He says that because of the above he has been damaged in the sum of $11,000, and asks a verdict in his favor for that sum."

It is to be noted that the words "it is alleged" were omitted from the above instruction by the court, thereby tending to inform and instruct the jury as to positive facts, instead of allegations of the plaintiff. By this in-

struction the jury were affirmatively informed by the court that the defendant conceived and consummated a scheme with the deliberate and fraudulent purpose of defrauding the plaintiff and delaying and hindering him, making it impossible for the plaintiff to perform the contract in every detail, although he was at all times willing to do so.

In a memorandum opinion the trial judge admitted that, technically, by the omission of the words "it is alleged," the jury were informed that "certain things were true," and that "unless the other instructions rectified this error of course a new trial should be granted." But the trial judge stated that, in his opinion, by reading all of the instructions together, the jury could not have believed that the only question in the case was the question of damages. At the conclusion of his memorandum opinion, however, the court further stated that a new trial would be granted unless a remittitur from the judgment was made. And, as noted above, this remittitur was made by the plaintiff.

We have held: "It is elementary that it is the duty of the trial court in its instructions to the jury to fairly state the issues raised by the pleadings." *Larsen v. Larsen*, 115 Neb. 601. And in *Terry v. Beatrice Starch Co.*, 43 Neb. 866, we held: "It is error for the court to give an instruction which assumes as established a disputed question of fact. It is for the jury alone to pass upon conflicting evidence." See, also, *Herold v. Coates*, 88 Neb. 487; *Estelle v. Daily News Publishing Co.*, 99 Neb. 397; *Willman v. Sandman*, 101 Neb. 92. In the present case, where the trial court in an instruction to the jury stated the facts as pleaded by the plaintiff but omitted therefrom the words "it is alleged," such instruction is erroneous in that it assumes as established facts concerning which the evidence is in conflict, thereby reflecting the opinion of the trial judge and invading the province of the jury. And such an error in an instruction to the jury is not cured by the giving of other instructions, where

such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered with the other instructions, tends to confuse the jury. *Morton v. Harvey,* 57 Neb. 304. Upon an examination thereof, we do not find that other instructions given by the court cured the prejudicial error complained of in instruction No. 1, given by the court. Other assignments of alleged error have been pointed out but, in view of our decision, we do not find it necessary to discuss them. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ED STONE, APPELLEE, V. THOMSON COMPANY, APPELLANT.

FILED DECEMBER 9, 1932. No. 28602.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: INJURY TO EMPLOYEE: VENUE. In an action to recover for personal injuries under the provisions of the Nebraska workmen's compensation law, where the plaintiff is a resident of Nebraska, and the employer maintained its principal headquarters in Nebraska but sent its employees to various adjoining states in the performance of certain contracts and employed the plaintiff to work at a point in Kansas where he was injured, the contract of employment being made in Nebraska, *held,* that the industry in Kansas was merely incidental to that carried on in Nebraska by the employer and that an action for compensation is maintainable here.
2. ———: ———: ———: LATENT INJURY. An employee is not precluded from recovering additional compensation where his injuries were latent and did not culminate in total disability until after six months from the date of the accident and proceedings for such compensation were instituted within six months after the culmination of the injuries into total disability.
3. **Appeal.** Where cases are tried *de novo* and the evidence is conflicting, this court will consider the fact that the trial judge saw and observed the witnesses while testifying and gave greater credence to some than to others.

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

Kennedy, Holland & DeLacy and *Ralph E. Svoboda,* for appellant.

Baker, Lower & Sheehan, contra.

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

DEAN, J.

This action was commenced pursuant to the provisions of the workmen's compensation act by Ed Stone, plaintiff, to obtain compensation for personal injuries sustained by him on or about January 6, 1931, while he was employed as a dump foreman by the Thomson Company, defendant herein. The plaintiff received compensation in the sum of $15 a week from January 13 to January 31, 1931, and $25 for medical care, and in this action he seeks additional compensation for total disability arising from his injuries.

The hearing before the compensation commissioner resulted in an award in favor of the plaintiff which, upon appeal to the district court for Douglas county, was affirmed, the court finding that the plaintiff has been totally disabled since August 27, 1931. The defendant was thereupon ordered to pay the plaintiff $15 a week for 300 weeks, less the compensation for two weeks and five days already paid to the plaintiff, and at the expiration of the 300-week period $12 a week for the remainder of his life. In addition, the defendant was ordered to pay certain hospital and medical expenses incurred by the plaintiff and also $100 as attorney's fees. The defendant has appealed.

The plaintiff is a resident of Omaha, but at the time of the accident he was employed by the defendant at or near Beagle, Kansas. The defendant company had its headquarters in Nebraska and within the city of Omaha.

The defendant contends that the provisions of the Nebraska workmen's compensation act do not apply here and that the court is without jurisdiction, the argument being that, if the work to be performed is in another state

than that in which the contract of hiring was made, the right of an employee to compensation is governed by the law of the state in which the work was to be performed if at the time there is no industry within the state where the contract was made to which the employment was incidental. And it is also argued that the residence of the employer within the state of the place of contract or an office therein do not determine the location of the industry. And in support of its contention the defendant cites, among others, two recent decisions of this court.

In *Watts v. Long,* 116 Neb. 656, 59 A. L. R. 728, the employer there resided in and had his principal place of business at Concordia, Kansas, and he maintained no place of business or branch office in Nebraska other than temporary quarters. The employee there resided at Wymore, Nebraska, where he was temporarily employed by the defendant, and he later moved to Kansas where he was again employed by the defendant. We held in the *Watts* case that the defendant's principal place of business was in Kansas, and that the contract was not incident to any industry carried on in Nebraska, but that it had reference only to work in Kansas, and that the employer might perhaps never obtain another contract of work to be performed in Nebraska.

In *McGuire v. Phelan-Shirley Co.,* 111 Neb. 609, a resident of Nebraska entered into a contract in Nebraska with a Nebraska corporation which had its principal place of business in Omaha for the performance of work in Iowa, where the employee was injured, and we there held that the compensation proceedings were maintainable in Nebraska. In *Watts v. Long, supra,* we held that the *McGuire* case was not controlling from the fact that the employer's principal place of business in that case was in this state, while the employer in the *Watts* case had his principal place of business in another state and did not actually carry on an industry in Nebraska.

The decision in *Watts v. Long, supra,* was approved

and followed in *Freeman v. Higgins*, 123 Neb. 73, also cited by the defendant. In the *Freeman* case the employer was a contractor residing at Fairbury, Nebraska, but his sole business at the time of the employment of the plaintiff, who also resided in Nebraska, was construction work in the state of Wyoming. There was no evidence that the employer in that case had his principal place of business in Nebraska, nor that he maintained any business in Nebraska. In fact the plaintiff in that case was listed as an employee in Wyoming at the time of his injury and we held that the contract was not incident to any industry carried on in Nebraska.

In the present case, however, the plaintiff is a resident of Omaha and, as disclosed by the evidence of a member of the defendant firm, the company had for several years preceding the trial, and within six weeks thereof, maintained its headquarters at Omaha. All parties agree that the matter of plaintiff's employment was there discussed, although the actual performance of the work was in Kansas. The defendant claims that the engagement of the plaintiff was made in Kansas, but the testimony adduced in support thereof is rendered somewhat equivocal on cross-examination. The plaintiff's testimony to the effect that his employment took place at Omaha, Nebraska, is persuasive, and we accept it as true, as the district court must have done. The case is tried here *de novo*. And where cases are tried *de novo* and the evidence is conflicting, this court will consider the fact that the trial judge saw and observed the witnesses while testifying and gave greater credence to some than to others. The record discloses that the Thomson Company is engaged in the general contracting business and carries on its business in Kansas, Iowa, Nebraska, Oklahoma and other adjoining states, and that at various times employees were taken from Nebraska to the places where work was to be performed. Clearly, the above cited *Watts* and *Freeman* cases are not controlling here. And in an action to recover for personal injuries under the provisions of the

Nebraska workmen's compensation law, where the plaintiff was a resident of Nebraska, and the employer maintained its principal headquarters in Nebraska but sent its employees to various adjoining states in the performance of certain contracts and employed the plaintiff to work at a point in Kansas where he was injured, the contract of employment having been made in Nebraska, we conclude that the industry in Kansas was merely incident to that carried on in Nebraska and that such action for compensation is maintainable here.

The defendant also contends that the evidence is insufficient to prove that the plaintiff's condition is a result of the injuries sustained by him in the course of his employment. But, in view of the facts which are hereinafter set forth, we cannot assent to this assignment by the defendant. When the accident occurred the plaintiff, with others, was engaged in loading a gas shovel upon a flatcar, when a plank which he was using to tighten cables slipped. The cable was tightly wound at the time, and the tension therein pulled it out of the plaintiff's hands and the plank swung around and struck him, thereby throwing him from the car to the ground and striking his left hip and abdomen. At the time the ground was frozen and covered with cinders. Immediately thereafter the plaintiff was treated by the defendant's physician, who testified that the plaintiff sustained a fracture of certain ribs on his right side and injuries to his kidney and stomach.

The plaintiff testified that he was very stiff and sore for some time after the accident, but that he was informed by his physician that it would be better for him to do light work, and that his injury was a flesh and muscle bruise which would wear off more quickly by exercise. The physician denied having advised the plaintiff to exercise, and denied having stated to him that he might have further difficulty in the future as a result of his injuries, but he testified that he informed the plaintiff that if he could stand it he could go back to work.

Plaintiff had a severe attack of pain in his back and in his left leg in the latter part of April, but he continued working for the defendant until some time in June, 1931, and during the summer he did similar work for other companies. During all of this time, however, his back and leg appear to have bothered him and, on August 27, he was compelled to cease working.

An Omaha physician examined the plaintiff and diagnosed his condition as a type of bone tumor, after X-ray pictures had been taken of his hip. He testified that a history of most cases involving tumor of the bone discloses that such tumors arise from a trauma or injury. An operation was performed on the plaintiff's hip, the operation consisting of making an opening in the hip and scraping out certain tissue which was described as a malignant growth. The physician's prognosis in respect of the plaintiff is that he will die from the condition existing in his hip and the doctor could not say how long he would live. He recommended future treatments of X-ray therapy to keep down the growth of the cells, but he testified that the case might reach a point where such treatments would be of no avail "because in all forms of cancer they eventually die." And in a report dated October 14, the physician concluded with the statement that the plaintiff's condition was due directly to the injury he sustained in January, 1931, and he testified that it was generally agreed by all bone authorities that such a condition was usually the result of trauma. He further testified that about 50 per cent. of the people in plaintiff's condition believe they have a rheumatic condition until the X-ray pictures reveal otherwise.

The physician by whom the X-ray pictures were taken testified that the first pictures were taken before the operation and that at the time he expressed the opinion that the plaintiff had a new growth of some character in the bone which was of a destructive type and which has a "bad prognosis" and, in his opinion, will prove fatal to the plaintiff. He also expressed the opinion that a trauma

caused the plaintiff's condition. To the same effect is the evidence of another physician.

On behalf of the defendant, testimony was offered to the effect that a trauma does not cause a tumor and that the plaintiff's condition is not due to the injury he received. One physician testified, however, that if there were signs of external violence and if the plaintiff had black and blue marks at the time of the injury he would say a trauma was the cause of his condition.

From an examination of all of the evidence, we conclude that there is ample testimony showing that the tumor is a direct result of the injury suffered by the plaintiff. So far as disclosed by the record, the plaintiff was in good health before the accident. And it is further disclosed that there apparently is no cure for the tumor or cancerous condition and that it will eventually prove fatal to the plaintiff.

It is contended that the plaintiff did not file his claim herein within the 6-month period provided by statute. The injury did not culminate in total disability until some months after the plaintiff had signed a release of final settlement with the defendant, and at the time he had no means of knowing that the condition in his hip would develop into a malignant growth as a result of the injury. We do not think the plaintiff is precluded from recovering compensation where such injuries were latent and did not culminate in total disability until after six months from the date of the accident, and proceedings for compensation were instituted within six months after the culmination of the injury into total disability. *McGuire v. Phelan-Shirley Co., supra*; *Flesch v. Phillips Petroleum Co., ante,* p. 1. Complaint is also made that the court erred in excluding certain evidence on the cross-examination, but we do not find merit in this contention of the defendant.

The judgment is affirmed, with an allowance of $100 to plaintiff's attorneys for services in this court.

AFFIRMED.

ADAM BAUMANN, APPELLEE, V. AMOS T. HUTCHINSON, APPELLANT.

FILED DECEMBER 9, 1932. No. 28142.

1. **Verdict.** The record discloses that the verdict is supported by the evidence.
2. **Negligence:** AUTOMOBILES: CARE REQUIRED IN DRIVING. The operator of a motor vehicle, in backing the same onto a public alley, must look backward, not only before he begins his operation, but while he is in the act of backing, and must give a signal of his intention to back, in order that he may not collide with or injure those lawfully using such alley.
3. **Release:** AVOIDANCE. Release of a claim for personal injuries may be avoided if it is executed in reliance on misrepresentations as to the nature or extent of the injuries, amounting to fraud, on the part of releasee, or his agent.
4. ———: ———. Where a releasee, or his agent, communicates to the releasor the professional opinion of releasor's physician, it is the duty of the releasee, or his agent, to repeat the opinion with entire correctness.
5. ———: ———. If the one responsible for a personal injury, or his agent, falsely represents to the injured person what a physician or surgeon thinks or has said about his injuries, it is a fraud which may justify the rescission of a release, executed in reliance upon such false statement.
6. ———: AVOIDANCE: FRAUD. "When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract." *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730.
7. **Trial:** REFUSAL OF INSTRUCTIONS. It is not error for the court to refuse defendant's request for additional instructions, where it has, on its own motion, fully and fairly instructed the jury on defendant's theory of the case. *Blado v. Draper*, 89 Neb. 787.
8. ———: INSTRUCTIONS. The court is not required to state the whole of the law applicable to the case in a single instruction. It is sufficient if the charge, as a whole, fully and fairly instructs the jury with reference to all the issues in the case.

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

Rosewater, Mecham, Burton, Hasselquist & Chew, for appellant.

Lawrence W. Rice and *E. T. Hayes, contra.*

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

GOOD, J.

This is a personal injury action in which plaintiff recovered judgment, and defendant has appealed.

The errors relied on for reversal are that the evidence is insufficient to sustain the verdict, and the giving and refusing of instructions to the jury. The record reflects the following facts:

Plaintiff was thrown from a ladder and received the injuries of which he complains. He was standing on the ladder, washing a second-story window of a business building in the city of Norfolk. The building abutted on the south side of a paved public alley, 16 feet in width. The ladder was placed in the alley, the upper end against, and the lower end about four feet from, the building. The alley extends east and west, and on the north side thereof, opposite the building on which plaintiff was working, was another business building, known as the Killian building. The west part of the Killian building abutted on the north side of the alley; the eastern part of the building lacked about 25 feet of reaching to the alley.

At about 9:30 a. m., on May 23, 1930, defendant, whose automobile had been parked in the rear of the east part of the Killian building, got into his car and backed it southwesterly into the alley and against the ladder on which plaintiff was working, knocking the ladder down and precipitating plaintiff to the pavement. Plaintiff sustained a fracture of the radius of the right arm; a fracture of the os calcis bone of the left foot, and also a

fracture of the tubercle of the astragalus bone in the same foot. He also received injuries to his back which at the time were not believed by his physician to be serious. The evidence on behalf of plaintiff tends to prove that some months later it was discovered that he had sustained a compressed fracture of the twelfth dorsal vertebra, and a fracture of the processes of the first lumbar vertebra. The evidence on behalf of defendant respecting the injuries to the vertebræ conflicts sharply with that on behalf of plaintiff.

Immediately after the injuries plaintiff was removed to a hospital in Norfolk, where he was put under an anæsthetic, and the then-known fractured bones were set, a splint being placed on the right arm and a cast on the left foot and leg. Morphine was also administered to him hypodermically, but the precise time when it was administered is not disclosed. On the following day defendant, together with the local agent and adjuster, respectively, of defendant's insurance carrier, called upon plaintiff at the hospital and discussed with him a settlement for his injuries and the damages sustained thereby. At the time of this conversation plaintiff was not represented by counsel, or by any relative or friend of the family. Near the close of the conversation, plaintiff's wife and children came into his room at the hospital. Very little was said after she entered. Apparently there was a statement made that the three men were going to see plaintiff's surgeon. This they did, and they had a conference with the surgeon, who exhibited to them the X-ray pictures, taken the day before, of the injured parts of plaintiff's body. Some of these had been taken before and some after the fractures were reduced. The surgeon also informed the three men of the nature of the then-known injuries, and that plaintiff would probably be disabled for a year or more. About an hour later they returned to the hospital, at which time the plaintiff's wife and children had departed, and took up with plaintiff the question of a settlement of any claim which he might

have for his injuries. They informed him that the doctor's bill would be about $200 and the hospital bill about $20, and that they were willing to give plaintiff $400, as a settlement of any claim he might have. Thereupon releases were drawn and presented to plaintiff for his signature. He was then lying in a hospital bed, with his right hand in a splint and his left foot and ankle in a cast. They requested his signature, and he informed them that he could not write because of his injured right hand. It was suggested that he could put his thumb print upon the releases which would answer for his signature. Thereupon an ink pad was procured; his left thumb was inked, and the releases were placed on a paper or magazine and held for him while he placed his thumb thereon.

The evidence on behalf of defendant is to the effect that plaintiff voluntarily placed his thumb upon the ink pad and also voluntarily placed it upon the releases. Evidence on behalf of plaintiff tends to show that he had to have assistance in putting his thumb upon the pad, and that he was assisted in putting his thumb print upon the releases. Evidence on behalf of plaintiff tends to show that defendant and the insurance adjuster and agent did not fully and correctly inform the plaintiff with respect to his injuries and give to him the full information which they had received from plaintiff's doctor, but made it appear that his injuries were much less, and that his disability would be of much shorter duration than as told them by the doctor. The evidence on behalf of plaintiff tends to prove that at the time of the first conversation and the second conversation, an hour later when the releases were supposedly executed, plaintiff did not desire to talk and appeared to be somewhat dull or stupid; whether from the effect of the shock or the morphine, or a combination of them, is not fully disclosed. After the thumb prints were placed upon the releases, a check for $400 was given to plaintiff. Plaintiff never cashed or indorsed the check, and later he took the check to the office of the local agent, and gave it to him, telling him

that he was not satisfied with the settlement. Two days later this suit was begun, and three or four days later the agent returned the check to plaintiff in a registered letter, and it remained in his possession until the trial of this cause in the district court, when it was tendered back to defendant.

In *Vandervert v. Robey*, 118 Neb. 395, it was held: "Backing out from private property onto a public highway is an operation demanding a high degree of skill and caution to avoid danger or injury to any person on the highway or collision with any vehicle thereon, and one engaged in such operation must use greater care than would be required of one driving along the highway.

"The duty of the driver of a vehicle, about to enter upon the highway from a private drive, to look for vehicles approaching on the highway implies the duty to see what was in plain sight, unless some reasonable excuse for not seeing is shown."

In *Taulborg v. Andresen*, 119 Neb. 273, it was held: "The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway."

The record discloses that defendant did not give any warning of his intention to back into the alley; nor did he keep a lookout while backing; because thereof, he failed to see plaintiff or the ladder upon which he was standing. The evidence is such as to warrant a finding of negligence on the part of defendant.

Defendant charges plaintiff with contributory negligence in failing to keep a lookout or to place signals, and in failing to secure himself in some manner from falling when the ladder was knocked from under him. We are of the opinion that no negligence on the part of plaintiff has been shown. A flag would not have protected plain-

tiff, because defendant did not look. Had he looked, he would have seen the ladder and plaintiff standing thereon. It is not negligence for one, without securing himself by straps to the building, to work on a ladder resting securely on the pavement in a public alley, and leaning against a solid building. There are other alleged acts of contributory negligence on the part of plaintiff; in fact, almost every conceivable act that the ingenuity of counsel could suggest, but we find no evidence in the record that would justify a finding that plaintiff was guilty of any negligence that contributed to his injury.

It follows that the case was properly one for submission to the jury, and the evidence is such as to warrant a finding for plaintiff, unless he is barred therefrom by the releases which were executed on the day after his injury.

Defendant seeks to justify the meager sum that was paid, on the theory that defendant denied any liability, and that it was a compromise settlement of a disputed claim. First, it appears that plaintiff had made no claim, had asserted no cause of action against defendant; but defendant and the insurance agent and adjuster, on their own volition, sought plaintiff in the hospital very soon after his injuries, to obtain a very prompt settlement, evidently before plaintiff could have an opportunity to consult with counsel or be properly advised. The promptness with which plaintiff was sought out for a speedy settlement, while he was in a disabled condition and still suffering from shock, and without the advice of counsel or the knowledge of friends or relatives, is significant of a great desire on the part of the insurance company to secure an advantageous settlement for it under circumstances which cannot be commended. It is significant that, while these men were in the room with plaintiff and after his wife came in, they made no mention of any settlement in her presence, and it is also significant that plaintiff was in such a physical condition that he did not even mention the matter to his wife.

Evidence on behalf of plaintiff tends to show that at the time the releases were executed he was led to believe that it was as a settlement only for his hospital and doctor's bills, and "for the time being." It is true, this is controverted by evidence on behalf of defendant. Plaintiff did not read the releases, nor were they read to him. There is a conflict in the evidence as to whether the contents of the instruments were fairly interpreted to the plaintiff either by defendant or by the insurance agent or adjuster.

In an annotation appearing in 48 A. L. R. 1462 *et seq.*, the subject of avoiding release of claims for personal injuries is exhaustively considered. At page 1486 it is said: "It is well settled that a release of a claim for personal injuries may be avoided if it is executed in reliance on misrepresentations as to the nature or extent of the injuries, amounting to fraud on the part of the releasee, its agent, or physician. Where the professional opinion relied on to avoid a release is not given directly by the physician to the patient, but is communicated to him by a third person, as a claim agent of the releasee, it is the duty of the agent to repeat the opinion with entire correctness; and if the person responsible for the injury, or the agent, falsely represents to the releasor what a physician or surgeon thinks or has said about his injuries, it is a fraud which will justify the rescission of a release executed on such false statement." The text to the note is supported by numerous authorities, and we deem it sound law.

In *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730, it was held: "When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract."

In the instant case, while the settlement was for $400, the jury awarded plaintiff $5,000. If plaintiff was en-

titled to recover, it is clear that the amount given in settlement was grossly inadequate. Under the facts presented, we are satisfied that there was sufficient evidence of fraud to require the submission of that question to the jury. The finding of the jury on conflicting evidence will not be disturbed unless clearly wrong. We conclude that there is ample evidence to sustain the verdict if the cause was properly submitted to the jury.

With respect to the alleged errors in refusal of instructions, it may be noted that defendant requested the giving of 34 separate instructions, and requested submission to the jury of 14 special interrogatories. The court gave to the jury 25 instructions, 5 of them from defendant's requests, and also submitted 12 of the special interrogatories requested by defendant. The real issues that should have been properly submitted to the jury were not numerous and were comparatively simple. It may be observed that many of the requested instructions embodied the same propositions, but couched in different language.

Defendant makes separate complaint concerning the refusal of the court to give 14 of his requested instructions. A number of these instructions state correct principles of law, and some of them are applicable to the issues submitted to the jury. However, from a careful examination of this mass of instructions, we are satisfied that the court included in its charge to the jury a proper instruction on every issue that should have been submitted to the jury. The substance of most of defendant's requested instructions was included in the court's charge to the jury. To set out and discuss each of the instructions would unduly extend this opinion, and we think would serve no useful purpose. It is not error for the court to refuse defendant's request for additional instructions, where it has, on its own motion, fairly and fully instructed the jury on defendant's theory of the case. *Blado v. Draper,* 89 Neb. 787.

Defendant insists that the court erred in giving instruc-

tion No. 9 on its own motion. That instruction informed the jury that the burden was upon plaintiff to prove his cause of action by a preponderance of the evidence; that if he has done so he is entitled to recover, and that if he has failed to do so the jury should find for the defendant, and the term "burden of proof" is defined therein. The ground of the complaint is that in this instruction the court failed to inform the jury that plaintiff must establish that the release pleaded was procured by fraud or mistake. In other instructions this phase of the case was fully and completely given to the jury, with the information that, unless the jury found from a preponderance of the evidence that the release was procured by mutual mistake *and* fraud, plaintiff could not recover. The jury, in response to special interrogatories, found specifically that defendant and his representatives made representations to plaintiff at the time the alleged settlement was made and prior to the execution of the release, and further answered to the effect that defendant and his representatives advised plaintiff incorrectly as to the information given them by plaintiff's physician. Under the circumstances, it is clear that the jury were not misled by the instruction. In fact, the instruction was more favorable to defendant than he was entitled to, in that it required the jury to find that the release was procured both by fraud and by mutual mistake.

Complaint is also made of an excerpt from instruction No. 10 given by the court. Taking the instruction as a whole, it does not appear that there was anything therein that was or could have been prejudicial to defendant.

Defendant assigns error in the giving of instruction No. 12 on the court's own motion. We have carefully examined the instruction and find no erroneous statement of law contained therein; nor is any pointed out in the briefs of defendant.

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

AFFIRMED.

GLENN M. STANDISH, APPELLANT, V. LARSEN-MERRYWEATHER COMPANY ET AL., APPELLEES.

FILED DECEMBER 9, 1932. No. 28588.

1. **Master and Servant:** EMPLOYEE: INDEPENDENT CONTRACTOR. Whether one is an employee or an independent contractor, within the meaning of the workmen's compensation law, must be determined from the facts of the particular case.
2. ———: ———: ———. Owner of truck, engaged by a gravel contractor furnishing gravel for county highway, is not an independent contractor, but an employee, within the meaning of the workmen's compensation law, where the gravel contractor retains the right to control the manner in which, and time when, the work shall be performed, and possesses the right to direct when hauling shall stop and be resumed, and right to terminate employment at will, without incurring liability therefor.
3. ———: INJURY TO EMPLOYEE: LIABILITY. A county, letting a contract for graveling a highway, without requiring contractor to procure policy of insurance to protect the contractor's employees, will be jointly liable with the contractor to the latter's employee who, under the workmen's compensation law, receives a compensable injury in the prosecution of the work of the graveling contract.

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

Reed, Ramacciotti & Robinson and *Roman L. Hruska,* for appellant.

G. F. Nye, contra.

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

GOOD, J.

This is a workmen's compensation case, in which plaintiff, the workman, appeals from a judgment denying him any compensation. Whether plaintiff was an independent contractor or an employee is the principal question. In determining such relation, resort must be had to the facts and circumstances disclosed in each particular case.

Showers v. Lund, 123 Neb. 56. The record before us shows the following pertinent facts:

The county of Douglas let to Larsen-Merryweather Company (hereinafter called the company) a contract to haul and spread gravel on a designated part of one of its highways. The county had arranged with the owner of a gravel pit to furnish the gravel. The contract with the company required it to haul the gravel from a designated pit to a designated place on the highway, where each load was dumped, as directed by a representative of the county. In performing this work the company used some of its own trucks. It procured the services of several persons owning trucks to do the greater part of the hauling. Plaintiff was one of those persons. By agreement with the company, plaintiff was required to furnish and service his truck, and was to receive 70 cents for each load of three tons of gravel hauled. The agreement was indefinite as to length of time that plaintiff was to haul. No specified number of loads, or quantity of gravel, was agreed upon. Plaintiff was at liberty to quit hauling at any time; the company could have discontinued his services at any time, and neither would have been liable in damages to the other by plaintiff's cessation of hauling. Plaintiff was required to get each load of gravel at a particular place and to haul and dump it at a definite place. He was required to haul three tons at a load, and to weigh part of the loads, to make sure that his loads came up to the required weight. He was furnished by the company with tickets, consisting of a stub and three coupons, the stub and each coupon bearing the same serial number. One coupon was delivered to the pit owner at the time each load was taken from the pit; one was given to the county's representative when the load was dumped; one was retained by the truck driver, while the stub went to the company. The company paid for the weighing and settled with the truckers at the end of each week for the number of loads hauled.

It is insisted by appellees that plaintiff was an inde-

pendent contractor. The fact that there was no agreement for any definite number of loads to be hauled, or for any definite quantity of gravel, or for any definite time that he was to work, and the further fact that the company possessed and exercised the right to stop hauling on account of rainy weather; directed when the work should be resumed, and had the right to terminate the relation at any time, without liability for damage, we think clearly shows that plaintiff was not an independent contractor.

It is suggested that, because plaintiff furnished his own truck and serviced the same, and received pay at a stipulated price for each load, this was sufficient to render him a contractor. It is pointed out in the case of *Claus v. De Vere,* 120 Neb. 812, that many classes of workmen, such as brick masons, carpenters, and others, furnish their own tools, and the fact that they furnish their own tools does not make them independent contractors. In the instant case, there was no independent contract, unless there was one for each load hauled. Such was not the intention of the parties. The evidence clearly shows that the company had the right to superintend and direct the manner in which the work was to be performed.

In *Showers v. Lund, supra,* where the essential facts were almost identical, this court held that the relation was one of master and servant, or of employer and employee, and not of an independent contractor. Upon the strength of the holding in that case, which we deem sound, we are constrained to hold that plaintiff was not an independent contractor, but was, within the meaning of the compensation law, an employee.

It is contended that the county, in no event, is liable in this case. With this contention we are unable to agree. By the provisions of sections 48-106 and 48-115, Comp. St. 1929, the provisions of the workmen's compensation act are made applicable to the state and to every governmental agency created by it. The provisions of section 48-116, make a person who lets a contract liable to an

employee of the contractor, unless he requires the contractor to procure insurance from a company licensed to make such insurance contracts in this state. It is stipulated in the record that there was no requirement on the part of the county that the company should take out insurance to protect its employees; nor did it do so. Under these circumstances, the county is jointly liable with the company to whom it let the contract.

No question is raised that plaintiff's injuries did not arise out of and in the course of his employment. It follows that he was entitled to compensation.

The judgment of the district court is reversed, and the cause remanded to that court, with directions to ascertain the extent and duration of plaintiff's disability, and to award compensation accordingly.

REVERSED.

MARION F. BERGANTZEL, APPELLANT, V. UNION TRANSFER COMPANY, APPELLEE.

FILED DECEMBER 9, 1932. No. 28515.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY.** A compensable injury, under the workmen's compensation act, must be reasonably incident to the employment, and unless there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, such injury does not arise out of the employment.
2. ———: ———: ———. Where an employee, of his own volition, to accomplish a private purpose, wholly unconnected with the master's business, chooses to go to a dangerous place, where his employment does not necessarily carry him, and there incurs dangers of his own choosing, the resulting injury suffered by him, and thus caused, does not arise out of, or in the course of, his employment.
3. **Evidence** examined, and *held* to sustain the conclusions of the district court.

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

Gray & Brumbaugh, for appellant.

Swarr, May & Royce, contra.

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

EBERLY, J.

This is an appeal from the order of the district court for Douglas county denying plaintiff's claim for compensation under the workmen's compensation law, based upon the death of her husband. The trial court determined from the evidence "that the accident by which claimant's (plaintiff's) husband lost his life did not arise out of, or in the course of, his employment by the defendant company, but from an independent cause which (employment) * * * had no causal relation to his death." The record discloses conflicting evidence as to the essential facts of the transaction in which deceased lost his life. This class of cases this court on appeal now hear *de novo.* Comp. St. 1929, sec. 48-137. "Yet, when the testimony of the witnesses upon the vital question involved is conflicting, this court will, while trying the case *de novo,* consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other." *Southern Surety Co. v. Parmely,* 121 Neb. 146. See, also, *Jones v. Dooley,* 107 Neb. 162.

It appears without question that in the late afternoon of June 27, 1931, four truck drivers in the employ of the defendant, Union Transfer Company, viz., Price, Schnabel, Stinson and Bergantzel, were in Sioux City. Bergantzel and Stinson had completed their work at this place and were ready to start with their trucks on the return trip to Omaha. Price's truck had a cargo of wool on board which the course of business rendered necessary to transfer to the Schnabel truck. It seems, without a definite order, by common consent, for the purpose of securing a cooler place to perform this work, these four men in the trucks operated by Price, Schnabel and Stinson, respec-

tively, left the warehouse and dock of their employer, and drove to a certain point on the banks of the Missouri river, in the vicinity of Sioux City, Iowa, which rendezvous is south of and adjacent to a paved highway there extending in a general east and west direction. On their arrival at the appointed spot the Price and Schnabel trucks were placed end to end, south of and parallel to the paved road, and the transfer of the wool from the Price truck to the Schnabel truck was commenced by the persons last named aided by Bergantzel. Situated some fifty feet east of where the two trucks were thus parked, and somewhat farther south from the paved highway at this point, was what the witnesses refer to as the "shack" of one Iverson, who was engaged in selling minnows for fish bait.

The other truckers preceded Stinson to this scene. When he arrived he parked his truck south of the paved highway and some fifty or sixty feet east of the "shack." Instead of joining the three truckers, who had preceded him, in the work of transferring the cargo of wool, Stinson met Iverson and learned that a dice game was in progress in the "shack." He then abandoned, at least temporarily, the work of his employer, accompanied Iverson to the "shack" and engaged in the gambling there being carried on. After a time a quarrel over the result of a certain bet made by Stinson arose between the latter and Iverson. It developed into a fight between these two, during which Stinson received a cut on his wrist from a spade in the hands of Iverson.

Up to this point there is no substantial dispute in the evidence. Iverson testifies that, after Stinson received the cut on the wrist, Stinson called to the other three truck drivers, then at work on the two trucks. These men thereupon suspended work and all came over to the vicinity of the "shack." Stinson spoke to them, and one of the three last arriving said, "Let's get him." Then together they made a concentrated movement against Iverson in aid of Stinson. Iverson, backing up, kept off

his pursuers by swinging a spade, until one of his friends, a boy staying with him in the shack, handed him his revolver. Then, when the four continued to follow him, Iverson testifies: "I had to pull the gun and had to hold it on them until I got away from there." The evidence as to Iverson's actual movements is in agreement that the trouble started south of the "shack," and that he was chased around the east, north, west and south sides of the structure and finally made his escape, through some trees situated south and east of the "shack," to and along the paved highway leading eastward. Iverson's testimony is further to the effect that, as he had made good his escape, "Stinson said he would wait until I come back if he had to stay all night."

The testimony of Price and Schnabel is, in effect, a denial of participation in the fight first occurring; that they, together with Bergantzel, came over towards the "shack" when Stinson called to them; that they heard no threats uttered by either one of these three, and did not see any of the three physically engage in the assault on Iverson. They admit that on their arrival Stinson renewed the assault on Iverson; that the three were at all times in a relatively close proximity to the fight and in a general way conformed their movements to the movements of the principal actors therein. However, it is quite apparent from their testimony that the assault on Iverson was renewed by Stinson contemporaneous with their arrival in the near vicinity of the "shack;" that they made no effort nor exerted any influence to prevent it; that no one examined Stinson's wound, and the latter regarded it as wholly unimportant. Though one of these three was the acting foreman in charge of the work, neither he, nor any of those who accompanied him, either prior to the trouble, or during or after the assault, ever directed or requested Stinson to join them and assist in the then uncompleted work of the employer, the transfer of the wool to the Schnabel truck; and when the first fight was over, Price and Schnabel state that Stinson was

left by them keeping his vigil in the vicinity of the "shack;" Schnabel returned to the unfinished work at the truck, and Price and Bergantzel, on one of the trucks, went to a neighboring telephone, it seems, to secure, by a complaint to the police, the arrest of Iverson. When Price and Bergantzel returned from telephoning, the unfinished job of the transfer of the wool was completed by Price, Bergantzel and Schnabel. Then, leaving Schnabel to cover his load with the usual canvas, but leaving their own truck canvas still lying on the ground, Price, who testifies he was expecting trouble, with Bergantzel, went over to Stinson, who was then still in the vicinity of the "shack," keeping watch. Substantially at the time of their arrival, a Ford car, containing Iverson and two friends, drove up from the east and stopped just north of the "shack." The arrival of the automobile signaled the commencement of a second fight. Price and Stinson were active participants in this, though the part played by Bergantzel is not clear. After a time, on the arrival of Peterson, who was the foreman of defendant, in a truck driven by him, Iverson and his friends broke off the fight, made good their return to the Ford car, and drove away. Just as the Ford, in which Iverson and his friends were, was leaving, an accidental shot through the back window of the Ford to the eastward killed Bergantzel, who was then standing near the south edge of the paved road some feet east of the "shack." It is to be noted that, had the deceased remained with the truck in which he came to the scene of the misfortune, and where his work was to be performed, he would have received no injury.

In the consideration of the evidence in the record, we assume that, where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the state as well as the federal Constitution. The liability is based, not upon any act or omission of the employer, but upon the existence of

the relationship which the employee bears to the employment, because of and in the course of which he was injured. *Cudahy Packing Co. v. Parramore,* 263 U. S. 418. As phrased by the Nebraska statute, compensation for death or injury provided by its terms is limited to compensation "for personal injuries to or for the death (of an employee) by accident arising out of and in the course of his employment." Comp. St. 1929, sec. 48-110. The provisions quoted are also subject to a further limitation that they are "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, sec. 48-152.

Appellant's contention is that the instant case invokes the application of the rule that, where an employee attempts to render assistance to a fellow workman or to protect the property of the master and suffers injury in so doing, his injury arises out of and in the course of his employment. In the instant case no employer's property was endangered, and the evidence before us wholly negatives the thought that Bergantzel was killed while attempting to rescue Stinson, a fellow workman, from the effects of an injury threatened while the latter was then actually engaged in the performance of his duties in his master's employment. This principle of limitation of the employer's liability is fully recognized in each of the cases cited by appellant. Thus, in *Dragovich v. Iroquois Iron Co.,* 269 Ill. 478, 484, the court states, as the fundamental basis of the opinion: "It is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment." So, too, in *Matthews v. Bedworth,* 1 Minton-Senhouse W. C. C.

124, the reviewing notes in the opinion are: "Here the man (injured in attempted rescue) was in the same employment, and engaged in the same work as the one who was alive at the bottom of the pit." Similar references appear in *Yates v. South Kirby,* 3 B. W. C. C. 418, and *London and Edinburgh Shipping Co. v. Brown,* 7 Sess. Cas. (5th Series) 488.

Under the record before us, but one conclusion can be sustained, which is, that, after his arrival at the scene of this tragedy, Stinson temporarily quit the services of his master to engage in gambling, and thereafter devoted his time exclusively to the prosecution of his individual quarrel arising therefrom. In no possible sense could his transactions be considered as the transactions of the master, or for the master's benefit, or within the scope of the master's employment. And when Bergantzel sought to rescue him, if such was the fact, it was a matter wholly unrelated to the master's employment. As between the Union Transfer Company, Stinson, and Bergantzel, with reference to the transaction here involved, the indispensable, inherent, basic nexus is nonexistent. A compensable risk must be reasonably incident to the employment, and unless there is apparent to the rational mind upon consideration of all the circumstances a causal connection between conditions under which the work is required to be performed and the resulting injury, the injury does not arise out of the employment. *Natol v. Booth & Flinn Co.,* 139 Okla. 103.

"If an employee is injured in the course of his employment in a fight which did not arise out of the employment, his injury is not compensable." *Talge Mahogany Co. v. Beard* (90 Ind. App. 611) 169 N. E. 540.

Where an employee chooses to go to a dangerous place where his employment does not necessarily carry him and incurs a danger of his own choosing, altogether outside any reasonable requirement of his position, such risk is not an incident to the employment. *White Star Coach Lines v. Industrial Commission,* 336 Ill. 117.

So, too, "An employee who suffers injury in a street brawl brought on by himself, and for his own purposes, is not entitled to compensation, even though he was engaged in his employer's business just before the fracas and intended to resume it immediately afterwards." *Wooley v. Minneapolis Equipment Co.*, 157 Minn. 428.

Indeed, this jurisdiction is committed to the doctrine: "An injury inflicted upon an employee by a fellow employee not arising from any order, direction, duty or act connected with the employment, but arising out of and occurring during or immediately following a personal altercation between the two, concerning matters not arising out of the performance or supposed performance of any duty or service in the employment, and resulting from what amounted to an assault by one upon the other, is not such an injury as will entitle the injured employee to compensation from the employer under the workmen's compensation act." *Urak v. Morris & Co.*, 107 Neb. 411. The reason upon which this rule is based is even more cogent where the party causing the injury has no connection whatever with the employer or the employer's business and the injured employee receives his injury at a place other than in or about the premises devoted to the employer's business.

After an independent consideration of the record before us, we arrive at the conclusion that the judgment of the district court was correct, and it is

AFFIRMED.

WILLIAM B. BANNING ET AL., APPELLEES, V. FRANK MARSH, SECRETARY OF STATE, APPELLEE: WILLIAM D. HEFLIN, INTERVENER, APPELLANT.

FILED DECEMBER 9, 1932. No. 28518.

1. Appeal: MOOT QUESTIONS. It is not within the province of this court to determine abstract, hypothetical, and moot questions.
2. ———: DECLARATORY JUDGMENTS ACT. Declaratory judgments act applies only to actions where there is an actual contro-

versy and where only justiciable issues are presented by proper parties.

3. **Constitutional Law.** Constitutionality of statute will not be determined unless necessary to proper disposition of pending case.

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

Arthur F. Mullen and *Harold W. Felton,* for appellant.

Hall, Cline & Williams and *Sterling F. Mutz, contra.*

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

DAY, J.

This suit was brought to enjoin the secretary of state from placing on the ballot a referendum on chapter 107, Laws 1931. The validity of the signatures to the referendum petition was questioned. The appellant intervened as a taxpayer and alleged that the law was unconstitutional for that it violated the Fourteenth Amendment of the federal Constitution and section 3, art. I of the Nebraska Constitution. The trial court entered a decree finding that the referendum petition did not contain a sufficient number of valid signatures, distributed as required by law, to subject the legislative enactment to a vote. There is no appeal from this part of the decree. The trial court also found that the enactment was a constitutional exercise of the legislative power, although properly holding that its constitutionality was not involved in this case.

The appellant prosecutes this appeal to secure a determination by this court of the constitutionality of the law. The right of the intervener to challenge the constitutionality of this act is grounded upon his interest as a taxpayer to prevent additional tax burdens by a referendum upon an unconstitutional statute. It is the appellant's contention, to quote from his brief, "that taxpayers of the state should not be required to pay the expense incident to having a referendum of an unconstitutional

statute." However, since the decision of the trial court from which no appeal was taken, the appellant was not threatened with this expense for that the trial court, finding that the referendum petition was insufficient, enjoined the secretary of state from placing the referendum ballot title on the official ballot. The constitutional question then became a moot question. It is not within the province of this court to determine abstract, hypothetical, and moot questions. *Kerr v. Gering & Co.*, 88 Neb. 192; *Ververka v. Fullmers*, 83 Neb. 6; *Heesch v. Snyder*, 85 Neb. 778; *State v. Armstrong*, 94 Neb. 592.

This court cannot determine the question presented by the briefs under what is known as the declaratory judgments act, for sections 20-21,140 to 20-21,155, Comp. St. 1929, apply only to actions where there is an actual controversy and where only justiciable issues are presented by proper parties. *Lynn v. Kearney County*, 121 Neb. 122; *Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 68 A. L. R. 105; *Lyman v. Lyman*, 293 Pa. St. 490; *Post v. Metropolitan Casualty Ins. Co.*, 237 N. Y. Supp. 64; *Garden City News v. Hurst*, 129 Kan. 365. In the case at bar, there is no controversy between the parties and no justiciable issues presented. There can be no actual controversy between the secretary of state and the appellant in this matter. The only duty devolving upon said officer relative to this law was, if the referendum petition was sufficient, to place the question on the ballots at the general election. The secretary of state is not a law-enforcing officer, and the appellant does not allege in his petition of intervention that the defendant will or threatens to enforce said law to his prejudice. The secretary of state, under the decision of the trial court from which no appeal was taken, could not place the ballot title for a referendum for such measure on the official ballot. The question of the constitutionality of the act therefore becomes one that is abstract, hypothetical, and moot.

The determination of the constitutionality of the act

was not necessary to the determination of the issues in this case wherein the issue was whether or not the referendum ballot title should be placed on the official ballot by the secretary of state. Since that issue was determined upon the insufficiency of the referendum petition, the constitutionality of the statute was not necessary to a determination of the issues in the case. The constitutionality of a statute will not be determined unless necessary to proper disposition of a pending case. *Omaha Grain Exchange v. Spillman,* 118 Neb. 729; *State v. Fulton,* 118 Neb. 400; *War Finance Corporation v. Thornton,* 118 Neb. 797; *Lane v. State,* 120 Neb. 302; *Knowlen v. Lahr Motor Sales Co.,* 59 N. Dak. 404; *Rowe v. Stanley County,* 52 S. Dak. 516; *In re Friedman,* 183 Minn. 350; *New York Life Ins. Co. v. Burbank,* 209 Ia. 199.

The wisdom of the foregoing rules is exemplified by this case. Although able attorneys appear as counsel, oral argument was waived. It will be time to pass upon so important a question as the constitutionality of chapter 107, Laws 1931, when it is presented to the court upon adequate argument in a case between parties with an actual controversy and presenting only justiciable issues.

Since it appears that the questions presented upon the appeal have become moot, it is ordered that the appeal be dismissed.

APPEAL DISMISSED.

MAURICE C. COLLINS, APPELLANT, V. SPRAGUE'S BENSON PHARMACY, APPELLEE.

FILED DECEMBER 9, 1932. No. 28309.

1. **Negligence:** DUTY OF OWNER OF BUILDING. The duty which a merchant owes his customers, with respect to the safety of the premises, applies particularly to that part of the premises which is appointed for the transaction of his business.
2. ———: ———. Where one, at his own request, and solely for his personal pleasure, convenience, or benefit, enters upon the private portion of the business premises of another, with his consent, but without an invitation, he is a bare licensee

in such portion of the premises not open to the public, and the occupier of the premises owes no duty to him, save to refrain from inflicting injury upon him.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Kennedy, Holland & DeLacy, contra.

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

PAINE, J.

This is an appeal from a judgment of dismissal, rendered by the district court, based upon a directed verdict for the defendant.

The plaintiff alleged in his petition that he was 69 years of age, and weighed 220 pounds, and at 4 p. m. on March 2, 1931, while in the drug store of the defendant in Omaha, having a prescription compounded, he requested permission of the defendant's clerk to use the toilet; that the clerk told the plaintiff to come with him to the rear of the store, going behind the prescription case; and the plaintiff, in attempting to follow the clerk, stepped into the door leading to the room in which the toilet was located; that the floor of this room immediately inside the door led directly to the basement by a sharp stairway, and, in order to reach the toilet, it was necessary to step across the top step of the stairway, and plaintiff stepped directly into the stairway opening in the floor, and fell eight feet to the basement. Plaintiff charges negligence in maintaining the open space in such toilet room, which he alleges was so dark that the floor space could not be readily seen, and in failing to provide electric lights, railings, barriers, or obstructions about the floor, and in failing to warn the plaintiff of the existence of the opening in the floor and the danger of falling into the same, and in failing to advise him that he would have to step across the opening in the floor to reach the toilet.

The defendant admits that the plaintiff sustained injuries in the defendant's drug store on the date alleged, but denies that they were as serious as set forth in the petition, and alleges that such injuries were caused by and contributed to by the plaintiff's own negligence and contributory negligence, the latter being more than slight as compared with any negligence on the part of the defendant. The plaintiff's reply was a general denial.

It is admitted by the defendant that the toilet was in an awkward place; that there was no way to get to it except by stepping diagonally across the corner of the stairway opening, or by stepping down on the first step of the stairs and then stepping back to the floor level. Defendant maintains that, if the toilet had been down at the foot of the stairs, the accident could have happened in the same way; that plaintiff did not trip over any obstruction whatever, but he merely failed, in spite of warnings, to see that there were stairs leading to the basement.

It is maintained by the plaintiff that it was dark at the opening leading to the stairs, while the defendant maintains that there was plenty of light there, as there was a double window a little farther to the east, and light from another double window; that this led off from a storage room, in which there were four electric lights burning.

The defendant testified that they allow no customers to go back to this toilet unless they are accompanied; that he heard the clerk say to the plaintiff, "Step over, and look out for these stairs," and that immediately thereafter he heard his wife say, "Mr. Collins fell down stairs." The clerk who led the plaintiff back said that, when he reached this passageway, he said: "Be careful of the stairs; you have to step to the right." He also testified: "I lifted the chain up which we have there all the time. * * * Before I realized what happened he seemed to lunge forward for the stairs. I didn't have any idea that he was going to do anything like that. If

I had known that I could have grabbed one arm and held him, but I had no idea that anything like that was going to happen. * * * I was right next to him. Q. Where was the chain? A. Right across the doorway. * * * I told him to be careful of the stairs and step to the right. Q. About how high was the chain off of the floor? A. About that high (indicating). You could bump into it right across the chest here. Q. Was the door open or closed when you got there? A. It was closed. I opened it and held the chain in my hand. Q. The chain is inside the door, is it? A. Yes, sir, inside the door. Q. Just how were you standing with reference to Mr. Collins when you unhooked the chain? A. He stood right in front of me like this. I stood right behind him." The clerk insisted that it was not dark there, even when there was a storm outside.

Mrs. Sprague testified that she was working at her desk, with an electric light over the same, immediately to the right of the door leading into the toilet, there being only an 18-inch filing case between her desk and that door; that the clerk opened the door and reached over and unhooked the chain and told the plaintiff to step to the right, and that Mr. Collins did not step to the right, but stepped directly ahead down the stairs. She testified that there was plenty of light, as there were two double windows, a door with a transom over it, and four electric lights burning in the room from which the door led to the toilet and the stairway.

The case was tried to a jury, and at the conclusion of all of the testimony the defendant moved the court for an order dismissing the jury and entering judgment in defendant's favor, or for an order directing the jury to return a verdict in favor of the defendant, for the following reasons: First, that the evidence is insufficient to sustain a verdict in plaintiff's favor against the defendant; second, the evidence conclusively establishes that the accident took place on a portion of the premises not used or intended to be used by customers, and to which

no invitation arising out of the relationship of storekeeper and customer extended, for the reason that the plaintiff was a mere licensee in that portion of the premises where the accident occurred, to whom the defendant owed no duty other than not to injure him wantonly or wilfully; third, that the evidence conclusively shows that the plaintiff was guilty of more than slight negligence; fourth, that the evidence fails to establish any negligence on the part of the defendant proximately causing the accident.

It is contended on the part of the defendant that the duty of a merchant to exercise reasonable care to keep his premises safe does not extend to such parts of the building as are used for the private purposes of the owner, or to which customers are not expected to go. A customer in a store, who asks for the toilet, and who is shown by the clerk to a toilet in the rear of the premises, used by employees only, is a mere licensee, to whom the storekeeper owes no duty except to refrain from wilfully or wantonly injuring him.

1. While the question is not free from doubt, yet it is quite generally accepted as the law that the duty which a merchant owes his customers, with respect to the safety of the premises, applies particularly to that part of the premises which is appointed for the transaction of his business. *Keeran v. Spurgeon Mercantile Co.*, 194 Ia. 1240, 27 A. L. R. 579. In this case, a directed verdict was affirmed.

The law presumes that a person knows what he would have known had he made ordinary use of his senses, and that, when taken to a place by a clerk, where a door led to another room, in which there was a toilet, and a chain, stretched breast-high to bar his way, was unhooked by such clerk, he would follow the direction given by such clerk, standing beside him, "Be careful of the stairs; you have to step to the right;" and would avoid falling into an open stairway directly ahead. The law very naturally requires a person to make reasonable use of his own

faculties to observe and avoid danger. *Schmidt v. Bauer,* 80 Cal. 565, 5 L. R. A. 580; *Herzog v. Hemphill,* 7 Cal. App. 116; *Broadston v. Beddeo Clothing Co.,* 104 Neb. 604; *Knies v. Lang,* 116 Neb. 387, 57 A. L. R. 1022.

It has been held that a merchant is required to keep safe only that part of his premises to which his customers are invited, and is not responsible for unsafe condition of those parts of his premises not intended for reception of visitors or customers, and where they are not expected or invited to go. *Wall v. Woolworth Co.,* 209 Ky. 258.

2. In a very similar case, in an opinion by Judge Pound, found in *Hudson v. Church of the Holy Trinity* (250 N. Y. 513) 166 N. E. 306, a judgment was reversed, and it was held:

"One feeling her way along dark hallway in unfamiliar surroundings, without finding out where she might safely go to find toilet, * * * was guilty of contributory negligence, precluding recovery for damages by fall down cellar stairs, as matter of law.

"Religious corporation held not liable for injuries to woman, coming to its premises to pay for sewing material, by fall down cellar stairs in search of toilet, not shown to have been maintained for convenience of woman coming to premises for such purpose."

This court has defined and distinguished licensee and invitee, and held: "Where one, solely for his personal pleasure, convenience, or benefit, enters upon the premises of another with his consent, but without an invitation, express or implied, he is a *bare licensee,* and the occupier of the premises owes no duty to him save to refrain from wilfully or wantonly inflicting injury upon him." *Kruntorad v. Chicago, R. I. & P. R. Co.,* 111 Neb. 753. See *Mullen v. Sensenbrenner Mercantile Co.,* 260 S. W. (Mo.) 982, 33 A. L. R. 176, and notes; *MacDonough v. Woolworth Co.,* 91 N. J. Law, 677; *Pettyjohn & Sons v. Basham,* 126 Va. 72.

The defendant did not offer rest room facilities to customers, but provided a toilet for the use of employees

only. Ordinarily, customers who asked for such convenience were sent elsewhere. The plaintiff requested the use of a toilet, and was led back into a part of the store not open to its customers. He was a licensee by permission; and fell through a stairway, which was guarded by a chain, and which he had been warned to avoid at the instant he stepped into it.

Mere permission of an owner, allowing customers to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation. The law does not penalize good nature, or indifference, nor does permission ripen into right.

There being no error in the record, the judgment is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1933

HELENA ESAU, APPELLEE, V. SMITH BROTHERS, INC., APPELLANT.

FILED JANUARY 6, 1933. No. 28623.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: INJURY TO EMPLOYEE: VENUE: CONSTITUTIONAL LAW.** An employer, domiciled in Texas, was engaged in laying a natural gas pipe line through Kansas and Nebraska. While it had its headquarters in Kansas, had accepted and was working under the Kansas workmen's compensation law, the employer orally engaged an employee residing in Nebraska, who worked on its project in Kansas a short time, whereupon the employer moved its headquarters to Nebraska and the employee there died of an injury arising out of and in the course of the employer's said industry in Nebraska. The compensation law of Kansas provides that it shall apply to injuries sustained outside the state, unless otherwise specified in the contract of employment. Under the oral contract of employment made in Kansas, neither employer nor employee said anything about any compensation law. Defendant preserved its objections to jurisdiction under the Nebraska law and contended that a failure to hold the Kansas law applicable violates the full faith and credit clause of the federal Constitution, sec. 1, art. IV. *Held*:

(a) The headquarters of the employer, the industry of the employer in which the employee was engaged when injured, and the residence of the employee, all being in Nebraska, the proceedings for compensation are maintainable under the Nebraska workmen's compensation law. This holding is hereby declared to be in accord with our settled public and domestic policy.

(b) Failure to hold the Kansas compensation law applicable in the circumstances does not violate the full faith and credit clause of section 1, art. IV of the Constitution of the United States.

2. ———: ———: ———: DEPENDENTS. Under the facts shown in the opinion, the plaintiff is held to be a partial dependent of the fatally injured employee and as such entitled to compensation.

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

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

Hubka & Hubka, contra.

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

GOSS, C. J.

This is a proceeding under the Nebraska workmen's compensation law, brought by a mother, claiming to be a dependent, on account of the fatal injury and death of her son.

Most of the vital facts, so far as they affect the employment and the injury to the employee, are admitted by the pleadings and by a stipulation of facts. Defendant is a Texas corporation, with its principal place of business in Dallas. During October and November, 1930, it was executing a contract for the laying of a natural gas pipe line and connections in a northeasterly direction from Haddam, Kansas, through Nebraska and into Iowa. At Haddam, on October 16, 1930, it employed William P. Esau, about 27 years of age, unmarried son of plaintiff, as a laborer. He continued uninterruptedly in such employment until November 1, 1930, when he was fatally injured near Beatrice, in Gage county, Nebraska. The injury arose out of and in the course of his employment. When the contract of employment was entered into, no mention was made by either of the parties of any workmen's compensation law; the employer had elected to

abide by, had complied with, and was working under, the Kansas workmen's compensation law, a printed copy of which was stipulated in evidence. It contains a provision that "this act shall apply also to injuries sustained outside the state where the contract of employment was made within the state, unless such contract otherwise specifically provides." Laws (Kan.) 1927, ch. 232, sec. 6. William P. Esau at no time elected to come within the provisions of said law. This paragraph states substantially all facts admitted by pleading and by stipulation.

The evidence further shows that when William P. Esau began work for defendant, its camp was at Haddam, Kansas, but about a week before his injury the main camp had been moved from Haddam to Steele City, Nebraska, which then became and was at the time of the injury the temporary headquarters of defendant as its work progressed in a northeasterly direction, though the work in Kansas was not yet completed. While the employee was subject to be sent back into Kansas to aid in finishing work there, it does not appear that he ever worked on his job aiding the welders anywhere except in Nebraska, after the headquarters was moved to Nebraska. His wages were $4 a day and he worked seven days each week. Both he and his mother, the plaintiff, were residents of Nebraska.

Defendant alleged, and has contended throughout the proceedings, that Nebraska has no jurisdiction under its compensation law and that plaintiff's rights, if any, must be determined under the Kansas law. The Nebraska compensation commissioner allowed plaintiff $15 each week for 350 weeks as sole dependent. On appeal the district court cut this to $3.85 a week, finding that plaintiff's son contributed only about $200 each year to her support as a partial dependent. The employer appealed, arguing that the Kansas compensation law contains plaintiff's exclusive remedy.

The appellant relies upon the recent case of *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, as presenting what it calls an identical situation. Both employer and em-

ployee were citizens and residents of Vermont. The employer company had its principal place of business in Vermont and lines extending into New Hampshire. Leon Clapper, employed by it as a lineman for emergency service in either state, was sent to restore some burned-out fuses at a substation in New Hampshire and while doing so was killed. Sued in the federal court (on removal from the state court) in New Hampshire by a local administratrix of the deceased, the company set up as a special defense that the action was barred by provisions of the Vermont compensation act. Judgment for plaintiff was affirmed by the court of appeals but reversed by the United States supreme court on the ground, among others, that the failure to recognize the special defense, under the particular facts, constituted a violation of the full faith and credit clause of section 1, art. IV of the federal Constitution. But the very last sentence of the opinion is cautionary. The court said: "We have no occasion to consider whether if the injured employee had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under New Hampshire law." This phase of the opinion, delivered by Mr. Justice Brandeis, was amplified in the concurring opinion by Mr. Justice Stone. So the situations are not identical.

We believe no superior force of the full faith and credit clause of the federal Constitution will compel us to recognize a defense based upon the Kansas law, under the facts here, if in conflict with our interpretation of the Nebraska compensation law and in conflict with our public and domestic policy in relation thereto.

In *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, the employee, McGuire, lived in Nebraska, and the employer, Phelan-Shirley Company, had its principal place of business in Omaha. Under a contract of employment made in Nebraska, McGuire was injured in Iowa while assisting in handling a ditching machine in the execution of agreed work for the employer. It was held that the com-

pensation proceedings were maintainable in Nebraska. The decision was based on the intent of the statute and of the parties to the contract that the law of the place of contract should govern because both parties resided in Nebraska, the employer carried on its industry in Nebraska and the work in Iowa was but an incident to the industry in Nebraska. See *Watts v. Long,* 116 Neb. 656, 661. In the last named case it was held that the Nebraska law is not "applicable to a nonresident employer and resident employee, where the contract of employment was made in this state for services to be performed in another state, and the employer was not, at the time of the contract, engaged in any trade, business, profession, or avocation in this state." This was approved and followed in *Freeman v. Higgins,* 123 Neb. 73, although there the employer and employee both resided in Nebraska but the contract was made and the industry carried on in Wyoming; and the employer was not engaged in any industry in this state to which the services to be rendered were incidental. In *Stone v. Thomson Co., ante,* p. 181, plaintiff resided in Nebraska, the employer maintained its principal headquarters in Nebraska, the contract of employment was made in Nebraska, and the employee was sent to Kansas, where he was injured. It was held that the industry in Kansas was merely incidental to that here and that the action for compensation was maintainable here.

Thus it will be observed that our decisions put great emphasis upon the place where the industry was carried on, though taking into consideration the place of contract and the residence of the parties. Running through these and other cases is the theory that the industry should bear the burden of injury to employees under it.

The statute (Comp. St. 1929, sec. 48-106) says: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." The defendant's principal

place of business was in Texas, but its headquarters, which were in Kansas when it engaged the employee, had been moved to Nebraska, where it was carrying on its business of laying the pipe line when William P. Esau received his fatal injury. The defendant answers the call of the statute in that it was an "employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." While its domicile was Texas, its only headquarters shown in the evidence for the conduct of its industry was Nebraska, the industry was being carried on in Nebraska, the employee resided in Nebraska and was injured in Nebraska. We do not think it accords with our public policy to admit that the Kansas contract and compensation law deprive Nebraska of its jurisdiction under its compensation law. On the other hand, we are of the opinion, and declare it to be the settled public and domestic policy of this state, that, under the facts of this case, the action of the plaintiff is maintainable in Nebraska. We have not been cited a case, nor have we found one, resulting in refusal to take jurisdiction in the state where the injury, the residence of the injured employee, and the only headquarters of the industry in which he was employed when injured, coincided. These elements concurring, we do not regard the provision of the Kansas law, by which the employer seeks to hold the employee to the so-called exclusive remedy there afforded, as binding here.

Complaint is made that the court erred in finding the plaintiff a partial dependent of her injured son and as to the amount of the judgment. In addition to the facts first stated, the evidence shows that the plaintiff is in a dependent and necessitous state, that the son William had no other dependents, that when he was working and the mother needed it he contributed to her support, that he had not only manifested this in practice in previous years, but recently had orally manifested his intention to take care of his mother; and while his recent financial support had been less because he had been out of work,

yet the evidence, though informal and not very complete, fully justifies the finding of the district court as to the amount of his contributions. The act is highly remedial both in character and purpose. It should be liberally construed to attain the accomplishment of its beneficent objects. Technical refinements of interpretation will not be permitted to defeat it. *Parson v. Murphy*, 101 Neb. 542; *McCrary v. Wolff*, 109 Neb. 796. We are of the opinion the district court did not err to the prejudice of the appellant in finding plaintiff a partial dependent of the injured employee and in fixing the compensation. The plaintiff is allowed an attorney's fee of $100 in this court, and the judgment of the district court is

AFFIRMED.

E. H. LOUGEE, INC., APPELLEE, V. THOMAS H. MATTERS: HELEN M. MATTERS, APPELLANT.

FILED JANUARY 6, 1933. No. 28311.

1. Judicial Sales: SETTING ASIDE: INADEQUACY OF PRICE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *Metropolitan Life Ins. Co. v. Heany*, 122 Neb. 747.
2. Appeal. Upon appeal, a question not available to appellant may be disregarded, though discussed in the brief and argued at the bar.

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

M. O. Cunningham, for appellant.

Cranny & Moore, contra.

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

ROSE, J.

This is a suit to foreclose a 9,000-dollar mortgage on an improved lot in Omaha. The district court entered a decree of foreclosure for $9,612.42. Defendant took a

stay of execution, which waived errors, if any, in the proceedings and decree. The mortgaged realty was sold at sheriff's sale for $10,493.50. The sale was confirmed and defendant appealed from the order of confirmation.

Inadequacy of price is urged as a ground of reversal. Estimates of value as shown by affidavits ranged from $14,500 to $15,000, but the discrepancies between the estimates and the sale price are insufficient to overturn the confirmation, within the meaning of the following rule:

"A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *Metropolitan Life Ins. Co. v. Heany,* 122 Neb. 747.

Another objection to confirmation is based on the proposition that a material party was not brought into the case. An examination of the record shows that this point, though discussed in the brief and argued at the bar, is not available to defendant. It is therefore disregarded.

AFFIRMED.

WINSLOW STATE BANK, APPELLANT, V. PAUL WESTLIN ET AL., APPELLEES.

FILED JANUARY 6, 1933. No. 28322.

1. **Fraudulent Conveyances:** CONVEYANCE FROM HUSBAND TO WIFE. "A husband may lawfully give his wife a deed or mortgage to secure a preexisting *bona fide* debt owing to her, and such conveyance is not fraudulent as to his other creditors, if taken in good faith, and without any fraudulent purpose." *Ward v. Parlin,* 30 Neb. 376.
2. ———: ———: GOOD FAITH. Evidence examined, discussed in the opinion, and *held,* that it is amply sufficient to establish that the chattel mortgage was given in good faith by the defendant to his wife as security for various loans of money advanced prior to the execution of a note by the defendant to the plaintiff bank, and without any intent to defraud the bank.

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

Robins, Yost & Lamme and *Dolezal, Mapes & Johnson,* for appellant.

Cook & Cook, contra.

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

DEAN, J.

This action was begun in the district court for Dodge county by the Winslow State Bank, plaintiff, against Paul Westlin, defendant, to recover $1,426, under the terms of a promissory note dated October 29, 1930, which was executed and delivered by defendant Westlin to Harvey Realph and by the latter sold and assigned to the plaintiff bank. The bank alleged that there is now due $1,439.84 from Westlin, together with interest thereon at the rate of 10 per cent. per annum from March 9, 1931. Westlin admits that he signed the note, but he alleged that the plaintiff bank is not the holder of the note in due course and that no valuable consideration was paid therefor to Realph by the bank.

Anna M. Westlin, the defendant's wife, filed a petition in intervention, wherein she alleged that on February 24, 1931, for a valuable consideration, the defendant executed and delivered to her his promissory note in the sum of $2,650, bearing interest at the rate of 6 per cent. per annum, and that, as security therefor, he gave her his chattel mortgage, which was filed of record the same day. It appears that a sale of the property included in the chattel mortgage was held, at which the defendant acted as his wife's agent, and that an order of attachment and garnishment was entered against the proceeds of the sale pursuant to proceedings instigated by the plaintiff bank. The intervener contends that she is entitled to the proceeds of the sale, except the amount of $500, which she alleges is due Frank H. Peterson, to whom she and the

defendant are indebted under a note executed by them July 14, 1928, in his favor.

The court found and decreed that $1,570.16 was due the plaintiff bank from the defendant under the terms of the note held by the bank. But the court also found and decreed that the mortgage of the defendant's wife is a valid lien upon the property of the defendant, which was sold at auction, and that the intervener is therefore entitled to recover $1,016.49, or the balance remaining after the payment of $561.65 to Frank H. Peterson, above named. The court further found that the order of attachment and garnishment, filed by the bank against the proceeds of the sale of defendant's property, is not sustained by the evidence. From the judgment so rendered, the bank has appealed.

The main question for determination here is whether the defendant borrowed money from his wife and, if so, whether the chattel mortgage given to secure such loan was executed in good faith.

The record discloses that in 1928 and again in 1930, the defendant's wife instituted proceedings for a divorce, but that each time a reconciliation followed, and the parties are now living together. In the petition for divorce filed in June, 1930, it is stated that, "during the years 1928 and 1929 the defendant borrowed from the plaintiff (the intervener herein) the sum of $2,300, no part of which has ever been repaid to the plaintiff." It may be observed that the note given by the defendant to his wife in the sum of $2,650 represents the above $2,300, together with interest thereon, all of which the defendant admits was loaned to him at various times by his wife with the understanding that he was to repay her. That the defendant's wife considered him indebted to her is also established by the evidence of an attorney whose services she procured in the proceedings for a divorce.

It appears that on June 2, 1930, when the divorce proceedings were pending, an attorney drafted a mortgage for the parties, which was not recorded until February 21 of the following year, for the reason that the defend-

ant and his wife desired to withhold such mortgage from record until the payment and discharge of another mortgage against the defendant which became due and was paid in January, 1931. It further appears that the February 21 mortgage was substituted by another mortgage dated February 24, 1931, and this for the reason that the parties desired to make some change in the items listed therein.

The record also discloses that the intervener, the defendant's wife, received money from her grandfather at various times, and that, after his death, she received an inheritance from his estate. It also appears that she received money from her brother at one time. An exhibit, compiled from the books of the bank in which the intervener maintained a checking account separate from that of the defendant's discloses that the following amounts of money were received by her from her grandfather and deposited to the account of her husband, namely:

"September 2, 1927, check $100 Peter Murray (the intervener's grandfather) to Anna M. Westlin. Deposited to Paul Westlin account.

"April 11, 1929, check $1,016.34 Peter Murray Estate to Anna M. Westlin. $350 deposited to account Paul Westlin. $666.34 deposited to account Anna M. Westlin.

"May 13, 1929, check $700 H. P. Dahl to Anna M. Westlin. Deposited to account Paul Westlin.

"May 21, 1929, check $350 Anna M. Westlin to Paul Westlin. Deposited to account Paul Westlin."

The record also discloses that at one time the defendant's wife borrowed $500 from her cousin, Frank H. Peterson, as above mentioned, for which she and the defendant signed a note, and it appears that this amount was deposited to the defendant's account but that the intervener paid the interest as it became due on the note.

Certain canceled checks are in the record tending to prove that at various times the defendant's wife paid for numerous items out of her own checking account, including feed, hardware, trucking, hired help and other

expenses, and it appears to have been agreed between them that the defendant would give his wife a note secured by a chattel mortgage after all loans had been completed. And from the testimony of the defendant's wife, it is disclosed that she had no knowledge of the note executed by her husband in favor of the plaintiff bank until a notice was received from the bank stating that an interest payment would shortly be due.

The defendant purchased a Buick automobile early in 1929, valued at $1,425, and after the car had been driven about 20,000 miles he gave it to his wife. It appears, however, that the entire amount due on the car had not been paid by the defendant, and that his wife made some payments thereon. The Buick was traded for a Ford automobile and $150 in cash, which was applied to the remainder due on the other car. The Ford was mortgaged for more than $300 and the money so received was turned over to the defendant. And it also appears that the Ford was later traded to a man who assumed the mortgage on the car and allowed the defendant a credit of $50 on a threshing bill, and, in addition thereto, the defendant's wife received an old model of a Ford valued at about $15. During all of this period, the defendant had access to and drove the cars in question. We fail to see that the defendant's wife materially gained in the above transactions.

A review of the evidence does not disclose that the mortgage by the defendant to his wife was not given in good faith, nor is it disclosed that it was given with the intent to defraud the plaintiff bank or any other creditor. And particularly is this the fact, when it is taken into consideration that there was some marital difficulty between the parties in 1928 and in 1930. Surely it will not be contended that, with domestic difficulties prevailing, the parties contemplated a transfer of the property from the husband to the wife to defraud the husband's creditors. The evidence establishes that the money obtained from his wife by the defendant was considered merely as a loan and that such loan was to be repaid.

And it is to be remembered that the petition for divorce filed in June, 1930, alleged that at various times the defendant had been loaned certain sums of money in the aggregate sum of $2,300, no part of which had been repaid to her.

This court has held to the following proposition:

"A husband may lawfully give his wife a deed or mortgage to secure a preexisting *bona fide* debt owing to her, and such conveyance is not fraudulent as to his other creditors, if taken in good faith, and without any fraudulent purpose." *Ward v. Parlin,* 30 Neb. 376; *Dayton Spice-Mills Co. v. Sloan,* 49 Neb. 622. And we have also held that, when a conveyance from a husband to his wife is attacked by a creditor, the presumption is that such conveyance was fraudulent, but such presumption is not one of law but merely of evidence, and is applicable only to creditors whose debts existed at the time the conveyance was made. *Jansen v. Lewis,* 52 Neb. 556. In *Clarke Drug Co. v. Boardman,* 50 Neb. 687, we held that an insolvent son may prefer his mother to his other creditors by securing her debt, but that the burden was on the mother to show by a preponderance of the evidence that such preference was in good faith and not for the purpose of defrauding the other creditors.

In the present case the judgment is amply supported by the evidence, which discloses that the defendant's wife had some financial means of her own; that she many times advanced money to her husband; and that, in acknowledgment of such loans of money, the defendant gave her his note secured by a chattel mortgage. These loans of money all transpired before the defendant obligated himself to the plaintiff bank. In view of the facts and the law applicable thereto, we conclude that the judgment is right, and it is hereby

AFFIRMED.

TRAVELERS INSURANCE COMPANY, APPELLEE, V. LAWRENCE N. SMITH, APPELLANT.

FILED JANUARY 6, 1933. No. 28302.

1. Judicial Sales: CHILLING OF BIDDING: QUESTION OF FACT. Whether bidding has been deterred or discouraged at a judicial sale, ordinarily, is a question of fact to be determined from evidence.
2. ———: ———: PRESUMPTION. In absence of evidence, chilling of bidding at judicial sale will not be presumed because successful bidder added the words "plus costs" to his bid.

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

E. W. Moehnert and *R. H. Mathew*, for appellant.

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

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

GOOD, J.

This is an appeal from an order confirming a judicial sale had in an action for foreclosure of a real estate mortgage. The grounds relied on for reversal are that the sale was improperly conducted and was not advertised as required by law.

The mortgaged premises were sold to the plaintiff upon its bid for the sum of $22,686.42, "plus costs." The amount bid was the exact amount due on the decree, including interest to date of sale, plus costs. Defendant argues that, because of the words "plus costs" in plaintiff's bid, the amount thereof was indefinite and had a tendency to discourage other bidders, since they could not know the precise amount of the costs.

Whether prospective bidders have been deterred or discouraged from bidding at a judicial sale by the act of a party to the suit, ordinarily, is one of fact to be ascertained from evidence. In the instant case, there is no bill of exceptions. We are therefore unable to determine whether or not there were other bidders or prospective

bidders, or that any one was deterred or discouraged from bidding because of the nature of the bid made by plaintiff. There is nothing in the record from which this court can determine that the amount of costs was unknown or could not have been readily ascertained. This court cannot say, as a matter of law, that the defendant was prejudiced by the form of plaintiff's bid.

It is contended that the sale was not properly advertised. The point relied on is that the description of the premises in the notice of the sale was indefinite. The mortgage covered three quarter-sections of land, the southeast quarter of section 8 and two quarters in the adjoining section, in the same township and range. Subsequent to the execution of the mortgage and prior to the decree of foreclosure, defendant conveyed to Sherman county for road purposes a strip, 26 feet wide, off the south side of the southeast quarter of section 8. In the foreclosure action plaintiff recognized the sale of this strip by defendant, and sought and obtained a decree on the three quarters, with the exception of the 26-foot strip. The decree, order of sale and notice of sale each described the three quarters and excepted therefrom the 26-foot strip of land. The description exempting this 26-foot strip is by metes and bounds, is accurate and free from uncertainty and could not have misled any one. The objection seems to be frivolous.

The record appears to be free from error. The order of confirmation is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. COLUMBUS STATE BANK, APPELLANT: BERTHA GROSS, INTERVENER, APPELLEE.

FILED JANUARY 6, 1933. No. 28310.

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

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

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

McElfresh & Walker, contra.

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

EBERLY, J.

This is an action in equity by Bertha Gross, intervener, to impress a trust in her favor in the amount of $145 upon the assets of the Columbus State Bank, an insolvent institution. In the district court judgment was given for the intervener, and the receiver, a representative of the depositors, who are the real parties in interest, appeals.

The facts making up the transaction out of which the litigation arises are not substantially in dispute, and embrace the following: Miss Gross, a teacher of the Columbus city schools, in payment of salary received a school warrant, of which the following is a copy:

"Columbus, Nebraska, 10/15/30. No. 12. Treasurer of School District City of Columbus. Pay to the order of Bertha Gross $145, the sum of one-hundred forty-five and no/100 dollars, out of any moneys in your hands belonging to the general fund. Payable at par through any bank in Columbus, Nebraska. John L. Pittman, President. O. F. Walters, Secretary."

Intervener indorsed her name on the back of this instrument in the form of an indorsement in blank, placed the same in an envelope which she addressed to an "out of town bank," and to which she affixed the necessary stamp, and then intrusted the same to one of her pupils, a fourteen year old girl, with directions to deposit the same in the United States mails for transmission to the addressee. This messenger, unfaithful to her trust, removed this school warrant from the envelope and, aided by and because of the genuine signature of the payee regularly indorsed on the back thereof, "cashed" the instrument at the Columbus State Bank. The president

of this institution transacted this business with intervener's messenger, and testifies that the method followed was the usual way of handling transactions of this kind; that there was no benefit to his bank in the transaction; that the treasurer of the local school district had his checking account with the Commercial National Bank of Columbus, and that, after the payment of the $145 had been made to the messenger, this instrument "was put in the clearing, and that is how we got our money back." As to this fact, this witness is fully corroborated by the cashier of the Commercial National Bank, who testifies that, during the month of October, 1930, the school funds of the local district were deposited in his bank, and that this "Gross" school district warrant was by it on October 17, 1930, received "through clearing" from the Columbus State Bank, which transaction of "clearing" his testimony substantially describes. This "Gross" school warrant, thus received as a check, was then by the Commercial National Bank as a check charged against the school district account. Thus, it appears by uncontradicted evidence that the usual or customary transactions involved the "cashing," the "payment" of the warrants as they were presented to the banks of Columbus by the holders thereof; and this established course of business we accept as embodying the practical interpretation of their respective rights and duties by all parties to these transactions.

The language of the original school district warrant with its indorsement is quite consistent with the course of business outlined by the evidence. Written across the back of the warrant appears the genuine signature, "Bertha Gross." Under it appears the impression of the cancelation stamp of the Columbus State Bank, and there also appears the perforation cancelation stamp of the Commercial National Bank. Both of these stamps appear to have been applied to the school warrant in the same manner as when applied to checks paid at their respective counters.

It would also seem that we are fully justified in hold-

ing that the evidence, the circumstances disclosed by the record, as well as the actual course of the business, fairly establish what is tantamount to an agreement between the school district and the banks of Columbus that the latter, wholly without compensation to themselves and for the benefit and convenience of the school district, would cash or pay for and on behalf of the latter such school district warrants issued by it bearing on the face thereof the words, "Payable at par through any bank in Columbus, Nebraska;" and for such outlays made by them would receive due reimbursement. Indeed, it is inconceivable that without such prior understanding the officers of this district would have incorporated in their warrants issued by them the language under consideration.

It is quite obvious that these transactions, so far as the banks engaging therein are concerned, could not be considered as investments made by them or entered into by them for their individual financial advantage.

Even so, it must be admitted that not only are the terms of the basic instrument which constitutes the source of this litigation unusual, but the course of business is itself novel. As part of the warrant, as already noted, we find the words, "Payable at par through any bank in Columbus, Nebraska." The word "payable," when used in promissory notes and other commercial transactions, means ordinarily "to be paid," rather than "which may be paid." *Johnson v. Dooley*, 65 Ark. 71, 40 L. R. A. 74.

A check, on the face of which appeared the words "payable through (a named bank in another city of the same state) at current rates," was before the supreme court of Georgia in the case of *Farmers Bank v. Johnson, King & Co.*, 134 Ga. 486, and it was held that this was a material part of the direction, that the check "is to be paid in that way," and that the drawee bank was not required to pay the check when not presented through the bank thus named but directly by a third bank.

Our court is likewise committed to the view that the

words, "payable at (a designated bank)," in a promissory note are a material term, and compliance therewith in the transaction then before this court was obligatory upon those seeking to hold the indorsers thereon to their contractual liability. *Witte v. Broz,* 111 Neb. 76, 84.

Thus, we see that the words "payable at (a designated bank)" employed in commercial paper are effective to create an agency where legal demand for payment may be made which will be binding on all parties thereto. 8 C. J. 549.

By parity of reasoning, in consideration of the established facts of the instant case, and accepting the principles announced in *Farmers Bank v. Johnson, King & Co., supra,* we arrive at the conclusion that the employment in this transaction in a similar manner of the words, "payable at par through (a designated bank)," was necessarily intended, and is effective, to create an agency for payment vested for the purpose expressed with full and complete powers of the principal. The designated bank is the agent of the maker of the instrument. Its acts within the scope of the authority conferred are the acts of its principal. Whatever may come into its possession because of such acts, or pursuant thereto, is and must be deemed the property of the principal. And if such agent, in any of such transactions, advances or uses its own moneys or funds, such moneys or funds will, in equity, be deemed advancements made to the principal, and for its use and benefit, and for which the agent will be entitled to reimbursement. But such advancements of moneys and funds by the agent will not, as against his principal, ordinarily invest the agent with title to the obligation, for the payment or discharge of which such moneys or funds were employed.

Where an agent "is employed to compromise or settle claims against his principal, he will not be permitted to purchase such claims himself and enforce them against his principal." 2 C. J. 708. See, also, *Crile v. Fries,* 86 Neb. 789.

Neither will his right to reimbursement be limited to

the enforcement of the obligations discharged by his advances, but the right of reimbursement is wholly unconnected therewith. The necessary propriety of this rule may be illustrated by a concrete example: Assuming that on the last moment of the last business day permitted by the statute of limitations, a written obligation containing the clause now under consideration be presented to the agent named therein for payment. Under the conditions assumed, it is obviously the duty of the agent to pay it. But, would it be seriously contended that, if in making such payment the agent was compelled to and did employ his own funds for his principal's benefit, his right to reimbursement could in any manner be affected or denied because on the succeeding day the obligation thus paid, if then unpaid, would be barred by the statute? And then again, in this equitable procedure the maxim that equity regards intent and substance rather than form is controlling. It can therefore make no difference as to the resulting equities of the parties whether in pursuit of this course of business, or in carrying out the contract involved, a Columbus bank, as agent, on receipt of the school district warrants presented for payment at par over its counters, pays the same from moneys of the school district on deposit with it, or then otherwise in its actual possession, or whether it employs its own funds in making such payment, and thereafter is reimbursed. The substance of the two transactions, in view of the fundamental rights of the parties, is identical, and equities arising therefrom cannot be different.

Thus, the evidence in the record establishes that every act performed by the Columbus State Bank was the act of an agent, and ostensibly within the scope of the authority evidenced by the terms of the school district warrant which it paid. Though the money actually paid was money advanced by it to and for the benefit of its principal, the school district, yet as paid over to the party cashing this warrant, it was in equity the money of the school district and not of itself. This warrant with its "paid stamp" impressed thereon was thereafter promptly

transmitted as required by the course of business, and as agent this bank was then reimbursed out of the school district funds for the payment thus advanced. The Columbus State Bank never was, and in equity was expressly precluded from being, the owner of the school district warrant, and never in legal contemplation sold this warrant to its principal. After payment thereof to Miss Gross' messenger, improperly made it may be admitted, this school district warrant was thereafter at all times treated by the Columbus State Bank as the property of the school district issuing the same. The actual possession thereof by the agent (the bank) was the legal possession of the principal (the school district). There was no admixture or confusion of the assets evidenced by the school district warrant with the individual property of the agent bank. The honesty and entire good faith of this institution and of its officers and employees stand unchallenged. These facts expressly negative the theory that the individual property of the Columbus State Bank was, as a result of this transaction, in any manner "enhanced," "swelled," or "augmented," and for lack of this essential element of proof, it would seem that intervener has failed to sustain the cause of action upon which she relies in the instant case.

Nor can this conclusion be affected by the question of the power of the school district to create an agency for payment. Ostensibly such agency was created by the express language employed in the warrant before us. This transaction was carried out and completed by both school district and bank in strict compliance with the powers thus conferred. No act was performed therein by the Columbus State Bank inconsistent with its character as agent, the fruit of the agency was accepted by the school district, reimbursement was made, and on this basis the transaction was closed.

In thus denying the claim of intervener to impress a trust upon the assets of the Columbus State Bank to the extent of the value of this warrant, we are not overlooking the following contentions: That a school district

warrant in Nebraska is not a negotiable instrument; that a thief cannot convey title to a school district warrant to a purchaser for value and in good faith, even though this warrant at the time of such transfer bears the genuine indorsement of the payee; that the real owner of the paper, under these circumstances, may pursue and claim his property in the hands of whomsoever it may be; that every act of control or dominion over property without the owner's authority, and in disregard of his rights, is in contemplation of law a conversion; that it is not the advantage accruing from the defendant's act nor the motives inducing it, but the substantial injury inflicted on the plaintiff which ordinarily constitutes the gravamen of the action; and that a person intermeddling and assuming the management of property (including an embezzled warrant) without authority will be a trustee *de son tort*, and that the indorsement of such school district warrant by the owner thereof does not estop him to assert title thereto.

Conceding these principles, as applied to certain concrete cases, to be correct statements of common law doctrines, the fact remains that this court has denied their application in cases where the controlling facts were substantially identical with those of the instant case, and refused recovery to the admitted owner of the warrant.

We refer to the *Bartley* cases which are reported as follows: *Bartley v. State*, 53 Neb. 310, on rehearing 55 Neb. 294, *State v. Omaha Nat. Bank*, 59 Neb. 483, and *State v. Omaha Nat. Bank*, 66 Neb. 857. To set forth fully the facts involved and the varying judicial views would unduly extend this opinion. But we may epitomize the facts involved as follows: Bartley was state treasurer. Pursuant to legislative authority, and to reimburse the state sinking fund, on April 10, 1895, a state warrant in due form was issued, which in terms directed the "Treasurer of Nebraska, Pay to J. S. Bartley, or order (a sum definite)," and which on its face recited, "For to reimburse state sinking fund." This warrant was by the state treasurer indorsed, "Presented and not paid for

want of funds and registered for payment April 10, 1895, Number 27932." Almost immediately thereafter Bartley indorsed his name on the back of this warrant and delivered the same to the Omaha National Bank for negotiation and sale. The Omaha National Bank sold it to the Chemical National Bank of New York. The proceeds of the sale were credited to J. S. Bartley in his individual capacity and paid out on his individual check. In November, 1896, this warrant, upon notice of the state treasurer directing its presentation for payment as a duly registered state warrant, was transmitted by the Chemical National Bank to the Omaha National Bank, and by the latter institution presented to J. S. Bartley as state treasurer, who in his official capacity paid the same by his official check drawn on the Omaha National Bank as a state depositary. The Omaha National Bank then remitted the funds so collected to the Chemical National Bank of New York. This court in the cases referred to, in effect, determined: That the state warrant was a nonnegotiable instrument; that it was properly issued, but "that the fact that Bartley had the right to receive it" conferred on him no authority to dispose of it, and that the instrument and the moneys evidenced thereby were at all times, in equity, the property of the state of Nebraska; that the facts enumerated constituted evidence ample to sustain a conviction of embezzlement by Bartley. But, in an action by the state against the Omaha National Bank, based on this transaction, it being in effect established by the evidence and found by the trial jury that what was done by the Omaha National Bank, its officers and agents, was in the usual course of banking business, innocently of the true nature of the transaction, and in good faith and without knowledge, and that no profits accrued to the institution by reason thereof, a recovery against the Omaha National Bank was denied.

The rule, controlling, announced by Day, C. (later a justice of this court) in the final opinion which a majority of this court adopted is: "Where property has

been taken from the plaintiff without his knowledge or consent or of those having the lawful custody over it, the motive which prompted the defendant to receive and dispose of it is an immaterial issue. But this rule does not apply when the plaintiff, his agent or servant, having the lawful custody or control over the property, consents to or requests the defendant to receive and dispose of it. In such case guilty intent is an essential element of conversion."

Miss Gross' messenger on this occasion was her servant. "The master's possession of personalty continues where he delivers a thing to his servant to be by him kept, used, carried, or applied in the course of his employment as a servant. The servant is said to have, not the possession, but a mere charge (*onus*) or custody." 1 Labatt, Master & Servant (2d ed.) 733.

"Custody of property means such a relation towards it as would constitute possession if the person having custody had it on his own account." 8 Am. & Eng. Ency. of Law (2d ed.) 530.

The instant case, in view of the admitted facts, would fall within the exception to the general rule above announced by Judge Day, and it would for this reason, in addition to the one heretofore given, follow that the evidence in the record is wholly insufficient to sustain the determination of the trial court.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

J. J. JOHNSON, APPELLANT, V. SMITH, HULTIN, ANDERSONS COMPANY ET AL., APPELLEES.

FILED JANUARY 6, 1933. No. 28325.

Attachment: DISSOLUTION: LIABILITY ON BOND. No liability arises against either principal or surety under an attachment bond after an order of dissolution entered pursuant to a stipulation adjusting disputed matters.

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

J. E. Wilson, for appellant.

Schiefelbein & Donato, contra.

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

DAY, J.

This is an action to recover damages upon an attachment bond given in an action on an account. The trial court sustained a demurrer to plaintiff's petition.

The allegation in the petition relevant to a discussion of the alleged error is that there was entered in the attachment case the following journal entry:

"Now on this 4th day of August, 1931, settlement made in open court whereby $250 of funds is paid into court for the plaintiff and credited on his account and *by agreement of all parties and in settlement;* attachment is dismissed, and discharged, also garnishment. And as to attachment and garnishment each party pay its or his own costs.

"By the Court,
"Harry D. Landis, District Judge."

No liability arises against either principal or surety under an attachment bond after an order of dissolution entered pursuant to a stipulation adjusting disputed matters. *Eiseley v. Norfolk Nat. Bank,* 89 Neb. 382; *Downs v. American Surety Co.,* 132 Minn. 201.

The trial court properly sustained the demurrer to plaintiff's petition.

AFFIRMED.

RAYMOND E. MASTERS, APPELLEE, V. METROPOLITAN CASUALTY INSURANCE COMPANY, APPELLANT.

FILED JANUARY 6, 1933. No. 28337.

Insurance. Evidence examined and found insufficient to support verdict.

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

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

Courtright, Sidner, Lee & Gunderson, contra.

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

DAY, J.

This is an action for weekly indemnity under an accident insurance policy which excepts coverage for disability caused directly or indirectly, wholly or partly, by hernia. The insurance company defended on the theory that plaintiff's disability was due to hernia for which no indemnity was due under the terms of the policy. The defendant appeals from a judgment in favor of plaintiff.

Appellant contends that the evidence does not support the verdict. The plaintiff testified that he had an accident; that thereafter he had an operation for hernia. A physician, who examined him in November following the accident in January and the operation in February, testified from the examination and the history given him as to the nature of hernia in general and the extent of plaintiff's disability. However, plaintiff by his testimony had fixed the limit of his recovery at fifteen weeks' total disability, and no amount of opinion evidence would entitle him to a greater recovery.

But that is not the controlling question, which is: Was the plaintiff's hernia caused by the accident of January 9, 1931, or did the plaintiff have the hernia before that time? There is no evidence that the hernia was caused by the accident of January 9, 1931. There is evidence that after the accident the hernia caused disability. A

physician testified for the defendant that he examined the plaintiff in January, 1930, a year before this accident; that plaintiff then had a hernia; that he saw him after this accident, and that he had the same hernia with an increase of the local symptoms over the previous year. This evidence is uncontradicted by competent evidence. In order to forestall future controversy, we note that plaintiff denies that this physician told him in 1930 that he had a hernia. The only conclusion which the evidence supports is that the plaintiff had the hernia at least a year prior to the accident involved in this case, and that the accident did not cause the hernia.

This was therefore a disability for which the defendant did not contract to indemnify the plaintiff. The judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

EVARISTO URIBE, APPELLEE, V. WOODS BROTHERS CONSTRUCTION COMPANY, APPELLANT.

FILED JANUARY 6, 1933. No. 28523.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY. The evidence in this case does not sustain the finding and the judgment that the cause of the disability was a heat stroke arising out of the employment, for it discloses that the unfortunate plaintiff was and is suffering from a heart condition of long standing.
2. ———: ———: ———. That whatever occurred to plaintiff on this occasion was not an accident arising out of his employment, entitling him to compensation therefor.

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

Woods, Woods & Aitken, for appellant.

George I. Craven and *Harry A. Spencer, contra.*

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

PAINE, J.

This is an appeal by the Woods Brothers Construction Company from an allowance of over $3,300 for an accidental injury sustained by an employee working for them on the construction of the bridge over the Platte river at Ashland, on Federal Highway No. 6.

The plaintiff, Evaristo Uribe, was hired as a laborer and carpenter on July 29, 1931, and went to work at noon that day a few miles east of Ashland, where the defendant company was constructing a new bridge on Federal Highway No. 6, across the Platte river. Before he had completed a full second day's work, between 10 and 11 o'clock on the morning of July 31, he complained of feeling sick to the foreman, who told him to go and rest in the shade. He returned to work about 2:30 in the afternoon, and finished out that day, and rode back to Lincoln that evening in a friend's car. The next day he called Dr. Cameron, who gave him some digitalis. On August 3 the doctor called again, and told him to keep on taking the same medicine. After that Uribe made ten trips to the doctor's office, the last of these trips being on January 13, when he was trying to shovel some snow and his heart ran up again, and he went to the doctor's office for treatment for his heart action.

Plaintiff filed action against defendant, alleging that on the morning of July 31 he had suffered a sunstroke while at his work of a carpenter, and on October 1 a hearing on this petition was had before Cecil Matthews, deputy compensation commissioner, and an order was entered by him upon October 22, dismissing the claim for compensation, from which order plaintiff appealed to the district court for Lancaster county. After a trial in the district court, Uribe recoverd a judgment for two-thirds permanent disability, and defendant was directed to pay him $10.67 a week, beginning July 31, 1931, and continuing so long as the disability shall continue, but not to exceed 300 weeks, and to pay Dr. W. L. Cameron $17, and to pay Dr. George W. Covey $40, and defendant was required to furnish such further medical care and treatment as may be required.

The defendant claims that the appellee did not have a heat stroke upon July 31, nor at any other time, and that a heat stroke never results in permanent impairment of the heart; that, even if he had suffered a heat stroke, it was not an accidental injury, arising out of his employment, so as to entitle him to compensation; that whatever disability he had, and is now suffering from, is caused by a diseased heart condition, which has been brought about and caused by an infection, which infection is still present and is causing the continuation of the disability.

The plaintiff's attorney qualified an interpreter to use in examining Mr. Uribe, who was a Mexican, and the objection was made by the defendant that he had testified before the compensation commissioner without the use of an interpreter, and defendant objected to one being used in the district court, even though plaintiff's attorney had insisted that he had used a Spanish interpreter when talking with him to prepare the case.

The evidence discloses that the plaintiff was working under the same conditions as other workmen were working, and that he complained of trouble, but did not specify the kind of trouble, and the foreman told him to go and rest in the shade; that after dinner he was able to come back and complete the day's work, which of itself indicated a heart attack, rather than a sunstroke. When he called a doctor the next day, the doctor gave him digitalis for his heart, but did not, then or at any time, give him liquids, or treatment with cold packs, or any of the usual remedies applied for heat strokes. Dr. John Thompson testified that such heart symptoms developed rather gradually, and that the history of this case shows that it was due to a heart condition, rather than to anything else. He further testified that, pathological changes following a heat exhaustion, the nervous system is more sensitive to a heat stroke than the heart; that the liver, spleen and kidneys are equally as sensitive to a heat stroke as the heart; that they were not affected in this case, and that his blood pressure of 160 indicated a

heart condition of long standing, and it was his conclusion that the high blood pressure preceded the date of the alleged heat stroke. In addition, the films taken in electrocardiograph tests indicated coronary disease. Dr. Thompson further testified that the medical text then in court gave no case where the heart effects of a sunstroke had lasted longer than two weeks, while in the plaintiff's case the heart disease still continues, and he says that, after a careful examination of plaintiff, he found he had a chronic myocarditis, due to infection, a rheumatic type of heart disease; that he had an increase in the size of the heart, a high blood pressure, pyorrhea, and a possible coronary occlusion.

It has been held that, if the employment brings about no greater exposure to injurious results from natural causes, such as lightning, severe heat or cold, than those to which persons generally in that locality are equally exposed, then there is no causal connection between the employment and the injury. *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303; *Robson, Eckford & Co., Ltd., v. Blakey* (1912) Sess. Cas. 334, 5 B. W. C. C. 536.

It was held in *Lewis v. Industrial Commission*, 178 Wis. 449, where an employee died from a heat stroke, that the claim was not compensable, as the exposure of the deceased to sunstroke at the time and place of injury was not different from that of ordinary outdoor workmen.

And in *Dougherty's Case*, 238 Mass. 456, 16 A. L. R. 1036, where a teamster delivering coal suffered a sunstroke, from which he died, recovery was denied, the court saying that the hazard of sunstroke would not seem to have been different from that to which persons in general were exposed.

In *Campbell v. Clausen-Flanagan Brewery*, 183 App. Div. (N. Y.) 499, the driver of a brewery wagon, engaged in delivering beer on an excessively hot day, about 3 o'clock in the afternoon, alighted from the wagon, walked around, and a few moments later dropped dead, but his assistant, who had worked with him on the wagon during the day, did no more than perspire, and it was held

that the driver was not, by reason of his employment, subjected to a special and increased hazard, not common to the public generally, and that the heat prostration did not arise out of his employment.

In the case of *Roach v. Kelsey Wheel Co.*, 200 Mich. 299, an employee was engaged in removing the old and placing new brick work around a boiler, where the temperature was about 136 degrees, the boiler being still warm, and compensation was denied on the ground that it did not appear that he exercised in any unusual manner, different from other employees engaged in the same work.

If any one will examine the record in this case, there will be considerable doubt in his mind as to whether Uribe suffered a heat stroke at all upon July 31, 1931, for Thomas A. Blair, of the United States weather bureau, clearly shows that the temperature at Ashland on July 31 was 97 degrees, whereas that on the day before was 103, and upon the afternoon he started work, July 29, it was 109, and the natural conclusion, from reading the medical evidence, would be that he was then, and is now, suffering from a heart condition, which was brought about by an infection, and which causes his disability, and that, on the other hand, the conditions under which he was working on the river bank at the Platte river bridge, which was being constructed, were no different from those under which all of the other employees were working at the time, and that he was exposed to no different chance of injury from heat than any other outdoor worker at the same time and place, and that whatever occurred to Mr. Uribe on the morning in question was not an accident arising out of his employment, and that he is not entitled to compensation therefor.

This court finds that the deputy compensation commissioner, Cecil Matthews, was right in dismissing Uribe's petition for compensation, and that the judgment of the district court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

CITY OF MITCHELL, PETITIONER, V. WESTERN PUBLIC SERVICE COMPANY, OBJECTOR.

FILED JANUARY 12, 1933. No. 28639.

1. **Constitutional Law:** EMINENT DOMAIN. Chapter 188, Laws 1919 (Comp. St. 1929, secs. 19-701 to 19-707) does not violate section 14, art. III of the Constitution, for the act contains only the one subject and that subject is clearly expressed in its title.
2. ———: ———: BOARD OF APPRAISERS. The board of appraisers provided for by chapter 188, Laws 1919 (Comp. St. 1929, secs. 19-702, 19-703), though termed a "court of condemnation," does not constitute a court under the Constitution and laws of this state, although such board exercises functions judicial in their nature; and it was competent, under the Constitution, for the legislature to designate the district judges as a class from which appraisers should be chosen and to authorize this court to select the district judges to act as such appraisers.
3. ———: ———: RIGHT OF TRIAL BY JURY. When the Constitution was adopted, there existed no right of trial by jury in cases involving the exercise of the right of eminent domain; and so the act involved here is not violative of section 6, art. I of the Constitution, that "The right of trial by jury shall remain inviolate."
4. ———: ———: SPECIAL LAWS. The act is not a special act regulating the practice of courts of justice prohibited by the seventh interdiction of section 18, art. III of the Constitution.
5. ———: ———: DUE PROCESS OF LAW. The act, in authorizing the appraisers to apportion costs, and in requiring a cost bond and payment for a transcript as a condition of appeal, does not violate the equal protection and due process clauses of the federal Constitution.

Original application for appointment of a court of condemnation, and objections thereto. *Objections overruled.*

C. M. Palmer, Wright & Wright and *Fred A. Wright,* for petitioner.

Clarence A. Davis, Morrow & Morrow and *Mothersead & York,* for objector.

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

GOSS, C. J.

This arises upon the original application of the city of Mitchell for the appointment of three district judges as a "court of condemnation;" and upon the objections of the Western Public Service Company, owner of the electric light and power plant and property sought to be acquired by the city by exercise of the power of eminent domain.

The mayor and city council certified to this court that, at a special election, held on October 4, 1932, under article 7, ch. 19 (sections 19-701 to 19-707) Comp. St. 1929, more than the required 60 per cent. of the votes cast at the election by qualified electors were in favor of the question submitted to the electors. The certificate quotes the question submitted and states that 578 votes favored it and 93 votes were against it. No objection is made to the form or facts certified. All objections made by the company attack the constitutionality of the act upon which the proceedings are based and upon which appointment by this court would be predicated. Within 30 days after the receipt of the certificate this court, in order to comply strictly with the terms of section 19-702, Comp. St. 1929, and because the parties consumed the 30 days in preparing their briefs and making their oral arguments, appointed three district judges from three judicial districts, but withheld any order requiring such judges to attend at the county seat at a stated date to organize and proceed with its duties. Full consideration of the briefs and oral arguments of the parties will determine whether such further order will be made or whether the order of appointment will be set aside.

The company makes various objections to the constitutionality of the act and to the jurisdiction of the court. One of these is that the act contains more than one subject and that the title does not express the subject covered by the act, all in contravention of that portion

of section 14, art. III of the state Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

The act in question is a complete act in itself. It comprises article 7, ch. 19, Comp. St. 1929, consisting of sections 19-701 to 19-707. The title and text of the act, as passed by the legislature and first printed, are found in the 1919 Session Laws, ch. 188. The title reads: "An act relating to the exercise of the power of eminent domain by cities of the first or second class for acquiring public utility properties." The first three sections of the act extend the power of eminent domain over plants or systems of the nature involved here, provide for the appointment of three district judges as a "court of condemnation," and fix the procedure covering the ascertainment and finding of the value of such plant or system. Section 4 provides for appeal to the district court, and section 5 provides for appeal to the supreme court. Both of these latter named sections grant to the city authorities the power, for purposes of tender and payment of a final judgment as to value, to issue and sell bonds of the city "without vote of the people." The company presents this phase of its objections in the form of a question—"Is this act broad enough to include the authority to issue general revenue bonds of the city as is done by the act?" The company means, and argues, that the title is not broad enough to include the terms of the act itself providing for the issuance of bonds to pay for the property to be acquired by condemnation.

The Constitutions of about three-fourths of the states contain provisions somewhat similar to that under consideration here. Some are identical. Others have additional features. The cases under them show great variety. Many are cited by counsel. They indicate that each legislative act, including its title, must be considered by itself in determining whether it violates the constitutional provision.

"The main purpose of the constitutional provision * * * was to prevent surreptitious legislation, and not to put

the lawmakers in a straight-jacket." *State v. Johnson,* 116 Neb. 249. A title is not expected to specify minutely all the provisions of the act; the court will not be warranted in holding that an act of the legislature is void because a better title might have been adopted, if the general purpose of the act is expressed by the title, and the matter contained in the body of the act is germane thereto. *State v. Ure,* 91 Neb. 31, and citing Nebraska cases on pages 42, 43. Referring to the requirements of this constitutional provision, Cooley's Constitutional Limitations (8th ed.) 295, says: "It may therefore be assumed as settled that the purpose of these provisions was: First, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard, by petition or otherwise, if they shall so desire."

The words "relating to" in the title of the act suggest a reference to Webster's dictionary. There the intransitive verb "relate" is defined: "To stand in some relation; to have bearing or concern; to pertain; refer;—with *to.*"

The title to the act gave notice that the text of the bill related, pertained to, referred to and was concerned with the exercise of the power of eminent domain by the smaller cities of the state desiring to acquire public utility properties. All entitled to notice of the contents of the bill were presumed to know that such property could not be acquired by condemnation in the exercise of the power of eminent domain without paying for it. For the state Constitution says: "The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21. If any city within the prescribed class had the money on hand with which to pay for a public utility property, it is safe to assume

that its voters would know it before voting to acquire such a property. If it had not the funds, they would scarcely be heard to say that they did not know that bonds would have to be issued to carry out their decision at the polls to exercise the power of condemnation and to comply with the mandate of the Constitution that the element of payment must accompany the act of taking over the ultimate title to the property condemned. Moreover, while the bill for the act was pending in the legislature, what member thereof, or what citizen, could truly say that the title of the act did not give him as full notice of the power to issue bonds, if necessary to pay for the property to be condemned, as of any other power contained in the act? We are of the opinion that the act was confined to the one subject of the exercise of the power of eminent domain in acquiring public utility property; that the text of the act was germane to the title thereof; that it contained only one subject, and that the act is not violative of the constitutional provision heretofore discussed.

Section 1, art. II of the Nebraska Constitution creates the legislative, executive and judicial departments, and prohibits each from exercising any power belonging to another except as expressly directed or permitted. Section 1, art. V, vests the judicial power of the state in a supreme court, district courts, county courts, justices of the peace, "and such other courts inferior to the supreme court as may be created by law." Section 2, art. V, gives the supreme court jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law.

It has frequently been held by this court that the constitutional grant of original jurisdiction in judicial matters limits the original jurisdiction of this court to the matters enumerated in the Constitution. So the company further objects on the ground that the Constitution so limits the jurisdiction of this court that it cannot be vested by the legislature with any power, either execu-

tive, legislative, or judicial, and hence has no power to make the appointment. In this respect it is asserted that the statute authorizing the appointment undertakes to give this court administrative or executive duties forbidden by the Constitution. And it is claimed that the statute in question undertakes to create a court (meaning the "court of condemnation") in contravention of the Constitution.

In *State v. Neble,* 82 Neb. 267, there was involved the question of the right of district judges to appoint park commissioners for metropolitan cities in pursuance of a statute seeking to confer that duty upon them. This court, in an opinion by Judge Reese, found that the park commissioners performed no judicial function or duties, but that their duties are wholly executive and administrative. It was accordingly held that the part of the section providing for the appointment of the commissioners by district judges was unconstitutional and void.

A case, very similar to the instant one, involving the appointment by this court of three district judges as a "court of condemnation," was before this court in 1918. *In re Appraisement of Omaha Gas Plant,* 102 Neb. 782. It was there held that the ascertainment by appraisers of the amount of damages to be awarded to one whose property had been taken or damaged for public use, in the exercise of eminent domain, is a function judicial in its nature; that the board of appraisers provided for by the statute, though termed a "court of condemnation," does not constitute a court under the Constitution and laws of this state, although such board exercises functions judicial in their nature; that the appointment by this court, under the statute referred to, pertains to a judicial proceeding and is within the power of the legislature to provide for; and that it was competent for the legislature to select the district judges of the state as a class from which appraisers might be chosen, as men of judicial training and experience are no doubt well qualified for such duties. In the course of the argument, Judge Letton, who wrote the opinion, said:

"It is pointed out in *State v. Neble,* 82 Neb. 267: 'Many executive or administrative acts performed by judicial officers, and many judicial acts performed by ministerial officers, are and must be held valid. * * * The appointment of an officer might properly, we think, be classed as the exercise of an executive or administrative function, at least not judicial. Yet courts and judges frequently find it necessary to make such appointments in order that the judicial functions of the courts may be freely exercised. It often happens that the courts or judges are clothed with this appointing power where the appointee may not be required to discharge any duty which could be in any way ancillary to the exercise of the judicial functions of the court or judge making the appointment, and yet the validity of the appointment could not be successfully questioned, for the reason that the person appointed would exercise judicial functions in the discharge of the duties imposed under the appointment.' "

In discussing a very similar statute, and holding it to be valid, the supreme court of Iowa, in *Hutchins v. City of Des Moines,* 176 Ia. 189, said: "The proceedings are initiated by the resolution of the city council, and, upon the presentation of a certified copy thereof to the supreme court, that body is authorized to designate the district judges who are to constitute the court of condemnation, established for a single specified purpose. The tribunal is of legislative creation. The court merely designates who shall constitute it. In so doing, no one is appointed to office, but officers are assigned to the performance of certain duties. As members of the court of condemnation, they do not cease to be the judges of the district court. * * * In the case at bar, this court was not called upon to appoint any one to office, judicial or otherwise, but merely to assign three judges to the performance of certain judicial duties. As these were to be performed by judges of the nisi prius courts, it was particularly appropriate that their selection be left to the judges of this court, or rather, to the court, which is practically the same thing."

It was said in the opinion *In re Appraisement of Omaha Gas Plant,* 102 Neb. 782: "The benefit of the doubt in such cases must always be given to the legislature, and it is our duty to uphold the law, unless it is clearly void." Not only is that principle as strong here as it was there, but it is reinforced by the precedent there established with all its implications. In the circumstances we hold that the so-called "court of condemnation" does not constitute a court under the Constitution and laws of this state, that it was competent under the Constitution for the legislature to designate the district judges of the state as a class from which appraisers should be chosen, and that it was competent for the legislature to authorize this court to designate the district judges to act as such appraisers.

The company objects on the ground that the act violates that part of section 6, art. I of the Constitution, which says: "The right of trial by jury shall remain inviolate."

"This is a constitutional guaranty that the right of trial by jury shall remain as it did prior to the adoption of the Constitution of 1875. Without going into a history of this provision it is sufficient to say that at the time of the adoption of the present Constitution the right of trial by jury was guaranteed by the Constitution of the state to its citizens substantially as the right existed at common law." *Kuhl v. Pierce County,* 44 Neb. 584. See, also, *Sharmer v. McIntosh,* 43 Neb. 509; *Yager v. Exchange Nat. Bank of Hastings,* 52 Neb. 321; *Mayer v. State,* 52 Neb. 764; *Krumm v. Pillard,* 104 Neb. 335.

In its discussion of eminent domain, 20 C. J. 999, says: "In the absence of a special constitutional or statutory provision there is no right to trial by jury in condemnation proceedings. Due process of law does not require the damages in such proceedings to be assessed by a jury, but a jury trial is frequently provided for by special constitutional or statutory provisions." 10 R. C. L. 187, sec. 161, is to the same general effect. "What the tribunal shall be which is to assess the compensation must be

determined either by the Constitution or by the statute which provides for the appropriation." Cooley's Constitutional Limitations (8th ed.) 1207. Cases might be cited in great numbers in illustration of this rule. The act is not invalidated by its failure to provide a jury trial to assess damages.

It is further objected that the act is a special act "regulating the practice of courts of justice" prohibited by the seventh interdiction of section 18, art. III of the Constitution. The objector's specification indicates that this is based upon section 4 of the act, which provides that, upon appeal to the district court, the appeal shall be tried and determined upon the pleadings, proceedings and evidence embraced in the "transcript of the proceedings before such condemnation court including the evidence taken before it certified by the clerk, reporter and judges of such court." Laws 1919, ch. 188, sec. 4. It is asserted that this statute and the statute considered in the *Omaha Gas Plant* case are the only two instances in eminent domain statutes where the interested parties are not entitled to present and examine their witnesses in court on the appeal from the appraisal. Assuming this to be true, nevertheless it answers the constitutional objection if the legislature has made a reasonable classification and if the statute operates generally and uniformly upon all objects and persons of a class so constituted. *Livingston Loan & Building Ass'n v. Drummond,* 49 Neb. 200, and cases cited; *Cleland v. Anderson,* 66 Neb. 252, and cases cited; *Dougherty v. Kubat,* 67 Neb. 269. Classification of cities according to population has long been recognized in this and other states. The law under consideration operates uniformly upon all of the cities coming under it. As others may enter the classes they will be subject to it. Owners of public utility properties in such cities are generally and uniformly subject to it. The type of appraisers selected, the more than ordinary complication in condemnation matters, the practice of taking the evidence of experts as to value before such a board, more capable of passing upon evidence than ordinary appraisers,—

these considerations unite in suggesting that the legislature made a valid classification in the first instance. They provided a forum where the evidence of value could be adduced by both parties and preserved. The procedure on appeal, where the district court hears the case upon the evidence produced before the appraisers and duly certified for the purposes of appeal, is a proper method prescribed for the judicial determination of the value of property being condemned in this class of cases. We are of the opinion the act does not conflict with the Constitution as to being a special act regulating the practice of courts of justice.

It is further objected that the statute authorizing the apportioning of the costs between the owner of the plant and the city, and requiring of the owner a cost bond and payment for his transcript as a condition of exercising the right of appeal, violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

It will be noted that the statute (Comp. St. 1929, sec. 19-706) merely gives the court of condemnation "power to apportion the cost made before it." It is fundamental that the owner is entitled to just compensation for his property condemned in the exercise of the power of eminent domain, and ordinarily that may not be so diminished by the assessment of costs as to deprive him of the fund to which he is constitutionally entitled. It is conceivable, however, that the owner might, on the appraisement hearing, so conduct himself as to warrant the taxing or apportionment of certain costs against him. However, on appeal or review, these costs would be subject to retaxation. If the appraisement tribunal unlawfully assessed a part of the costs against the owner, the district court would, under the same statute, assess all of the costs against the city. We are of the opinion that this secures equal protection and does not violate the federal Constitution as to due process.

As to objection to the requirement of cost bond and transcript as a condition of appeal, this is novel. We

find nothing like it in our cases or statutes. In other condemnation matters these things seem to be required and have been complied with and no question raised. The general rule regulating appeals in eminent domain matters seems to be that, in the absence of a constitutional provision, the legislature may impose upon the exercise of the right of appeal such reasonable conditions as it sees fit. The owner will probably not find difficulty in providing a cost bond. If successful, the costs of the transcript will be subject to his request for favorable taxation. We are of the opinion that the requirements are fair and not unduly restrictive. They are not violative of the provision of the federal Constitution.

The district judges heretofore appointed will be furnished with a proper order as to the time to attend, organize and proceed with their duties in the premises.

OBJECTIONS OVERRULED.

ROSE, J., dissenting.

I am firm in the conviction that the legislature was without power to direct the supreme court to appoint a court of condemnation to ascertain the value of the privately owned electric light and power plant at the city of Mitchell for the purpose of municipal proceedings to acquire ownership thereof by condemnation. The supreme court had no authority to make the appointment. Both the act of the legislature and the judicial order of appointment were void as violations of the Constitution, which provides:

"The supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." Const. art. V, sec. 2.

The jurisdictional powers thus enumerated excluded all others. The necessity for those limitations on power has been demonstrated by legislative usurpations. The jurisdiction of the supreme court is appellate and original. The appellate jurisdiction may be enlarged by statute, but the original jurisdiction is limited by the Constitution

to "cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus." What the legislature attempted to require the supreme court to do was not to exercise appellate power. There was no appeal herein from any inferior court or other tribunal. This proceeding was an original one in the supreme court and was docketed by the clerk thereof. Adverse litigants appeared by counsel at the bar and presented diverse views of the law in an original proceeding outside of those enumerated in the Constitution. It was not a case relating to the revenue, to a civil case in which the state is a party, mandamus, quo warranto, or habeas corpus. The legislative act did not authorize the appointment of an officer of the supreme court. By virtue of a certificate showing that the city of Mitchell voted to acquire the privately owned electric light and power plant there, the legislature attempted to give directions as follows: "The supreme court shall within thirty days after the receipt of such certificate, appoint three district judges from three of the judicial districts of the state, and said three judges shall constitute a court of condemnation for the ascertainment, and finding of the value of any such plant, works, or system, and the said supreme court shall enter an order requiring such judges to attend as a court of condemnation at the county seat in which such city is located." Comp. St. 1929, sec. 19-702.

This is a specific command to the supreme court, as such, to make a judicial appointment and to enter a judicial order,—both outside of either appellate or original jurisdiction.

It has often been held that the enumeration of jurisdictional powers in the section of the Constitution, hereinbefore quoted, excludes all powers not so enumerated. In a unanimous opinion, never since changed, the rule of general application was stated as follows:

"It is not within the power of the legislature to confer upon this court original jurisdiction over subjects not enumerated in the Constitution." *State v. Hall,* 47 Neb.

579. See, also, to the same effect *Miller v. Wheeler,* 33 Neb. 765; *Bell v. Templin,* 26 Neb. 249; *Edney v. Baum,* 70 Neb. 159; *Larson v. Wegner,* 120 Neb. 449.

It follows, as already stated, that power to appoint a court of condemnation is not within the appellate jurisdiction of the supreme court and is not within its original jurisdiction, because the proceeding herein is not an appeal, or a case relating to the revenue, a civil case in which the state is a party, mandamus, quo warranto, or habeas corpus.

Neither expediency nor convenience justifies a legislative act or a judicial order beyond the boundary of power fixed by the Constitution. Without the makeshifts of supreme court commissions and the calling of district judges, the supreme court has been unable to perform all the duties arising within its appellate and original jurisdictions.

Litigants invoking rights protected by the Constitution should not be required to stand aside, while others beyond the boundary of judicial power engage the attention and time of the supreme court. The legislature should not be permitted to thus disturb the proper course of judicial proceedings, and the supreme court should not acquiesce in the usurpation, however laudable the legislative aim or the judicial purpose may be.

CITY OF SCOTTSBLUFF, APPELLEE, V. SOUTHERN SURETY COMPANY, APPELLANT.

FILED JANUARY 12, 1933. No. 28314.

1. **Municipal Corporations: OFFICIAL BONDS: MISAPPROPRIATION OF MONEYS: LIABILITY OF SURETIES.** Where the official bond of a city clerk provides that he "shall faithfully perform such duties as may be imposed on him by law," he breaches that obligation if he issues to himself in addition to his lawful salary a city warrant for extra compensation inhibited by statute, and his surety, in that event, is liable for resulting damages within the penalty of the bond, whether the warrant is issued by virtue of office or under color of office.

2. ———: CITY COUNCIL: UNAUTHORIZED ACTS: ESTOPPEL. Void action by a city council in allowing the city clerk unlawful compensation and in ordering a city warrant to pay it, if positively inhibited by statute, does not have the effect of an appealable judgment, but is open to collateral attack and does not estop the city to seek redress for resulting damages by means of a suit on the official bond of the city clerk.
3. ———: OFFICIAL BONDS: BREACH: INTEREST. In a suit on an official bond, the surety is liable for interest from the date of the breach on the amount then recoverable.
4. ———: ———: JUDGMENT: ATTORNEY'S FEES. Where judgment is properly rendered against a surety company on an official bond, a reasonable attorney fee may be taxed as costs in favor of obligee. Comp. St. 1929, sec. 44-346.
5. ———: ———: ———: ———. In determining the amount of an attorney fee to be taxed as costs, the calling of witnesses may not be necessary, where the record of the trial acquaints the court with the material facts.
6. ———: POWERS: EMPLOYMENT OF SPECIAL COUNSEL. "A city having a regular salaried attorney is not for that reason prevented from employing special counsel in particular instances when the city attorney is absent or ill or disqualified." *Meeske v. Baumann*, 122 Neb. 786.
7. Officers: PERFORMANCE OF DUTY: PRESUMPTION. In absence of evidence to the contrary, it may be presumed that public officers faithfully performed official duties.
8. Appeal: COSTS: REVIEW. For the purpose of review in the appellate court, it is incumbent on a litigant aggrieved by the taxation of costs to present a record showing error in that particular.

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

Morrow & Morrow, for appellant.

Clarke & Patterson, contra.

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

ROSE, J.

This is an action by the city of Scottsbluff, plaintiff, against the Southern Surety Company, defendant, surety on the bond of Charles C. Cross as city clerk during the

official term of two years beginning April 14, 1925. In the penal sum of $1,000 the bond contains the condition that the city clerk "shall faithfully perform such duties as may be imposed on him by law and shall honestly account for all money that may come into his hands in his official capacity during the said term." The salary of the clerk had been previously fixed at $900 a year or $75 a month. In addition thereto the clerk drew from the city treasury as "disbursing officer" $50 a month from July 1, 1926, until April 1, 1927, a period of nine months, or a total of $450. To recover back this latter sum as unauthorized compensation drawn from the city treasury in violation of law, with interest on each monthly payment of $50 from the date thereof, the city sued the surety on the clerk's official bond.

Defendant, the surety, admitted in its answer that Cross as clerk and disbursing officer drew from the city treasury $125 a month for the nine months beginning July 1, 1926, and interposed the defenses that the mayor and council by motion, second and vote, April 21, 1925, constituted the clerk a "disbursing officer" with duties different from those imposed by law upon the clerk and allowed Cross an additional salary of $50 a month for performance of the new duties imposed; that he performed the duties of the new office and drew the authorized salary of $50 a month therefor; that he presented to the mayor and council in one voucher a monthly claim of $75 for the salary of the clerk and of $50 for the salary of the disbursing officer; that for nine months the council allowed each monthly claim and ordered a warrant on the city treasurer for payment thereof; that Cross drew each of the nine monthly warrants for $125 in favor of himself and presented one of them to the city treasurer on the first day of the month or a little later; that the creating of the new office, the fixing of the salary therefor, the performing of the duties thereof, the allowing of the claims for compensation and the ordering of the warrants therefor estopped the city from asserting that Cross did not faithfully perform his duties as clerk

or that he was not entitled to the $50 a month received by him as disbursing officer or that the city was damaged by a breach of the clerk's bond.

In a reply to the answer, plaintiff admitted that, at a meeting of the city council April 21, 1925, it was moved, seconded and carried that the city clerk be constituted a disbursing officer at a salary of $50 a month. Other allegations of the answer were denied.

From judgment on a directed verdict in favor of plaintiff for $605.88, including interest from the date of each 50-dollar payment, defendant appealed.

It is first argued that the surety is not liable for the additional compensation of Cross as disbursing officer for the reason that he did not receive it by virtue of his office of clerk but under color of office. In support of this proposition the surety cited *State v. Moore,* 56 Neb. 82, *State v. Porter,* 69 Neb. 203, and other similar cases in which a distinction was drawn between "color of office" and "virtue of office," in testing the liability of sureties on official bonds. The effect of these decisions was to release sureties from liability for conduct in which public officials without authority of law, but under color of office, illegally enriched themselves at public expense. The distinction noted complicated the law applicable to sureties. The history of litigation on this subject shows that the rule adopted in the cases cited limited or partially destroyed the protection of official bonds and resulted in public losses. The weight of authority seems to be contrary to the cases cited, but a different rule and another line of cases control the case at bar. However, since contracts by principal and surety have been executed pursuant to law as construed in the *Moore* case and in other Nebraska cases, the situation perhaps calls for legislation requiring sureties on official bonds to assume liability for wrongful acts committed under color of office, if resulting in public loss, rather than for the overruling of former holdings of the supreme court.

In the *Moore* case the report shows that the state auditor used his official position to get possession of fees

payable to the state treasurer which he was not authorized to collect or retain and which never reached the public treasury. In the case at bar public money already in the city treasury was taken therefrom for excessive and forbidden compensation by means of warrants executed by the city clerk in favor of himself, the issuance of proper warrants being a function of his office.

In *Kane v. Union Pacific Railroad,* 5 Neb. 105, the official bond of a county treasurer, who had exacted excessive fees, contained a provision that "he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties, now or hereafter, required of his office by law." In an action on the bond the surety was held liable. The case was subsequently overruled on the question of jurisdiction, but on the point now in issue the court in the opinion said:

"The rule seems to be well settled, and is certainly sound in principle, that the exaction of illegal fees under color of office is a breach of such condition as that contained in the bond offered in evidence in this case. *People v. Schuyler,* 4 N. Y. 173; *Charles v. Haskins,* 11 Ia. 329; *Harris v. Hanson,* 11 Me. 241; *Ohio v. Jennings,* 4 Ohio St. 418; *Skinner v. Phillips,* 4 Mass. 69; *State v. Shacklett,* 37 Mo. 280."

This doctrine was approved and followed by a unanimous court in *Fox v. Meacham,* 6 Neb. 530; *Turner, Frazer & Co. v. Killian,* 12 Neb. 580; *Gordon v. Hennings,* 89 Neb. 252. It was also distinguished without criticism in *Eccles v. Walker,* 75 Neb. 722.

Under the charter of Scottsbluff, the salary of the city clerk, as shown by the evidence, was fixed by an unchallenged ordinance at $900 a year or $75 a month. Comp. St. 1929, sec. 16-306. This salary was the limit of the clerk's compensation for official services of all kinds. Comp. St. 1929, sec. 16-502. The city clerk was an elective officer who could not be appointed to any other city office created by the city council. Comp. St. 1929, sec. 16-302. It is shown by the statutes and the record that the city council was without power to constitute the city

clerk "disbursing officer" with an additional salary of $50 a month. Nevertheless, for each of nine months, the city clerk procured from the city treasury excessive compensation of $50 a month in the following manner: In a single monthly voucher he presented a claim for salary of city clerk, $75; and for salary of disbursing officer, $50; total, $125; or salary of city clerk and disbursing office, $125. On each of the vouchers he drew a single city warrant on the city treasurer for $125 and joined the mayor in executing it. It was his official duty to execute a monthly warrant in favor of himself for $75. The warrants were all presented and paid in full. The execution of the warrant for the authorized salary of $75 a month and for the inhibited compensation of $50 a month was a single act.

The action herein is not based on the condition of the bond that the city clerk "shall honestly account for all money that may come into his hands in his official capacity." It is founded on the obligation of suretyship that the city clerk "shall faithfully perform such duties as may be imposed on him by law." The law imposed on him the duty of drawing and executing monthly salary warrants in favor of himself for $75 and no more for that purpose. The city charter required him to perform all the duties of his office for the lawful compensation—$75 a month, and prohibited him from using his office to issue warrants for an additional salary. The city council was without power to constitute him disbursing officer at an additional salary. That action and everything under it were void, because inhibited by positive law. The void acts of the council created no rights and afforded no protection. Whether the excessive warrants were issued by virtue of office or under color of office, Cross breached his contract to "faithfully perform such duties as may be imposed on him by law," a specific obligation of suretyship by which defendant bound itself. The trial court conformed to these views of the law and the facts and in doing so did not err.

It is nevertheless urged by the surety as a defense that

the claims of the city clerk for additional compensation were allowed by the city council and that the allowances had the force of appealable judgments not open to collateral attack and from which there was no appeal. In this connection it is further insisted that the city clerk had no alternative except to obey the orders of the city council to issue the warrants. The argument on these issues is fallacious. For reasons already stated, the attempt of the city council to "constitute" the city clerk "disbursing officer" with an additional salary, the approval of claims therefor and the order to issue warrants accordingly were all prohibited by the city charter and were void in every particular. As void acts inhibited by statute, they were open to collateral attack. As direct violations of the city charter, they were not the acts of the city, but individual trespasses beyond official power and municipal legislation. The city was at liberty to rely on its charter, to denounce those acts as invalid, and to resort to the official bond of the city clerk for redress to the extent of the damages. Estoppel and all other defenses pleaded are without support in law or evidence. It follows that the peremptory instruction in favor of plaintiff is free from error.

The judgment is assailed as excessive on the ground that it contains interest on each payment of $50 from its date, instead of the date on which the action was brought, in absence of previous notice of a breach of the bond. In an opinion by Judge Letton the rule in Nebraska was stated as follows:

"It is alleged as error that the court allowed interest upon the penalty of the bond from the date of the breach. There is a conflict in the decisions on this point, but the question has been settled in this state in *Mullen v. Morris,* 43 Neb. 596, 611, and *Thomssen v. Hall County,* 63 Neb. 777, where it is shown that the weight of authority is in accordance with the holding of the trial court." *O'Shea v. North American Hotel Co.,* 109 Neb. 317.

The district court allowed an attorney fee of $150 as costs in favor of the city and this is challenged as er-

roneous on the ground that it was the duty of the salaried city attorney to prosecute all actions on behalf of the city without the municipal expense of other counsel. The trial court, in view of plaintiff's recovery of judgment, had statutory authority to allow a proper attorney fee as costs. Comp. St. 1929, sec. 44-346. The calling of witnesses to prove the value of legal services performed was not necessary to the taxing of an attorney fee, the trial court being familiar with the facts. The rule on appeal is the same. *Allen v. Tallon,* 120 Neb. 611. The record shows that two attorneys appeared for the city from the time the reply to the answer was filed until the bill of exceptions was prepared. In a recent opinion it was held:

"A city having a regular salaried attorney is not for that reason prevented from employing special counsel in particular instances when the city attorney is absent or ill or disqualified." *Meeske v. Baumann,* 122 Neb. 786.

The city charter provided for one salaried attorney only. It was properly assumed, in absence of evidence to the contrary, that the city authorities performed their duty in employing an additional attorney. *Meeske v. Baumann,* 122 Neb. 786. For the purpose of review in the appellate court, it was incumbent on the surety, if aggrieved by the taxation of costs, to present on appeal a record affirmatively showing error in that particular. Error is not so shown. An attorney fee of $75 will be taxed to defendant as costs in the supreme court for the services of additional counsel therein.

AFFIRMED.

RILEY SMYTHE, ALSO KNOWN AS RILEY SMITH, V. STATE OF NEBRASKA.

FILED JANUARY 12, 1933. No. 28421.

1. Criminal Law: RIGHT TO COUNSEL: WAIVER. In a criminal prosecution, defendant's right to counsel may be waived.
2. ———: ———: ———. The trial in a criminal prosecution may proceed without counsel for a mentally competent

defendant who failed to employ an attorney and rejected the offer of the court to provide one for him.

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

N. H. Mapes, 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.

ROSE, J.

In a prosecution by the state in the district court for Dodge county, Riley Smythe, also known as Riley Smith, defendant, was convicted of assault with intent to rob, and for that felony was sentenced to serve a term of ten years in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

The only assignment of error calling for attention in an opinion challenges the trial of defendant as erroneous in absence of counsel. The right to a defense in a prosecution for a felony includes the right of accused to be represented by an attorney, but defendant refused offers therefor and conducted his own defense without counsel from the beginning of the trial until the jury rendered a verdict of guilty. The right to have an attorney was granted by statute and it was the duty of the trial court to appoint one for defendant at public expense, if he was unable to procure one of his own choosing. Comp. St. 1929, sec. 29-1803, as amended by Laws 1931, ch. 65, sec. 6. The right to a trial is a fundamental one, but accused may waive it and plead guilty. He may likewise waive the right to counsel, if competent to do so. At the arraignment defendant rejected an offer of the trial court to provide counsel and the offer was repeated and rejected at the beginning of the trial. The record does not show that defendant, before and at the trial, was unable to select and procure the services of an attorney. It is well-settled law that the trial may proceed in ab-

sence of counsel for a mentally competent defendant who declined the court's offer therefor. It was not a peremptory duty of the court to force counsel upon him against his will. 16 C. J. 823. The evidence shows he was competent to refuse the aid of counsel when offered. The law does not permit accused to prevent the appointment of counsel for him, conduct his own defense to a verdict of guilty and procure a second trial on the ground that the court did not force counsel upon him. *Powell v. State of Alabama,* 287 U. S. 45, was cited but is not in point. The record fails to show that defendant did not have time to prepare for trial after available counsel had been refused. He exercised the right of cross-examination, challenged his identification as the guilty person, relied on the failure of the state to prove his guilt and was an advocate in his own behalf. The evidence is sufficient to sustain the conviction. A miscarriage of justice is not shown. Reversible error has not been found.

AFFIRMED.

ETHEL RUBINSON ET AL., APPELLEES, V. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED JANUARY 12, 1933. No. 28338.

1. Insurance: ACTS OF AGENT: RATIFICATION. The knowledge and information acquired by an insurance agent at the time an application for accident insurance was written was imputed to the company and, where the company accepted and retained the benefits obtained by its agent, such acceptance amounts to a ratification by the company of the act of its agent.
2. ———: POLICY: REFORMATION. A policy of insurance providing for the payment of $10,000 upon the death of the insured by external, violent and accidental means may be reformed to include death as the result of injuries received in an automobile accident, where the evidence is sufficient to show that the agent and the insured mutually understood the express coverage and protection desired by the insured, but which was lacking in the policy issued, and such fact was not discovered until after the death of the insured.

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

Brome, Thomas & McGuire and *Tinley, Mitchell, Ross & Mitchell,* for appellant.

Harry Silverman and *Raymond N. Klass, contra.*

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

DEAN, J.

On or about November 14, 1929, a policy of accident insurance was issued to Harry Rubinson by the North American Accident Insurance Company of Chicago. The insured died, on or about June 15, 1930, as the result of bodily injuries received in an automobile accident. His widow, Ethel Rubinson, as beneficiary under the policy, and O. L. Walker, to whom she assigned one-twentieth of the proceeds of the policy in suit, are the plaintiffs herein. They began this action in the district court for Douglas county against the defendant insurance company to obtain a reformation of the policy and, as so reformed, to provide that the payment of $10,000 for death by external, violent and accidental means generally shall include death as the result of injuries received in an automobile accident. Upon submission, the court found and decreed that the plaintiffs are entitled to a reformation of the policy to conform to the agreement of the parties, and judgment was thereupon entered for them and against the company in the sum of $10,000, with interest, and it was also ordered that the company pay plaintiffs' counsel $1,000 as attorney's fees. The defendant company has appealed.

On the application for the policy in suit provision is made that the following benefits will be paid by the company in the event of accident, namely: For loss of life, $10,000; for loss of both hands, $10,000; for loss of both feet, $10,000; for loss of one hand and one foot, $10,000; for loss of one hand, $2,500; for loss of one foot, $2,500; and for the loss of one eye, $1,500. But from a provision

in the policy relating to the $10,000 benefits, above described, it appears that the loss of life or injuries must have been incurred while the insured was riding in a public conveyance, presumably as a fare-paying passenger. In another part of the policy, however, provision is made for the payment of $100 to the beneficiary named therein for the loss of the life of the insured if caused by any accident "not otherwise covered by this policy." In pursuance of this last provision, a draft for $100 was sent by the company to the beneficiary herein as full satisfaction of the amount due under the policy, but this draft has never been presented for payment.

The record discloses that the insured was not versed in the use of the English language. His son, who was present when the solicitation of insurance was made, testified that the agent pointed out that the policy provided for a $10,000 death benefit payable upon the accidental death of the insured. It appears that the insured especially desired protection against loss of life or injuries from automobile accident and that the agent was so informed at the time. And when the policy was delivered, the agent again stated to the insured and his son that the policy was just as had been represented by him.

The company's agent testified that he referred the applicant to the provisions of the application and to the statements contained therein, and also to the policy. But it appears that a copy of the policy was not shown to the insured at the time he signed the application therefor. The agent testified that he informed the insured that the policy in suit was a general accident policy providing for the payment of a $10,000 death benefit and that it was in all respects as represented and would afford the same protection described on the back of the application. It also appears that the agent understood that the applicant desired insurance protecting him against injuries or loss of life in an automobile accident.

Upon receipt of the $100 draft by the plaintiff, one of her sons wrote to the company making inquiry as to why the draft was not in the amount of $10,000, which

was the sum the insured understood would be paid to his beneficiary in the event of his accidental death. At a later period, this witness wrote to the company for information in respect of the handling of an agency and, in response thereto, the company wrote: "Our 'Improved Premier' policy pays $10,000 principal sum for accidental loss of life, limbs or eyesight, and a benefit of $25 a week for loss of time from accidental injury or sickness, for a premium of only $10 a week, as shown on the inclosed circular."

Certain advertisements of the company contain the statement: "Which will your family want? In case of your accidental death, which would you rather give to your family—$10,000 cash—or sympathy?" Other advertisements clearly point out that the policy provides for the payment of $10,000 for accidental death and nowhere in such advertisements is it stated that, in order to recover the benefits described therein, the insured must have been riding in a public conveyance.

The policy in question was the first that had been written for the defendant company by the agent, but it is not shown that he was inexperienced, nor does it appear that he was not clothed with ample authority to represent the company. The agent had implied authority to take the application and to act for the company and, until the acceptance or rejection thereof by the company, the insured had the right to rely upon the authority of the agent in the premises. There appears to be no question but that the agent understood that it was protection against loss by automobile accident that was desired by the insured and that the insured understood he was obtaining full coverage of $10,000 for loss of life. "The application for insurance is usually given great weight in determining the intention of the parties in a suit for reformation." *Peterson v. Commonwealth Casualty Co.*, 212 Mo. App. 434. The knowledge and information acquired by the agent at the time the application was written was imputed to the company and, where the company accepted and retained the benefits obtained by

its agent, such acceptance amounts to a ratification by the company of the act of its agent, the presumption being that the agent communicated to the company the specific insurance desired by the insured. See *Sardo v. Fidelity & Deposit Co.*, 98 N. J. Eq. 22; *Norem v. Iowa Implement Mutual Ins. Ass'n*, 196 Ia. 983; *Nertney v. National Fire Ins. Co.*, 199 Ia. 1358.

The application and policy in suit were delivered to the insured in Iowa by the agent located there, and the residence of the insured at that time was in that state and it was in Iowa that his death occurred. It is contended that the contract of insurance is therefore an Iowa contract and that the substantive law of that state controls, although the procedure is determined by the law of Nebraska, the place of trial. The term "reformation" has been defined as follows: "Reformation is that remedy in equity by means of which a written instrument is made or construed so as to express or conform to the real intention of the parties when some error or mistake has been committed." 53 C. J. 906. And in 32 C. J. 977, it has been stated that the law of the forum, or the law of the place where suit is begun, governs matters relating to the remedies on the contract, regardless of where the contract was made or is to be performed. In this jurisdiction we have held:

"It is a general rule that, if, by inadvertence, accident, or mutual mistake, the terms of the contract are not fully set forth in the policy of insurance, it may be reformed so as to express the real agreement of the parties." *Robinson v. Union Automobile Ins. Co.*, 112 Neb. 32. See *Davis v. Highway Motor Underwriters*, 120 Neb. 734; *Pacific Mutual Life Ins. Co. v. Frank*, 44 Neb. 320.

In *Hartog v. Home Mutual Ins. Ass'n*, 196 N. W. 944 (197 Ia. 143) the court there held: "A mistake in an insurance policy, due to negligence of the insurance agent, acting within the scope of his employment, is satisfactory ground for reformation, since insured ordinarily relies upon the agent to properly set out the facts in the application."

We conclude that a policy of insurance providing for the payment of $10,000 upon the death of the insured by external, violent and accidental means may be reformed to include death as the result of injuries received in an automobile accident, where the evidence, as in the present case, is sufficient to show that the agent and the insured mutually understood the express coverage and protection desired by the applicant, but which was lacking in the policy and was not discovered until after the death of the insured. The court did not err in directing a reformation of the policy to conform to the agreement of the parties. Nor did the court, in view of the law applicable thereto, err in the allowance of attorneys' fees. The allowance for attorneys' fees in the district court having been ample, no further allowance will be made for services of counsel in the supreme court.

AFFIRMED.

FRED L. MARYOTT V. STATE OF NEBRASKA.

FILED JANUARY 12, 1933. No. 28340.

1. **Contempt.** There are two classes of constructive contempts—criminal and civil.
2. ———: CRIMINAL CONTEMPT. Contempt proceedings to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts.
3. ———: CIVIL CONTEMPT. Contempt proceedings, instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce such rights, or to administer the remedies to which the court has decreed the parties entitled, are, ordinarily, termed civil contempts.
4. ———: PROCEDURE. The rules of procedure in proceedings for criminal contempt are inapplicable to proceedings for civil contempt.
5. ———: CIVIL CONTEMPT: PROCEDURE. A civil contempt may be charged by affidavit of the party to a suit who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state.

6. ———: ———: ———. Proceedings for contempt to enforce a civil remedy and to protect the private rights of parties litigant may be instituted by the aggrieved parties and need not be in the name of the state.

7. ———: ———: REFUSAL TO PAY ALIMONY. Where, in a divorce action, a husband has been ordered to pay alimony for the support of his wife and children, and, being of sufficient ability to pay the same, wilfully and contumaciously refuses to pay, having no just or reasonable grounds for his failure or refusal, such conduct constitutes a civil contempt.

8. ———: ———: ———. A husband should not be committed to jail for a refusal to pay alimony unless his refusal is wilful and contumacious. If the husband has no means, or ability to procure means, wherewith to pay the alimony, and has just and reasonable cause for his failure so to do, he may purge himself of contempt by so showing, and in such case would be entitled to his discharge.

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

Courtright, Sidner, Lee & Gunderson and *Abbott, Dunlap & Corbett,* for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter called defendant, brings to this court for review the record of his conviction for contempt of court.

The record discloses that in a divorce action, instituted by defendant's wife, a decree was entered awarding her a divorce, the custody of their three minor children, all the household furniture, fixtures and furnishings, then in their home, occupied by her, and ordering defendant to pay her for the support of herself and children the sum of $65 a month. This decree was entered the 8th day of January, 1931, and required the first monthly payment of alimony to be made the 19th of January, 1931.

Defendant's occupation was that of an insurance salesman or solicitor. He failed to make any of the monthly payments and was cited for contempt. On a hearing he was adjudged guilty. Thereafter, he assigned to his wife all of the commissions that would be coming due him from his insurance employer, on account of renewals or payment of subsequent premiums, and the contempt order was canceled. Again he became in default, and the wife filed what is termed a motion, reciting the facts of the recovery of the decree, his failure to make the monthly payments, and charging that such failure was wilful and contumacious. This motion was duly verified. Thereupon, an order to show cause why he should not be adjudged guilty of contempt was served upon defendant. To this order he filed a showing in which he set forth his utter inability to pay anything upon the decree; that he was without property and without substantial income. On his application, the court appointed an attorney to represent him in the contempt proceeding because of his financial inability to procure counsel. After hearing the evidence, the court adjudged defendant guilty of contempt for wilful and contumacious neglect and refusal to pay the alimony, pursuant to the previous order of the court, and ordered defendant to be confined in the county jail for a period of 60 days.

Defendant alleges that the court erred in requiring him to be prosecuted in a proceeding in the divorce action, and contends that the prosecution should have been instituted by an information in the name of the state, and cites numerous cases of this court in which it has held that proceedings for contempt are, in their nature, criminal, to be governed by the strict rules applicable to prosecutions by indictment. See *Hydock v. State,* 59 Neb. 296; *Bee Publishing Co. v. State,* 107 Neb. 74; *Beckett v. State,* 49 Neb. 210; *Hawes v. State,* 46 Neb. 149; *Herdman v. State,* 54 Neb. 626.

From a careful reading of these and many other cases, involving the question of contempt, it is apparent that much confusion and lack of harmony exist, not only in

the decisions of this court, but of other courts. Much of this confusion is due to the failure to observe the distinctions in the several classes of contempt. Generally speaking, contempts are either direct, those committed in the presence of the court while in session, or constructive, consisting of those not committed in the presence of the court. Properly speaking, constructive contempts should be divided into two classes—criminal and civil. Those contempts which are prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts, while those instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled are, ordinarily, civil contempts. The rule announced above, while applicable to criminal contempts, is inapplicable to civil contempts. In criminal contempts the prosecution should be in the name of the state and by information.

Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a mere civil contempt, and the rules applicable to a criminal contempt are not applicable. Where a civil contempt is charged, it may be by an affidavit by the party to the action who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state. It may be observed that the line of demarcation between the acts constituting civil and criminal contempts is very indistinct. Some courts hold that they are to be regarded as criminal when the purpose is primarily for punishment, and civil when the purpose is primarily compensatory. Much of the confusion in the cases is due to the fact that there are contempts in which both elements, criminal and civil, appear, so that a contempt proceeding may be of a dual nature.

It is a general rule that proceedings for contempt to enforce a civil remedy and to protect the private rights of parties litigant should be instituted by the aggrieved parties and need not be by the prosecuting attorney or in the name of the state. An excellent discussion of the classification of contempts and the rules applicable to the procedure in the several classes may be found in 13 C. J. 56 *et seq.* Such is the situation that we have before us in this case. The proceeding is to enforce the private rights of defendant's wife, and it was proper to commence that proceeding in the original divorce action, for the purpose of enforcing an order made in that action.

In *Cain v. Miller,* 109 Neb. 441, it was held that an order for the payment of temporary alimony for the support of a wife was designed to secure the performance of a legal duty, in which the public has an interest, and it was there held: "It is the duty of a husband to support his wife. When, in an action for divorce, a husband has been ordered by the court to pay temporary alimony for the support of his wife during the pendency of the suit, and the husband, being of sufficient ability to pay the same, wilfully and contumaciously refuses to pay, having no just or reasonable ground for his failure or refusal, such refusal constitutes contempt of court, and such order may be enforced by imprisonment until the amount ordered is paid." The rule is applicable to the payment of permanent, as well as temporary, alimony.

The court did not err in the manner in which the proceeding was instituted and conducted. Defendant was apprised of the charge against him by an order to show cause, came into court, and defended.

It is further contended that the evidence is insufficient to support the finding and the order entered. The evidence shows that defendant is wholly without any property except a Ford automobile. The model, age, condition or value of the automobile is not disclosed. The record does not disclose how the automobile was obtained, but on oral argument it was stated by counsel that it was given to defendant to assist him in carrying on his occu-

pation as an insurance salesman. If this automobile possesses sufficient value to be taken into account, it could be reached by an execution, without resort to the harsh means of a contempt proceeding. For a period of four and a half months previous to the time of the contempt hearing defendant had received for his earnings the sum of $132.81. True, he had written some insurance for which he had not received his commissions, and which, when the time arrived, he might receive, amounting to approximately $75. The amount that defendant has received during the four and one-half months was insufficient to pay for the upkeep of his automobile and to pay his board and lodging. He was compelled to and did borrow or have advanced to him from his employer the sum of $85, with which to pay those items. The evidence shows a total inability of the defendant to comply with the order of the court with respect to the payment of alimony.

In *Cain v. Miller, supra,* this court held: "Imprisonment is a serious and drastic remedy. No one should be committed to jail for refusal to pay temporary alimony unless it is clear that the refusal is wilful and contumacious. If the defaulting husband has in good faith no means or ability to procure means wherewith to pay the alimony, does not wilfully refuse to obey the order of the court, and has just or reasonable cause for his failure to do so, he may purge himself of the contempt by so showing, and in such case would be entitled to his discharge."

Some authorities hold, and perhaps it is the general rule, that a *prima facie* case for civil contempt has been made when the proof shows that defendant has failed and neglected to pay the alimony for support of his wife and children, due upon an order made by the court. However, when the evidence is adduced and shows that he is financially unable to comply with the order of the court and is doing what he reasonably can to earn money for the support of himself, his wife and children, but is unable to earn enough to comply with the order of

the court, it would be unjust to imprison him for his failure. In such case, the failure is not wilful and contumacious.

The judgment of the district court is reversed, and the defendant discharged from the judgment for contempt. However, this is without prejudice to the right to institute other proceedings, or another proceeding for contempt, if the defendant becomes of sufficient ability to pay, and wilfully and contumaciously refuses to comply with the order made with respect to alimony.

REVERSED.

BETTY J. CLAUSEN, APPELLEE, V. LOTTIE P. JOHNSON ET AL., APPELLANTS.

FILED JANUARY 12, 1933. No. 28285.

1. Trial: INSTRUCTIONS. Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.
2. Appeal: INVITED ERROR. It is a sound and salutary principle of law that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about.
3. ———: EXCLUSION OF PRIVILEGED COMMUNICATIONS. Action of trial court in excluding certain communications alleged to have been made professionally to an attorney at law, approved.
4. Evidence examined, and *held* to sustain the judgment of the trial court.

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

Hall, Cline & Williams and *Courtright, Sidner, Lee & Gunderson,* for appellants.

Abbott, Dunlap & Corbett, contra.

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

EBERLY, J.

This is an action for damages inflicted by defendants upon plaintiff, the result of an automobile collision.

Verdict and judgment for plaintiff, and defendants appeal.

The evidence discloses that this automobile collision occurred about 4:30 p. m. on November 11, 1930, in the intersection of the paved Lincoln Highway and the graveled Somers Avenue north of the city limits, and near the northwest corner of the city of Fremont. Thelma Clausen, aged 21 years, with her sister Betty, aged 3½ years, as a passenger, was driving a model T-Ford owned by her father, Herman Clausen, north on Somers Avenue. This avenue was provided with stop signs north and south of its intersection with the Lincoln Highway, as authorized by section 39-1116, Comp. St. 1929. Lottie P. Johnson, wife of Jason F. Johnson, with her five children and her sister-in-law, was then driving west on the Lincoln Highway in her husband's Essex coach. Both drivers were familiar with the intersection. While the evidence is conflicting as to whether the model T-Ford obeyed the stop signs, and also as to the speed of the Johnson car in approaching the intersection, and as to other facts, a collision between the two cars actually occurred at this point, as a result of which the plaintiff Betty J. Clausen received the injuries of which she complains. The petition does not separately set out, number, and identify the material acts of negligence very clearly. It seems at least to charge, in the order named, (1) driving at a speed in disregard of the driver's visibility; (2) driving at a speed in disregard of the condition of the road; (3) driving at a speed exceeding 45 miles an hour; (4) driving without control of the car; (5) driving without maintaining a proper lookout so as to (a) stop, (b) decrease speed, or (c) turn aside so as to avoid striking the car in which plaintiff was riding. The defendants in their answer, by proper allegations, challenged the truth of the charges thus made. Plaintiff filed a reply.

The first instruction of the court, stating the allegations of the petition, abstracted it in the narrative form, and in substance submitted the following charges of negligence to the jury (our numbering inserted): "(1) That Mrs. Johnson negligently drove said Essex coach in dis-

regard of the then conditions of her visibility of the road, drove her car at a rate of speed greater than was reasonable and proper, having regard for the then conditions, and at such a rate of speed as to endanger the life and limb of the plaintiff; * * * (2) that Mrs. Johnson negligently drove her car without having control thereof; (3) that Mrs. Johnson could have, by using reasonable care, seen the Ford long before reaching said intersection and could have decreased her speed and could have turned or stopped and avoided the collision; (4) that the sun was low in the west, impairing the visibility to Mrs. Johnson, and that she negligently drove the car at a rate of speed within which she could not stop within the range of her vision. Plaintiff says that because of Mrs. Johnson's negligent acts aforesaid the accident occurred."

Instruction No. 2 properly sets forth the contentions of defendants as the same appear in their answer.

Instruction No. 3 is as follows: "The burden of proof is upon the plaintiff to prove all the material allegations in her petition contained, except as such allegations are admitted in the pleadings or upon the trial. The occurrence of the accident is admitted. Therefore in order to prevail in this case, plaintiff must prove, by a preponderance of the evidence, the following material matters: (1) That the proximate cause of the accident and the injuries resulting therefrom, if any, was the negligence of the defendant in one or more of the particulars alleged in plaintiff's petition; (2) or that the accident would not have occurred but for the negligence of the defendant in one or more of the particulars charged in plaintiff's petition; (3) the amount of plaintiff's damages, if any."

By instruction No. 4 the jury were properly instructed as to the rule of "a preponderance of the evidence." In No. 5, "proximate cause" was defined. In No. 6 the jury were instructed that the gist of this action is negligence, and that term was defined, as heretofore approved by this court.

Instruction No. 7 contained the following, in addition to other statements: "Therefore the negligent acts of the

said Lottie P. Johnson, if any, are the negligent acts of the defendant Jason F. Johnson, and he is responsible for those acts, if any."

Instruction No. 9, given by the court, embraced the following: "If, under the rule as to the burden of proof given you in these instructions, you are satisfied from the evidence that the collision occurred naturally and proximately because the defendant, Mrs. Johnson, was negligent in the operation of the Essex car in and about the scene of the accident, in one or more of the particulars charged in plaintiff's petition, or because of that in conjunction with the negligent act or acts of Thelma Clausen, as a proximate cause, the accident occurred and plaintiff was injured and suffered damages in consequence thereof, then and in that case you should return a verdict in plaintiff's favor."

By instruction No. 10 the jury were instructed that if they found that Mrs. Johnson was not negligent, and that the accident occurred simply and solely because Thelma Clausen was negligent, or because it was unavoidable, then their verdict should be returned for defendants.

As applied to the situation presented by the record in the instant case, the applicable rule is: "Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578. See, also, *Christensen v. Tate,* 87 Neb. 848.

Considered as an entirety, the instructions before us in effect define "burden of proof," "negligence," and "proximate" in a manner repeatedly approved by this court, and further expressly advise the jury "that negligence is the gist of the action," and permit recovery by plaintiff only in the event that if, under the rule as to the burden of proof as given in these instructions, the jury are satisfied from the evidence that the collision occurred, naturally and proximately because Mrs. Johnson was negligent in one or more of the particulars charged in plaintiff's petition, etc. The language employed in all the instructions given must be construed in

the light of terms as expressly defined by this court, and the conclusion that "negligence" on the part of the defendants is assumed by the instructions so considered is wholly unjustified. Indeed, upon a record more vulnerable to the objection now under consideration than the one before us, we held: "When the jury in one instruction is told that, in order to find for the plaintiff, they must find that the damages complained of were caused by defendant's negligence, a subsequent instruction that, if they find for the plaintiff, the plaintiff would be entitled to recover the damage he has sustained by reason of the negligence of defendant, is not erroneous as assuming that the defendant was negligent." *Christensen v. Tate,* 87 Neb. 848.

Appellants in their brief contend that the instruction given by the trial court as to section 39-1116, Comp. St. 1929, was erroneous. However, in view of the fact that the instruction as given on this subject was substantially as then requested by the parties now complaining, we need not further consider it. It is a sound and salutary principle of law that a party cannot be heard to complain of an act done by the trial court which such party was instrumental in bringing about. *Missouri P. R. Co. v. Fox,* 60 Neb. 531; *Sorensen v. Sorensen,* 68 Neb. 483; *Miller v. McGannon,* 79 Neb. 609; *Knutson v. Rosenberger,* 81 Neb. 761.

We have considered the ruling of the trial court excluding from the evidence certain statements claimed to have been made to an attorney by Thelma Clausen. Without further extending this opinion it may be said that no error was committed thereby. Comp. St. 1929; sec. 20-1201; *Jahnke v. State,* 68 Neb. 154; *In re Estate of Bayer,* 116 Neb. 670; *In re Estate of Strelow,* 117 Neb. 168; *Spaulding v. State,* 61 Neb. 289; *Basye v. State,* 45 Neb. 261.

We have carefully examined the record in view of the challenge of defendants as to the insufficiency of the evidence to support the judgment. Conceding that the evidence is conflicting, yet the jury were the constitu-

tional triers of the facts. There is evidence in the record that is ample, if believed, to support their conclusions. We cannot say, therefore, that the finding of the jury is unsupported by the evidence.

The judgment of the district court is,

AFFIRMED.

LEO B. STUHR, APPELLEE, V. CITY OF GRAND ISLAND, APPELLANT.

FILED JANUARY 20, 1933. No. 28131.

1. **Eminent Domain**: DAMAGES. "Where land is taken (for public use) from the owner by the power of eminent domain, the owner is entitled to receive the full market value of such land as of the date it was appropriated." *Stewart v. City of Lincoln*, 108 Neb. 825.
2. ———: ———. "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. Only such special damages will be allowed as affect the present market value of the land." *Stuhr v. City of Grand Island*, 123 Neb. 269.
3. ———: ———. Where a portion of an owner's land is appropriated for public use by the power of eminent domain and remaining land is claimed to be damaged, the measure of damages is the difference, if any, between the value of such remaining land just before and its lesser value just after the appropriation, the latter item considered as if the proposed use of the appropriated land were made effectual.
4. **Former Judgment Vacated**. Former judgment of this court, in *Stuhr v. City of Grand Island*, 123 Neb. 369, set aside and judgment of the district court affirmed.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Arthur G. Abbott, Arthur C. Mayer and *H. G. Wellensiek*, for appellant.

Cleary, Suhr & Davis, contra.

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

GOSS, C. J.

This case, involving a judgment for damages arising out of condemnation of plaintiff's land for a sewer, was heard by one of the divisions of the court, and an opinion was adopted reversing the judgment of the district court. *Stuhr v. City of Grand Island,* 123 Neb. 369. A motion for rehearing was duly filed. On consideration thereof an oral argument on the motion was allowed and had by the full court. The case was fully reargued—as if on the merits.

An injunction suit between the same parties, arising over the sewer, was previously before this court. *Stuhr v. City of Grand Island,* 120 Neb. 491. In the injunction case we affirmed a final order of the district court enjoining the city from conducting its sanitary sewage through an open canal on the land condemned "until such a time that said city shall, by the construction of an adequate disposal plant, or by other appropriate means, render the output of the sewage of such city, which flows past the lands of the plaintiff, and which may be carried thereon by overflow, clear and odorless, with the contents of organic matter sufficiently oxidized so that it is nonputrescible and incapable of causing a nuisance."

In commenting on the effect of the injunction and on testimony that, notwithstanding the injunction, the sewer will emit noxious and offensive odors and thus damage property not taken, the opinion in the present case says: "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." *Stuhr v. City of Grand Island,* 123 Neb. 369.

We think the foregoing comment unduly restricted plaintiff's rights under the facts and the law. The sanitary sewage from the closed sewer was the main subject-matter of the injunction suit, but the decision of the district court that "the building of the open storm sewer, such as contemplated by the defendants at the inception of the suit, would not, in itself and disconnected with the problem of an influx and overflow of sewage from Wood river at the proposed outlet, constitute a nuisance or endanger the health of the plaintiffs to the extent that it should be enjoined." *Stuhr v. City of Grand Island,* 120 Neb. 491. So while, under the facts in that record, the decision refused to consider the open ditch through plaintiff's land a nuisance, and therefore declined to enjoin it, yet it was not intended by the decision in that case to impair plaintiff's right to prove any proper elements of damages when he should seek compensation for his property condemned and damages to the rest of his land not taken but affected by the creation and use of the sewer. The opinion under reexamination holds that in his action for damages plaintiff (1) may not use evidence as to the effect of the content of the open sewer, (2) may not show a present market value of his land for subdivision by reason of its proximity to Grand Island, and (3) may not show that the gravel on his land makes a market value beyond that for farming purposes. We think this was in some respects too restrictive of plaintiff's rights, and to some extent misinterpreted that which was involved. The reversal having been arrived at largely on the ground above named, and other assignments not having been discussed, we are constrained to reconsider the entire appeal on the merits. So many of the geographical and general facts

appear in the statements of the former opinions we will not restate them here.

Appellant's first assignment is that the court erred in failing to instruct the jury as to the material issues in the case. The first three instructions state what the parties pleaded, respectively, in the amended petition, the answer and the reply. The first instruction abstracts and condenses the amended petition, which the record does not show to have been attacked. The instruction concisely describes the plaintiff's land and improvements and the sewer to be dug across it—all as set forth at greater length in the petition. It recites that plaintiff alleges his land adjoins the city of Grand Island, abuts on the present and proposed Lincoln Highway, is in part highly productive for agricultural purposes, in part desirable for acreage tracts for home purposes, and in part valuable because of gravel deposit thereon. It states that plaintiff seeks to recover $2,400 damages for the four acres actually appropriated and $23,500 for the depreciation arising to the remaining land. It sets out the allegations as to damages on the phase last above in the following particulars: (1) The open ditch (dimensions described) with the dirt excavated therefrom will be unsightly, and the water therein (described as to qualities) will pollute the water supply of the tract and will be dangerous to life and health of those living near and of live stock kept on the tract; (2) the removal and relocation of improvements, the fencing and its maintenance necessitated; (3) the gravel deposits on the remaining tract and the present railroad trackage will be separated; (4) the main body of plaintiff's land will be segregated from its one tract of ten acres and another tract of one-half acre—requiring the building of a bridge. In succeeding instructions the court told the jury that the answer raised issues on these matters and then described the burden of proof upon plaintiff to prove the material allegations of the petition by a preponderence of the evidence. So the court intended, and the jury must be considered to have under-

stood, that the foregoing items constituted the material allegations, elements or particulars in which plaintiff was damaged, if at all. These matters were so plain and simple, and had been gone over so much in the trial, that the failure of the court to state and number each item separately and to tell the jury in specific words that these were the "material allegations" did not have any tendency to mislead the jury. It did not constitute prejudicial error. *Murray v. Burd,* 65 Neb. 427; *Van Horn v. Cooper & Cole Bros.,* 88 Neb. 687, 693. If all these matters and elements were material, then the court adequately stated them and properly submitted them.

It is next assigned that the court erred in holding that the damages should be assessed as of October 21, 1925, the date of the passage of the ordinance appropriating the land. Appellant seems to concede that this is the general rule, but argues that an exception should be made here and the taking of the land should be considered to have been accomplished as of the date of the trial. Where land is taken from an owner by the power of eminent domain, he is entitled to the full market value as of the date it was appropriated. *Stewart v. City of Lincoln,* 108 Neb. 825. Valuation for railroad right of way is fixed as of the time of taking; application for appointment of commissioners to assess damages constitutes a taking. *Northeastern N. R. Co. v. Frazier,* 25 Neb. 53; *Fremont, E. & M. V. R. Co. v. Bates,* 40 Neb. 381. Appellant urges an exception to this rule because it claims the city was prevented and delayed in taking possession of the condemned land by plaintiff's injunction suit. *Stuhr v. City of Grand Island,* 120 Neb. 491. The main purpose of that suit was to prevent the city from sending its domestic sewage through its proposed open sewer past plaintiff's lands without first treating it so that it would not constitute a nuisance. The district court protected plaintiff by its decree in this respect as we expressly interpreted that decree. That it was necessary for plaintiff to go into court to secure that relief

is apparent in the history of that case. One evidence is the cross-appeal of the city, one point of which was based upon that portion of the decree quoted in the second paragraph of this opinion. We not only denied the appeal but the cross-appeal as well. The right of the city to use the condemned land for a proper sewer use as contemplated was complete on October 21, 1925. The owner had the statutory right to appeal from the award. Comp. St. 1929, sec. 16-634. The delay in bringing the appeal to trial was occasioned fully as much by the conduct of the city as by that of plaintiff. We find no compelling reason to adopt an exception to the general rule. The court instructed the jury that the evidence showed that the city had not yet taken possession of the strip of land appropriated, that therefore no interest in the award was recoverable until after judgment, and that the matter of interest should be disregarded. This fairly and fully protected the city.

It follows that the district court did not err in striking from the answer the allegations therein pleading the portion of the plaintiff's petition in the injunction suit wherein plaintiff set forth that the ordinance and all condemnation proceedings were void, that the city acquired no title to the land, had no legal right to take it, and the like.

The jury found that the four acres appropriated were worth $1,000 and that the remaining land was damaged $7,500. Judgment was rendered for the total sum.

Error is conventionally assigned separately as to five instructions, but they are quoted together in the brief and are discussed in the same manner in order to save space. We shall do likewise. The first of them gave the jury the measure of damages to be derived under the evidence: First, the fair market value of the four acres appropriated at the time it was so appropriated; and second, as to the balance of the tract, the difference between its fair market values just prior and just subsequent to the "appropriation, had the proposed ditch been built thereon."

The next instruction cautioned the jury not to speculate upon what the four acres might be worth in the future for purposes for which it was not available or marketable, but said they were not confined to its value as agricultural land alone unless the jury found it was more valuable for that purpose than any other. They were told this amount should not be increased or diminished by any effect its taking has had upon the rest of the tract. There was testimony from which the jury might find a greater value, but they found the four acres to be worth $250 an acre. The appellant complains that the instructions segregated the four acres from the rest of the land and that the jury would naturally place a higher valuation on this than on the farm left adjacent. The court appears to have hedged the instructions with the restrictions necessary and it is noted that the defendant did not request others. The value fixed by the jury upon the four acres does not appear excessive. Certainly it is not so much so as to indicate prejudice.

As to the damages to the remaining land, in fixing the value of it after the appropriation the jury were told they could take into consideration the elements pleaded and proved. The instruction limited them, in arriving at the cost of removing and relocating buildings and improvements, to such as were actually on the land appropriated, though permitting them to consider the convenience of the location of all buildings and improvements after relocation, in estimating the depreciation in value of the remaining land or as an element in its then value. Another instruction told the jury they might take into consideration the effect of the location of the ditch upon all the uses to which the land was adapted, upon the convenience or inconvenience of carrying on the farm, and whether its location and construction would render it more or less attractive to buyers. Another told the jury to make no allowance for any destruction of gravel deposits, but if they found this land had gravel deposits, found that the value of these deposits depended upon

trackage, found that the ditch would render it more difficult to secure trackage and that the land would be depreciated thereby, then, in arriving at the amount of such depreciation, they might take into consideration the expense and inconvenience which the appropriation of the strip and the building of the ditch may have or cause the owner in procuring such trackage.

Without reciting the evidence, there was ample testimony referring to all of the elements mentioned in the instructions. The nearness of the land to the city, its adaptability to farming, its gravel content on the portion cut off from the rest, with proximity to desirable trackage intercepted by the ditch, the cost of moving and of bridges and so forth were covered by the evidence. The jury were carefully admonished that all the elements referred to in the instructions as to depreciation of the land remaining after the ditch was built were for their consideration in arriving at the amount of depreciation, if any. In other words, they were an aid to fix the market value of the tract after the appropriation of the four acres, so that the jury could determine the difference, if any, in the value before and after.

The appellant criticizes the reception of testimony that part of the land could be sold as tracts fronting on the pavement. This was one of the adaptable uses of the land pleaded and permitted to be proved. It now appears to us to be entirely proper. 10 R. C. L. 130, sec. 113. *Stewart v. City of Lincoln*, 108 Neb. 825, recites that the plaintiff testified to various things making his land desirable. We now think it was a question for the jury whether any of this land was adaptable for subdivision and whether that element should be considered in fixing its market value, rather than a question of law for the court. The same thing applies to the gravel on a portion of the tract and to the trackage thereto intercepted by the sewer. All these were held in the former opinion to have caused reversible error. In the light of the rehearing and of further consideration by the

whole court, we are of the opinion these matters do not constitute reversible error.

Lastly, it is claimed that the verdict and judgment are not sustained by the evidence and are excessive. Without reciting the facts, we find there was evidence from which the jury might have reached a much larger verdict. It was a matter for the jury. In the circumstances it will not be disturbed.

The former judgment in this court is vacated. The judgment of the district court is

AFFIRMED.

MISSOURI VALLEY PIPE LINE COMPANY, APPELLANT, V. GLADYS ORR NEELY ET AL., APPELLEES.

FILED JANUARY 20, 1933. No. 28357.

1. **Eminent Domain**: APPEAL: TRIAL DE NOVO. Where a jury is waived on appeal to the district court in a proceeding to condemn land for a right of way for a pipe line, the party aggrieved by the decision there is not entitled to a trial *de novo* on appeal to the supreme court.
2. ———: ———: FINDINGS. In a proceeding to condemn land for a right of way for a pipe line, the findings of the district court on issues submitted to it are equivalent to the verdict of a jury.
3. ———: ———: PRESUMPTION. The supreme court, in reviewing a judgment of the district court in a proceeding to condemn land for a right of way for a pipe line, a jury having been waived, will presume that incompetent testimony was disregarded, where evidence properly admitted was sufficient to sustain the decision below.
4. ———: DAMAGES. The right of a pipe line company to exercise the power of eminent domain depends on compliance with the legislative grant requiring determination of the damages sustained by reason of "the laying, relaying and maintenance" of the pipe line, in absence of an agreement for compensation. Comp. St. 1929, sec. 75-1102.
5. ———: ———. In a proceeding to condemn land for a pipe line, an award of $390 as damages for right of way 30 feet wide and 78 rods long diagonally across a 30-acre tract of land valued at $250 an acre *held* sustained by the evidence.

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

George A. Lee, Fred C. Foster and *William P. Warner,* for appellant.

George W. Leamer, contra.

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

ROSE, J.

The Missouri Valley Pipe Line Company, plaintiff, instituted this proceeding before the county judge of Dakota county to condemn land owned by Gladys Orr Neely, one of the defendants, for a right of way or easement for a natural gas pipe line. For this public utility plaintiff demanded the use of a strip of land 30 feet wide and 78 rods long diagonally across a 30-acre tract approximately a mile and a half from South Sioux City and about two miles from Dakota City. The easement sought was the privilege of laying, relaying and maintaining a 16-inch steel pipe 30 inches below the surface of the ground, and includes the right of ingress and egress for workmen, inspectors, teams, trucks and equipment. Pursuant to statute the county judge appointed commissioners to determine the damages sustained by reason of the "laying, relaying and maintenance" of the pipe line. Comp. St. 1929, sec. 75-1102. From an award of $156 in favor of the landowner both sides appealed to the district court, where a jury was waived and a trial resulted in a judgment in her favor for $390. Plaintiff appealed to the supreme court.

The question presented by the appeal is the sufficiency of the evidence to sustain the recovery of damages in the sum of $390. The pipe line has been constructed through the landowner's premises. Plaintiff is not entitled to a trial *de novo.* For the purpose of review, the findings of the district court are equivalent to the verdict of a jury, and it will be presumed that incompetent testimony

was disregarded in the determination of the issues below, if evidence properly admitted is sufficient to sustain the judgment.

The right of plaintiff to exercise the power of eminent domain, in absence of an agreement for compensation, depends on the legislative grant, which requires the determination of the damages sustained by reason of "the laying, relaying and maintainance" of the pipe line. Comp. St. 1929, sec. 75-1102. The application for the right of way implied damages in some amount. The witnesses on both sides were practically unanimous in the opinion that the value of the landowner's 30-acre tract, before it was intersected by the pipe line, was $250 an acre, but as to the value afterward the evidence was conflicting. On behalf of the landowner there was testimony to the effect that the tract was depreciated in value to the extent of $50 an acre, or $1,500, while a witness called by plaintiff, the Missouri Valley Pipe Line Company, expressed the opinion that the pipe line, which made heating and illuminating gas available to landowners, as it did, increased the land value $10 to $25 an acre. By this witness plaintiff itself adduced evidence to the effect that the land was best fitted for acreage, and that it could be cut into three to five-acre tracts and sold to people from Sioux City and South Sioux City. Both sides resorted to affirmative testimony of the nature indicated, and, though conflicting on the issue of damages, there is sufficient evidence to sustain the judgment of the district court.

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. MILTON PREBYL, APPELLANT.

FILED JANUARY 20, 1933. No. 28336.

Bankruptcy: DISCHARGE: MORTGAGE LIENS. Where a decree of foreclosure was obtained against a mortgagor, who thereafter was adjudged a bankrupt, such decree is a valid lien against

the property and the discharge in bankruptcy does not operate to cancel it.

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

B. W. Stewart, for appellant.

Perry, Van Pelt & Marti and *E. S. Ripley, contra.*

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

DEAN, J.

This is an appeal by Milton Prebyl from an order of the district court for Gage county confirming the sale of certain real estate to the Prudential Insurance Company of America, plaintiff herein.

On or about November 2, 1923, Milton Prebyl and Mollie Prebyl, his wife, executed and delivered to the plaintiff company their promissory note for $14,500, bearing interest at the rate of 5 per cent. per annum. By its terms the note became due November 2, 1930, and as security for the payment thereof, the defendants Prebyl executed and delivered to the plaintiff a mortgage on certain described real estate owned by them. The defendants defaulted in the payment of interest on the note and permitted the mortgaged property to be sold for taxes, whereupon the plaintiff, as provided in the mortgage, redeemed the property and elected to declare the entire sum due and payable at once.

On or about March 22, 1930, the defendant Milton Prebyl was adjudged bankrupt and a trustee was thereupon appointed to take charge of his estate. An order was entered on June 14, 1930, by the referee in bankruptcy, permitting the plaintiff company to foreclose the mortgage herein. A voluntary appearance was entered by the trustee in bankruptcy, wherein the trustee alleged that whatever sum remained after the sale of the property, in an amount over the lien of the plaintiff company, should be paid to him as trustee. The court found and decreed that $16,629.99, with interest at 10 per cent. per

annum from September 18, 1930, was due the plaintiff under the terms of the mortgage, and that such mortgage constituted a first lien against the real estate in suit and that the plaintiff was entitled to a foreclosure thereof. A stay of nine months was granted to the trustee in bankruptcy.

The real estate was subsequently sold for $11,000 to the highest bidder, the plaintiff company. Objections were filed by the defendant Prebyl to the confirmation of the sale, but such objections were overruled by the court. The defendant has appealed.

The defendant's argument is that the bankruptcy proceeding discharged all of his debts, including that of the note held by the plaintiff, and he contends that the mortgage in suit represents only a security for the debt owing to the plaintiff, but in no way does it pass title, and that he is therefore entitled to a perpetual injunction preventing the enforcement of the decree of foreclosure. In view of the authorities hereinafter set forth, we do not agree with the defendant.

In 7 Remington on Bankruptcy, sec. 3443, the following rule is announced, namely: "In actions to try the title to property, or to determine the validity of liens on property, or interest therein, where no recovery of a debt is sought, the defendant may not interpose his discharge in bankruptcy—discharge bars debts, not ownership of property, whether such ownership be absolute, conditional or by way of lien, whether it be ownership of the whole or merely partial ownership." And in the same work at section 3449, this is said: "The discharge does not operate to cast off good and valid liens given or acquired for the debts, either liens by contract or by legal proceedings, nor to prevent their enforcement. It is purely personal to the bankrupt." In 42 L. R. A. n. s. in notes at pages 294 and 295, it is stated that a mortgage lien is not avoided by the subsequent discharge of the mortgagor as a bankrupt, the courts recognizing the rule that such a discharge releases the personal liability

only. "Where a judgment creditor's suit is commenced before a decree in bankruptcy against the defendant therein, so as to obtain a lien upon his property, and the defendant subsequently obtains his discharge under the bankrupt act, he cannot plead such discharge in bar of the suit generally; as the discharge is only a bar to a personal decree against the property." *Lowry v. Morrison,* 11 Paige Ch. (N. Y.) 327. In *Long v. Bullard* (117 U. S. 617) 29 L. Ed. 1004, the court held: "The setting apart of the homestead to the bankrupt * * * does not relieve the property from the operation of liens created by contract before the bankruptcy." And in *Sample v. Beasley,* 158 Fed. 607, the rule is stated: "A court of bankruptcy has no jurisdiction to enjoin the sale of property on judgment rendered in a state court enforcing mortgage liens of debt long prior to four months preceding the filing of the petition or adjudication of the mortgagor a bankrupt."

The decree of foreclosure herein was obtained in September, 1930, and the defendant did not receive his discharge in bankruptcy until the latter part of November, 1930. Merit does not appear in the contention of the defendant that the discharge in bankruptcy canceled the lien of the mortgage and that the title to the real estate therefore remains in him. Clearly it cannot be successfully argued that the bankruptcy act was intended to permit a bankrupt to avail himself of the provisions of the act, obtain a cancelation of his debts, including a mortgage lien which had been reduced to judgment, and have the title to the mortgaged property remain in him free from the lien of the mortgage. And where the mortgagee obtained a decree of foreclosure against the defendant, who subsequently was declared a bankrupt, such decree is a valid lien against the property and the discharge in bankruptcy does not operate to cancel it. The court did not err in refusing to issue a permanent order enjoining the plaintiff from enforcing the decree of foreclosure obtained by it.

AFFIRMED.

The following opinion on motion for rehearing was filed April 3, 1933. *Former opinion and syllabus modified.*

Bankruptcy: DISCHARGE: MORTGAGE LIENS. Where, after an order of a referee in bankruptcy permitting a mortgagee to foreclose a mortgage, a decree of foreclosure was obtained against a mortgagor, such decree is a valid lien against the property and the discharge in bankruptcy does not operate to cancel it.

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

DEAN, J.

Upon consideration of the brief and motion for rehearing filed herein, and of the assignments set forth therein, we decline to deviate from our conclusion. See *Prudential Ins. Co. v. Prebyl, ante,* p. 295.

The original syllabus and that part of the body of the opinion in which it is incorporated are withdrawn, however, and the language of the syllabus herewith submitted is substituted for the former syllabus and also for that part of the former body of the opinion withdrawn and becomes the law of the case. Where, after an order of a referee in bankruptcy permitting a mortgagee to foreclose a mortgage, a decree of foreclosure was obtained against a mortgagor, such decree is a valid lien against the property and the discharge in bankruptcy does not operate to cancel it. The court did not err in refusing to issue a permanent order enjoining the plaintiff from enforcing the decree of foreclosure obtained by it.

With the above changes in the opinion, the motion for rehearing is

OVERRULED.

ARTHUR D. COMPTON, APPELLEE, V. ELKHORN VALLEY DRAINAGE DISTRICT, APPELLANT.

FILED JANUARY 20, 1933. No. 28472.

1. Drainage Districts: LIABILITY. A drainage district is liable for such damage to crops as may be found to have been

caused by surface water collected from foreign watersheds and brought to such lands and left there through the failure of the district to take care of such extra burden. *Compton v. Elkhorn Valley Drainage District*, 120 Neb. 94.

2. ———: ———: PROOF. In an action against a drainage district to recover for damage to crops through the alleged negligence of the district, it is incumbent upon the plaintiff to allocate damage arising from foreign watershed from damage by prolonged and excessive rainfall and to show the extent of such increased overflow as well as the amount of damages arising therefrom, and in the absence of proof of allocation, a judgment will not be sustained.

3. ———: ———: ———. Evidence examined, discussed in the opinion, and *held*, that allocation of damage from foreign watershed has not been attempted, nor has it been proved what portion of the land was affected by the overflow or whether such portion so affected was planted in corn.

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

Courtright, Sidner, Lee & Gunderson and *George L. De Lacy*, for appellant.

Mullen & Morrissey and *Wells, Martin, Lane & Offutt, contra.*

Heard before DEAN, GOOD, EBERLY and PAINE, JJ.

DEAN, J.

This action was begun in the district court for Douglas county by Arthur D. Compton against the Elkhorn Valley Drainage District to recover for damages to crops on lands owned by him in 1923, 1924, and 1925, alleged to have been caused by reason of an overflow of water thereon through the negligence of the defendant district. Upon the death of Compton, the action was revived in the name of his widow, Mary Esther Compton, the plaintiff herein.

Under three causes of action, the jury found for the plaintiff in the following sums, namely, $1,200 for damage to 360 acres of corn in 1923; $4,500 for damage to 420

acres of corn in 1924; and $800 for damage to 420 acres of corn in 1925, together with lawful interest on the several sums. The defendant district has appealed.

This is the second appearance here of this action. See *Compton v. Elkhorn Valley Drainage District,* 120 Neb. 94. On the former appeal the judgment was reversed and the cause remanded for further proceedings, the principal question for determination being whether the drainage district was under legal obligation to maintain its works. We there held: "A cause of action will arise in favor of one so damaged when the damage occurs and not as of the date of the original construction of the works." And we also there held that the district is liable for such damage to plaintiff's crops as may be found to have been caused by surface water collected from other watersheds and brought to his lands and left there by the failure of the district to take care of such extra burden.

The defendant district contends that the trial court submitted the case to the jury on the second trial solely from the fact that he was reversed for previously having taken it from the jury, and that the court erred in assuming that he was bound by the decision of this court and that he otherwise would have given a peremptory instruction to find for the defendant. The district principally complains in that there was no attempt made to allocate the damage by foreign water from the damage by rainfall or other sources, and that the judgment is not supported by the evidence.

The Fouts and Creamery Road ditches involved herein were located and established by Douglas county in 1879, at a depth of about two and a half feet, but they were cleaned and deepened by the county at a later period. The defendant district was incorporated in 1909 and embraces about 55,000 acres of land in Douglas and Sarpy counties. Prior to 1909, and ever since, the plaintiff has been the owner of 480 acres of land within the district. The Creamery Road ditch is located on the east side of

plaintiff's land and the Fouts Road ditch is on the west side, the ultimate outlet of both ditches being the Elkhorn river, which is about two miles and a quarter east of the west line of the Compton land.

It appears that the nature of the soil in the Elkhorn Valley causes the ditches to fill and become clogged to some extent and that the drier the season is the more do the ditches fill with sediment. As originally planned by the district, the ditches will carry off an average heavy rainfall of 24 hours without damage to growing crops, providing no other heavy rains have fallen immediately prior thereto. The ditches were constructed to divert both surface and subsurface waters.

The plaintiff's contention is that, after the construction of the ditches, the defendant permitted them to become filled with sediment and debris to such an extent that they failed to carry away water flowing to the plaintiff's land in the natural course of drainage. But the defendant contends that the plaintiff's lands are low and swampy and that the ditches at no time injuriously affected such lands, but did in fact benefit them.

The record herein is voluminous and there is more or less repetition in the evidence of the many witnesses called by both the plaintiff and the defendant. But the fact appears to be established that the Compton land is low in certain places and that there are many swales thereon. And it is disclosed that at one time a large lake was on the land which covered several acres and that duck and geese hunting as well as fishing were there indulged. There is evidence tending to prove that a large portion of the Compton land was covered with water at various times during the years in question and that in some places the water reached a depth of about two feet and required from a day to a week to drain. It appears, however, that it was in the swales, and not on the higher ground, that the water reached the depth of two feet, and while it appears that the Creamery Road ditch overflowed at one point near the Compton land, it

is disclosed that the contour of the land was such that none of the land except that in the swales covering a few acres was flooded thereby. The record discloses that water stood all over the country in 1923, and especially in 1924, and that the corn generally was washed out by reason of excessive rains. One witness whose land is near the Compton land testified that his corn crop in 1923 was of only fair quality, and that in 1924 it was soft and sour on account of the wet season. There is also evidence to the effect that the ditches filled in some places, and that in 1924 the water ran across the road from the Creamery Road ditch, but, as above pointed out, it does not appear that the overflow extended beyond the low places.

Many witnesses, in behalf of both the plaintiff and the defendant, testified that, at the time in question and especially in 1924, the rain fell copiously for several weeks and that the weather was unusually cool. They also testified that it was necessary to replant the corn, in some instances more than once, on the higher ground as well as in the lower regions. One witness testified that he was unable to plant his corn until July because of the rain, and that there was little or no corn in the low places and only a fair crop on higher land. It also appears from the evidence of one witness that the average yield of corn in 1924 was only 12 bushels an acre as compared to 60 and 85 bushels in other years. Another testified that the Compton land contains many sloughs from which the water does not drain quickly after a heavy rainfall, and that there are other portions which cannot be drained because of the type of the soil. He also testified that the ditches functioned as well as any in the country with the exception of one or two points where they filled to some extent, but that this had no serious effect on the Compton land.

It is established that an abundant rain fell for 22 days out of a total of 28 from the middle of May until some time in June, 1924. There is no proof, however, that the

damages alleged to have been occasioned to the plaintiff's corn crops during the years in question were in fact occasioned by foreign water negligently permitted to overflow thereon by the defendant district. That there was much water on all of the land in the vicinity is true, but the fact remains that all of the crops throughout the district generally were very poor as a result of the excessive rains, and this was true of the higher lands as well as the low lands. It appears to be conceded that the plaintiff's lands would have been much wetter in the absence of the ditches.

The location of the corn crops during the years in question is vague, but the evidence appears to disclose that the lower places generally were in pasture and meadow and that the corn was on higher ground. As noted above, there is no proof that the water overflowing the Creamery Road ditch at one point or from the Fouts Road ditch ever covered any of the Compton land beyond the swales. In any event, the evidence fails to conclusively trace the exact damage attributable to foreign watershed, if any, and to show the extent of such damage.

The drainage district is liable for such damages to crops as may be found to have been caused by surface waters collected from foreign watersheds and brought to plaintiff's lands and left there through the failure of the district to take care of such extra burden. *Compton v. Elkhorn Valley Drainage District,* 120 Neb. 94. But, in an action against the district to recover for damages to crops through the alleged negligence of the district, it is incumbent on the plaintiff to allocate the damage arising from foreign watershed from damage by prolonged and excessive rainfall and tributary sources, and to show the extent of such increased overflow as well as the amount of damages arising therefrom. Upon an examination of the record, we conclude that allocation of damage by foreign water has not been attempted, nor has it been shown that the portion of land alleged to have been affected by foreign water was in corn, and in the absence

of proof of such allocation, the judgment cannot be sustained. *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755; *Murphy v. Chicago, B. & Q. R. Co.*, 101 Neb. 73; *Brown v. Chicago, B. & Q. R. Co.*, 195 Fed. 1007. Other assignments of alleged error have been pointed out, but, in view of our decision, we do not find it necessary to discuss them. The judgment is reversed and the cause remanded.

REVERSED.

STATE, EX REL. MARY ESTHER COMPTON, EXECUTRIX, APPELLEE, V. ELKHORN VALLEY DRAINAGE DISTRICT ET AL., APPELLANTS.

FILED JANUARY 20, 1933. No. 28536.

Case Followed. *Held*, that, in view of our decision in *Compton v. Elkhorn Valley Drainage District, ante*, p. 299, decided herewith, the judgment allowing the writ of mandamus herein must be and it hereby is reversed.

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

Courtright, Sidner, Lee & Gunderson, for appellants.

Mullen & Morrissey and *Wells, Martin, Lane & Offutt, contra.*

Heard before DEAN, GOOD, EBERLY and PAINE, JJ.

DEAN, J.

Mary Esther Compton, as executrix of the estate of her deceased husband, Arthur D. Compton, began this action to obtain a writ of mandamus requiring the directors of the Elkhorn Valley Drainage District to levy a special assessment for the payment of a judgment obtained by her against the district in an action entitled *Compton v. Elkhorn Valley Drainage District, ante*, p. 299, decided herewith. The decision in that case reversing the judg-

ment is controlling here. It follows that the judgment allowing the writ of mandamus in the present action must be and it hereby is reversed, with directions that the action be dismissed.

REVERSED.

GEER COMPANY, APPELLEE, V. LEROY B. WOLCOTT ET AL., APPELLEES: ALLBRIGHT-NELL COMPANY ET AL., APPELLANTS.

FILED JANUARY 20, 1933. No. 28352.

Mechanics' Liens. As to lienors without notice, either actual or constructive, of a conditional sales contract, trade fixtures, permanently affixed to the realty, become a part thereof and subject to mechanics' liens, unaffected by such conditional sales contract.

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

Prince & Prince and *C. W. Greenfield,* for appellants.

Lloyd W. Kelly, B. J. Cunningham and *Cleary, Suhr & Davis, contra.*

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

GOOD, J.

Plaintiff brought this action to foreclose a mechanic's lien on a rendering plant, consisting of a building and machinery therein, and the leasehold interest in realty on which the building was situate. Defendant Wolcott was the owner of the leasehold and made default. A number of the defendants filed cross-petitions and asked foreclosure of liens for material furnished for the construction of the building and for labor in constructing the building and installing the machinery. The Allbright-Nell Company (hereinafter referred to as the company) filed an answer and cross-petition, in which it asserted

ownership of the machinery under a conditional sales contract, and asked that it be adjudged to be the owner of such machinery, and that it be not subject to the liens of the plaintiff and cross-petitioners. Defendant Simonsen, through some arrangement with Wolcott, not clearly disclosed, purchased from the company the machinery for installation in the plant and paid something over $3,000 on the purchase price, leaving a balance of $4,000 unpaid to the company.

The trial resulted in a decree for plaintiff and the several cross-petitioners, asserting liens for material and labor upon the entire plant, and denying any relief to Simonsen and the company. The latter two have appealed.

It is conceded that the only controversy requiring our attention is whether the company is the owner of the machinery installed and is entitled to remove it from the building, or have a lien thereon for the unpaid portion of the purchase price.

The leasehold interest consisted of a specific part of the right of way of the Union Pacific Railroad Company, and was situated some distance north of the city of Grand Island in Hall county.

From the record it appears that Simonsen, who lived in Iowa, was interested in other rendering plants and had some knowledge of the construction and operation of such plants; that, through some arrangement, not fully disclosed, between himself and Wolcott, it was agreed that a rendering plant should be constructed upon the leasehold. Simonsen arranged with the company for the purchase of the machinery to be installed. Wolcott entered into an agreement with plaintiff and the other parties, claiming liens for material and labor, for the construction of the building and installation of the machinery. The machinery for the equipment of the plant was furnished by the company under a contract with Simonsen, whereby the title to the machinery was to remain in the company until the purchase price was fully paid. The con-

ditional sales contract between the company and Simonsen was not filed nor recorded in Hall county. The plaintiff and others, claiming liens for labor and material, had no knowledge of the conditional sales contract, or that the machinery was not paid for. The building was especially designed and constructed for the installation of the particular machinery which was furnished by the company.

There is a conflict in the evidence as to the extent and manner in which the several items of machinery are annexed or attached to the realty. It was agreed by all the parties that the trial judge should visit and examine the premises. Under such circumstances, we feel bound by the findings of the trial court with respect to the extent and manner in which the several articles of machinery were attached to the realty.

The trial court found: "Leroy B. Wolcott erected the said mill, factory, building, and plant, upon said real estate; that the same consisted of a main building constructed of lumber, cement blocks, poured cement, and other materials, with approaches and out-buildings appurtenant thereto; that rendering plant and factory machinery, and equipment, were, during said time, installed by the said Leroy B. Wolcott, consisting of rendering cooker, motor, press, pumps, Ancocracker boiler, grinder, winch, stoker, and fittings and appliances connected therewith; that said machinery and equipment were and now are firmly and permanently annexed and attached to said mill, plant and factory, and to said buildings and foundations thereof, and to the real estate upon which it is situated as aforesaid, that the said machinery and equipment were and are adapted to the use of said mill, factory, and plant, and that it was annexed thereto for permanent use in connection therewith, and with the intention on the part of all persons interested in the said machinery and equipment that the same should be and become a part of the said mill, plant, and factory, and of the said leasehold in said real estate, and that the said machinery and

equipment have been at all times thereafter and now are an integral part of the said mill, plant, and factory, and the leasehold interest in the said real estate." The court further found that the company sold all of said machinery under an agreement that the same should be installed in the said plant.

An examination of the record convinces us that these findings made by the trial court are in accordance with and supported by the evidence. The plaintiff and other lienors, furnishing material and labor for the construction of the building and installation of the machinery, performed their part of the contract with Wolcott, and have not been paid therefor. Within the time prescribed by statute, they filed liens for the materials furnished and services rendered. No question is raised as to the amounts due the respective claimants for liens, and the evidence shows that they were unaware that the machinery was not fully paid for, or that it was purchased under a conditional sales contract. The only question is as to whether the liens of plaintiff and other lien claimants extend to and cover the machinery furnished by the company and installed in the building.

Appellants contend that the statute providing for the filing of a conditional sales contract in the office of the county clerk was intended for the protection only of innocent purchasers, execution and attaching creditors, and further contend that, since the plaintiff and other lien claimants are not in these classes, they are bound by the terms of the conditional sales contract between the company and its vendee. Many decisions from this and other courts are cited and relied upon. Many of the cases cited relate to cases where the property, which was the subject of the conditional sales contract, retained its distinctive character as personalty. Many of the others relate to cases where the opposing claimant had either actual or constructive notice of the conditional sales contract. As we shall hereinafter see, these cases are not applicable to the situation presented by the record in this case.

Conditional sales contracts are entered into primarily for the protection of vendors of personalty, where the parties to such contracts contemplate that the property shall retain its character as personalty. They are not intended to and cannot apply to such articles of personalty as are sold for the purpose of being incorporated into a building and becoming a part of the realty. Lime, cement, brick, lath, nails and many other such articles might be mentioned which may be the subjects of a conditional sales contract, so long as it is contemplated by the parties to the contract that such items shall retain their character as personalty; but when it is contemplated and intended that the vendee shall use these articles in the construction of a permanent structure, to become a part of the realty, it is evident that they cannot apply. In such cases, the vendor may protect himself by filing a mechanic's or materialman's lien, but cannot retain title to the articles of personalty, because such articles, with the consent of the vendor, have lost their identity as personalty. From personalty they have been transformed into real estate, and where this was the intention of the parties, the conditional sales contract would cease to operate or have any effect after the transformation from personalty to realty had occurred.

There is a class of personal property which never becomes realty. As to such property we think the general rule is that the vendor under a conditional sales contract may retain the title and the right to repossess these articles from the vendee, or any one else, except only innocent purchasers, execution and attaching creditors, without notice, actual or constructive.

There is still another class of personal property, such as the machinery in the instant case, which may be properly termed, when placed in a building, trade fixtures, and which, as to certain persons, would remain personalty, but, as to others, would become realty. The rule is that, if such fixtures are placed in a building by a tenant and not intended to remain therein after the expiration

of his tenancy, they do not become a part of the realty and may be removed by the tenant, if, in so doing, no substantial injury is done to the freehold. In the instant case, the machinery was furnished with the understanding that it would be incorporated into a rendering plant for permanent use therein by the owner of the building. It was contemplated by all parties that it should become a part of the real estate. However, as against the vendee or those having notice, either actual or constructive, of the conditional sales contract, it may be that the vendee could retain title to the articles and retake them by replevin, if in so doing no substantial injury would result to the freehold. On the other hand, where such machinery was placed in the building, with the intention of vendor and vendee that it should remain there permanently and become a permanent part of the manufacturing plant, it would become a part of the realty as to all persons who had no actual or constructive notice of the contract.

In the instant case, plaintiff and defendant lienors furnished material and labor in the erection of the building and installation of the machinery therein for a permanent rendering plant, without notice, either actual or constructive, of any conditional sales contract between the company and its immediate vendee. As to them, the machinery became and was a part of the real estate, and they are entitled to a lien thereon.

The applicable rule is: As to lienors without notice, either actual or constructive, of a conditional sales contract, trade fixtures, permanently affixed to the realty, become a part thereof and subject to mechanics' liens, unaffected by such conditional sales contract. The views herein expressed find support in the following authorities: 26 C. J. 688; 40 C. J. 278; 11 R. C. L. 1062, 1063, 1064, secs, 6, 8, 9; *Great Western Mfg. Co. v. Hunter Bros.*, 15 Neb. 32; *Frost v. Schinkel*, 121 Neb. 784; *Washburn v. Inter-Mountain Mining Co.*, 56 Or. 578; *Northwestern Lumber & Wrecking Co. v. Parker*, 125 Minn. 107; *Geppelt v. Middle West Stone Co.*, 90 Kan. 539; *King v. Title Trust Co.*, 111 Wash. 508.

In *Great Western Mfg. Co. v. Hunter Bros., supra,* in the course of the opinion it was said (p. 38): "Again, the vendor's lien or ownership of the machinery reserved by the terms of the contract could only exist so long as the machinery remained personal property, and ceased upon the same being attached to the freehold and becoming a fixture. Hunter Bros. having attached this machinery to their elevator (with the consent of the vendor), it ceased to be personal property, and the reserved ownership of the vendor therein ceased to operate *eo instanti* with the act which entitled said vendor to a lien on the elevator therefor."

The company might have protected itself from loss either by filing in the proper office a copy of the conditional sales contract or by perfecting a materialman's lien, as provided by statute. It did neither. Its loss, if any, is due to its failure to take advantage of the rights conferred by statute.

We are convinced that the decree entered by the trial court is right, and it is

AFFIRMED.

CLARA H. HERBERT, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED JANUARY 20, 1933. No. 28616.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY.** Death resulting from heat prostration, arising out of employment, under the facts in this case is a personal injury caused by an accident, under the workmen's compensation law of Nebraska.
2. ———: ———: ———. Heat prostration may be a compensable accident, under the workmen's compensation law, if the workman is subjected to a greater hazard from the heat than that to which the public generally in that locality is subject.

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

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

Herman Ginsburg and *Joseph Ginsburg, contra.*

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

PAINE, J.

This is an appeal by the state of Nebraska upon a proceeding brought by the widow of a deceased employee under the workmen's compensation law, wherein such widow recovered a judgment in the district court for full death and funeral benefits, as authorized by law.

John W. Herbert, aged 71 years, was employed as a cement inspector for the state of Nebraska at $135 a month. He went to work at 5:30 a. m. upon June 30, 1931, at which time the temperature was 80 degrees, and suffered a severe heat prostration before noon, and was taken to a hotel in Central City by the engineer in charge, where he died before 6 o'clock the same afternoon.

At the time of the accident, he was working one mile east of Central City, at a cement dock, which was located in a slight depression, having a sand pile just to the east of the dock, averaging 25 feet in height, and upon the west side there was a string of five or six box-cars on a spur track, and on the north there was a built-up roadbed, all of which made it difficult for any breeze to strike him. His duties were to see that the right amount of cement was put into the paving mixture, to test the weight of the steel buggies to see that they all weighed approximately 250 pounds apiece, and also to make cement tests. Considerable cement dust was in the air where he worked, caused by the dumping of an equivalent of 4,650 sacks of cement a day at that dock, and the cement on this job was not shipped in sacks, but shipped as loose cement by the carload. The heat at the place where deceased worked was more intense than at other places where men were working on this job. Before 11 o'clock in the morning, when the temperature was about 98 degrees, deceased suddenly complained of being very ill, and was at once taken to the hotel in town. The wife

of the manager of the Ratcliff Hotel testified that he told her when he came in that he was very sick. She testified that he looked ashy, that he refused to eat any food during the afternoon. The manager of the hotel testified that he went up to the room of deceased several times, and that he complained of feeling cramps in his stomach and an awful diarrhea; that he asked for water, and he brought him a pitcher full of cold water; that he was lying flat on his back on the bed; that he had no clothes on, but a sheet over his feet; that about 5 p. m. the deceased was lying just the same, but was waiving his hand, and that when he went up again about 6 o'clock he found that he was dead, and called Dr. Boyd, who testified he found him in the position described, with his face flushed. He testified he had been dead about an hour at that time, and that the cause of death was heat prostration. The testimony of the three medical experts called to testify in the case was that, under the conditions and place of his employment, deceased would be peculiarly susceptible to heat prostration, and would be subjected to risk and hazard greater than that of the ordinary public, and each of the three testified that in their opinion he died of heat prostration. One of the physicians testified that the usual reaction to a heat prostration is that the patient does not realize how sick he is until he goes into a state of collapse. The state produced no medical testimony.

Two errors are relied upon for reversal: First, that the evidence is legally insufficient to show that deceased came to his death by heat prostration; and, second, that the evidence is insufficient to show that deceased's heat prostration, if any occurred, arose out of his employment by the state of Nebraska.

1. It is incumbent upon this court in compensation cases to consider the same *de novo*, the same as one tried in equity, as required by section 48-137, Comp. St. 1929. *Southern Surety Co. v. Parmely*, 121 Neb. 146; *Siedlik v. Swift & Co.*, 122 Neb. 99.

Section 48-109, Comp. St. 1929, places the burden of proof on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment. *Bartlett v. Eaton,* 123 Neb. 599.

An injury "arises out of" an employment when it occurs in the course of the employment and as a proximate cause of it; that is, when the injury is a natural and necessary incident or consequence of the employment, though not foreseen or expected. The phrase points to the origin or cause of the injury, and presupposes the existence of a causal connection between it and the employment. *Larke v. Hancock Mutual Life Ins. Co.,* 90 Conn. 303.

If the nature of the employment, or the conditions under which it was pursued, or the exposure to injury which it entails, or the doing of something incidental to the employment, was the proximate cause of the injury, it arises out of the employment. *Sponatski's Case,* 220 Mass. 526, L. R. A. 1916A, 333.

Upon the question whether deceased died of heat prostration or heatstroke, the words "sunstroke" and "heatstroke" are synonymous, and mean a sudden prostration resulting from exposure to excessive heat, regardless of the source from which the heat emanates.

"Sunstroke" is a personal injury caused by "accident," within the meaning of the workmen's compensation act. *State v. District Court,* 138 Minn. 250, L. R. A. 1918F, 918.

It has been said that heatstroke is an affection which is often fatal, due to exposure to the sun or excessive heat, and is marked by sudden prostration, with symptoms similar to apoplexy. Another says it is caused by paralysis of the center of respiration. *Kanscheit v. Garrett Laundry Co.,* 101 Neb. 702.

One of the physicians testified that heat prostration is usually due to an increase in the temperature in the body, and that temperature is kept down by the circulation of

air and evaporation, and the sun's rays are not a necessary factor.

2. It is a general principle that the employer is not responsible for damages to his workmen by lightning, storms, sunstroke, freezing, floods, or earthquake, which vigilance could not foresee or prevent. But compensation has been allowed for heat prostration in this state and many others, as an exception to the general rule, when the employment in any particular case brought with it greater hazard and exposure than those to which workmen generally in that locality were subjected.

It is sustained by testimony in this case that the deceased was subjected to greater risk and hazard than was the public generally, and that the widow was entitled to compensation. *Young v. Western Furniture & Mfg. Co.*, 101 Neb. 696; *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702; *Manning v. Pomerene*, 101 Neb. 127.

This court finds there is sufficient testimony to support the contention that deceased came to his death by heat prostration, which, under all of the evidence in this case, was an injury arising out of and in the course of his employment. There being no error in the record, the judgment of the district court is

AFFIRMED.

CLARA DAY BROEKER ET AL., APPELLANTS, V. SAMUEL N. DAY ET AL., APPELLEES.

FILED FEBRUARY 1, 1933. No. 27924.

1. **Deeds**: CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.
2. ———: ———: ———. In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, and what he proposed to do with it, and to decide intelligently whether or not he desired to make the con-

veyance, it cannot be said he was incompetent or incapable of executing the instrument.

3. ———: PARENT TO CHILD: UNDUE INFLUENCE: PRESUMPTION: BURDEN OF PROOF. In case of a gift or voluntary conveyance from parent to child, no presumption of fraud or undue influence arises, as between the parties thereto, from the mere fact of the relation. But where a gift of an entire estate is made by a parent to one child with whom he lives, there being another child and grandchildren who are also objects of his bounty, it will be scrutinized closely. This is especially true where the parent is quite old and his mental and physical condition is somewhat broken. Under such circumstances the burden is on the donee to overcome the presumption that the gift was secured through undue influence.

4. ———: CANCELATION: UNDUE INFLUENCE. The undue influence which will avoid a deed is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.

5. ———: ———: ———. Undue influence cannot be established by merely showing opportunity for its exercise.

6. Witnesses: COMPETENCY. All the parties to this action have a direct legal interest in the result, and all are representatives of a deceased person. All should have been denied permission to testify as to conversations and transactions with the deceased, where proper objections were made thereto, except where the opposing side had offered testimony of such conversation or transaction, as provided in section 20-1202, Comp. St. 1929.

7. ———: ———. In an action by heirs at law of a decedent to cancel a deed of their ancestor, on grounds of undue influence and mental incompetency, the wife of the grantee is incompetent as a witness to testify as to conversations had between her husband and the grantor.

8. Appeal. Upon appeal in actions in equity, this court is required by statute to try the issue *de novo*, without referring to findings of the trial court; but where the testimony of witnesses orally examined by the court upon the vital issues of the case is conflicting so that it would be impossible for both of the versions to be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted the version of one group rather than the other.

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

Frank P. Voter and *Frederick M. Deutsch,* for appellants.

H. E. Burkett and *Clarence E. Haley, contra.*

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

FROST, District Judge.

This is a suit by appellants, plaintiffs below, to cancel *inter vivos* gifts by deeds on the ground of mental incompetency of the grantor and undue influence of the grantees. The appellants are some of the heirs of the donor, Posey Day, while the appellees are the son of the donor and the son's wife, with whom the donor lived at the time of making the conveyances, which admittedly were made without any pecuniary consideration.

One of the conveyances which it is sought to set aside was made by the donor to his two sons, Samuel and Bert, by deed dated November 16, 1928, which sought to convey all of the real estate of the donor. Shortly thereafter one son, Bert, died and a second conveyance was made to Samuel dated February 8, 1929, to convey the interest which the father had received as the heir of Bert. It is the appellants' contention that at the time of the execution of these deeds the grantor was mentally incompetent to make them and that they were not the acts of the grantor but were procured by the undue influence of the grantees. It is asked that these deeds be canceled, the title quieted, and an accounting for rents and profits be made. Since the making of these deeds and before the bringing of this suit, Posey Day had died.

The appellees, on the other hand, contend that long prior to making these conveyances the donor had expressed an intention to do so, and that the conveyances were in furtherance of that intention and no undue influence was exercised by the grantee or his wife to pro-

cure them; and also that the donor was competent to make them.

The court found generally for the defendants, appellees here, and quieted the title of the premises in Samuel N. Day.

In the assignments of error, the appellants contend that the court erred in admitting the testimony of Samuel N. Day and of his wife, Clara Day, as the same pertained to transactions or conversations with the deceased; that the findings in the decree are contrary to the evidence, which demonstrates the confidential and fiduciary relationship between the donees and donor, and the presumption of fraud and undue influence arising therefrom has not been overcome; and that the evidence clearly demonstrates the mental incompetency of the grantor.

The record in this case is very voluminous and has been read and parts of it reread more than once in the preparation of this opinion. The court is grateful to the attorneys who assisted by extensive abstracts of the testimony which call attention to the salient points in the bill of exceptions. The legal questions have been carefully briefed and ably argued. However, there is nothing particularly new in the propositions of law involved in this case. The questions of fact, however, are quite troublesome and it has been difficult to reach a satisfactory conclusion therefrom. We will review briefly the legal propositions which are urged by the respective parties as they apply to the evidence.

The grantor in making a conveyance is presumed to have mental capacity sufficient for that purpose and the burden of proof is upon the one who alleges the want of such capacity. *Brugman v. Brugman,* 93 Neb. 408; *Keedick v. Brogan,* 116 Neb. 339. In determining the mental capacity of the grantor to execute the deeds, it is important to determine whether he understood what property he was conveying, to whom the conveyances were made, and whether he had definitely and intelligently determined to transfer all his property to one heir to

the exclusion of all others. *Brugman v. Brugman,* 93 Neb. 408; *Hacker v. Hoover,* 89 Neb. 317; *In re Guardianship of Wessel,* 114 Neb. 704; *Keedick v. Brogan,* 116 Neb. 339.

The undisputed facts in this case show that the two deeds which it is sought to cancel were in the nature of gifts *inter vivos* made by the father, Posey Day, first to the two sons, Bert Day and Samuel N. Day; and, second, a further deed from the father to Samuel N. Day to convey the interest of Bert Day, which the father had inherited upon the death of Bert Day. No presumption of undue influence arises between the parties to those deeds from the mere fact of the relationship which existed between the parties to these instruments. *Gibson v. Hammang,* 63 Neb. 349; *Nelson v. Wickham,* 86 Neb. 46; *Little v. Curson,* 114 Neb. 752.

However, an entirely different situation arises under the facts as they develop from the testimony in this case. It appears that the father, Posey Day, went to live with his two sons about one year before his death. Perhaps it would be more accurate to say he went to live with his son Samuel N. Day and the latter's wife, as Bert Day was a single man already living with them. He first made a deed of all his real estate to Samuel and Bert, but reserving to himself the possession and use so long as he should live. This reservation was put in at the suggestion of the banker and notary public who prepared the instrument. Shortly after this deed was executed Bert Day died, and the father, Posey Day, then made a second deed to Samuel N. Day which conveyed the interest that he inherited from Bert. This deed contained no reservation entitling the grantor to the use and profits of the property during his lifetime. The evidence further shows that the grantor in these deeds had a living daughter and also children and grandchildren of a deceased daughter, all of whom were his legal heirs. At the time he made these deeds he was 79 or 80 years of age and considerably broken in health. He sought no independent

advice, the deeds in each case being prepared by persons employed by his son Sam. Under these circumstances the law requires that the court should closely scrutinize anything done by the donees to secure the deeds in question and the burden is on them to overcome the presumption that the gifts were secured through undue influence. *Gibson v. Hammang,* 63 Neb. 349; *In re Estate of Noren,* 119 Neb. 653.

Not all influences will avoid a deed. Influences which arise out of the affection, confidence and gratitude of a parent to a child and inspire a gift are natural and lawful influences and will not render such a gift voidable. It is otherwise, however, where influences have been such as to confuse the judgment and control the will of the donor. If the act done is not the act of the donor himself but is simply carrying out the will of another, then that is an undue and unlawful influence and will avoid acts done on account thereof. *Hacker v. Hoover,* 89 Neb. 317; *Gibson v. Hammang,* 63 Neb. 349; *Brugman v. Brugman,* 93 Neb. 408.

In this case there is almost a total lack of evidence showing any urging or importuning by either of the defendants to secure the execution of the deeds. There is one bit of evidence that does have a material bearing upon that question, to wit, that of Martha Petty, the sister of the deceased. She stated that her brother told her that he did not do anything and that Sam had it all arranged before he knew anything about it. However, to meet this the defendants have both testified that the donor never was asked to execute the deeds, but that he was the moving party in bringing about their execution. Many other witnesses who had been much about the home testified that they had never heard the matter discussed between son and father or between the daughter-in-law and father. Possibly this testimony might not have very much significance, as you would hardly expect such a question to be discussed in the presence of a third party.

There is another bit of testimony which is significant in its bearing upon the deeds being the voluntary and intelligent acts of Posey Day, to wit, the testimony of Samuel N. Day of finding a letter of E. W. Miller, the real estate man who was the agent who acted for the owner in the sale of the farm to Posey Day back in the year 1900. Samuel N. Day testified the father had told him before this land was bought that, if he and Bert would come to Nebraska and help him pay for and develop the farm, they could have it when he was through. That testimony would have little weight in itself because neither Samuel nor Bert at that time were of age and naturally would expect to come with the father to Nebraska. However, when it is coupled with the statements in the letter of this real estate agent which pretty conclusively shows that Posey Day had asked him to have the title made to Bert and Samuel then that is an entirely different question. The testimony of J. W. Linkhart, one of the owners of the real estate, as to whom Posey Day wanted the title to run, substantiates the statements in the letter and goes a long way to establish the contention of the defendants that it had been the purpose of the father during all these years, even before the farm was actually acquired, that the title should go to the two boys.

The testimony shows that Posey Day executed a will, the date of which is not clearly indicated. This will gave the real estate to the two sons, Bert and Samuel, but Posey Day told third parties that the girls were to receive their share, indicating that he had imposed an obligation upon the sons to pay the daughters something; but what the testator had in mind as to the amount of that share is not disclosed by the testimony. This will was destroyed after the testator went to live with Samuel; but whether by Posey Day or by another is not clear. The fact this will was made does not necessarily indicate that Posey Day had changed his apparently long-fixed determination to give the farm to the boys. It does indicate that at the time of making the will he intended

that the girls should have a share but not the title to any portion of the real estate. As already stated, there is little testimony showing any effort on the part of Samuel or his wife to secure deeds from Posey Day. There was plenty of opportunity for importunities along that line while Posey Day was living in their home. However, undue influence cannot be established by merely showing opportunity for its exercise. *In re Estate of Bainbridge,* 121 Neb. 695. In this case George Bainbridge from time to time had distributed a considerable portion of his property to his different children. Two or three years before his death he made a will devising all the property he then possessed to one daughter to the exclusion of the other children. He had earlier made a deed to the same effect. Two years prior to his death his health failed and the favorite daughter came into the home and took charge and cared for him. After his death the will was contested charging the testator with being incompetent and that the will was procured by undue influence. The court took the question of undue influence from the jury and submitted only the question of competency of the testator. The jury found the testator competent and the case was then taken to the supreme court. In reviewing the case in this court it is stated in the opinion: "We are unable to find any competent evidence that undue influence was exercised in procuring the making of the will. The most that may be said is that there was opportunity for such influence to be exercised; but mere opportunity is insufficient."

The question has been raised as to the competency of the different parties to this action to testify, for the reason that they have a direct legal interest in the result and are all representatives of the deceased. In our opinion none of them were competent to testify over proper objections. In some instances the testimony was received by the court and ruling reserved. In others the objections were overruled. Where ruling was reserved we do not find any record of one having been entered later in the

trial. Section 20-1202, Comp. St. 1929, clearly states that the parties to this suit were incompetent to testify, unless the adverse party had introduced witnesses who testified in regard to the transaction or conversation in question, and then the incompetent parties may be examined in regard to the facts testified to by such witnesses. The same incompetency applies to a spouse of a party who claims interest in real estate, under the present law in Nebraska. *McEntarffer v. Payne*, 107 Neb. 169. "One claiming as heir is the representative of a deceased person." *Brown v. Forbes*, 1 Neb. (Unof.) 888. However, the court will presume that, even though incompetent evidence was received, the trial court ignored all such evidence in making its findings and decree. The trial court having before it other witnesses who were competent, that is sufficient to sustain the judgment rendered when considered in connection with the testimony of competent witnesses giving evidence upon transactions and conversations concerning which the other side had offered testimony.

As already stated, the testimony in this case is exceedingly contradictory. Many apparently disinterested witnesses have given testimony that it is impossible to reconcile with that given by apparently equally credible witnesses called by the opposing side. It is fair to presume that most of these witnesses, especially those not related to any of the parties, were entirely honest in what they said. Some had seen Posey Day when he had a fainting spell or had lost his way on the streets of his home village, while others who are equally close were certain that they had seen nothing of that kind. Two doctors were called on each side. Three testified as experts only, having had no personal contact with Posey Day. The fourth, Dr. Lutton, had treated Posey Day for some two years of his life, to wit, from 1925 to 1927, but had not examined or treated him during the last two years before his death. While not certain of his figures, Dr. Lutton had taken Posey Day's blood pressure in 1925 and again in 1927, and he thought it had increased from

180 in 1925 to 200 in 1927. In his opinion this increase was due to the hardening of the arteries of his patient, arterio sclerosis, and the immediate cause of his death was apoplexy, which followed in the natural development of that disease. These medical men were asked hypothetical questions which assumed many details that were not essential to the question asked and that did not assist as a basis for the expression of an expert opinion. These hypothetical questions assumed facts which were sharply controverted and this materially lessened the force of the conclusions of the respective doctors. The testimony does not justify the conclusion that Posey Day, when he made the conveyances, was of unsound mind to the extent that he did not know what he was doing. This conclusion is amply justified when you couple with it the long-settled purpose of Posey Day to give the farm to the boys.

It is hardly necessary to say that an old man who has become more or less childish, whose mentality is materially weakened, is more or less susceptible to the influence of those with whom he is in close contact and in whom he places confidence. However, what has been said as to mental capacity to deed applies to the question of whether undue influence was exerted. A long-settled determination to deed to certain persons seems to justify the conclusion that when a deed is made to those persons the grantor is following out his own desires rather than yielding to the influence of others.

It should not be the purpose of the court to question the righteousness of a conveyance, but only to determine whether that is the voluntary act of the grantor. In other words, the court is concerned in knowing whether a conveyance is made by one possessed of a mind competent to act and that he has acted without any undue persuasion. The fact that the grantor has others who were so related to him that they were proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of that conveyance. The case of *Hacker v. Hoover*, 89 Neb. 317, is a similar case, and

the main question was: Did the favored son use the opportunity which he had to persuade his mother to deed property to him instead of dividing it among all of her children? The court in its opinion say: "The mere fact that she gave him the property is not sufficient to prove undue influence. She had the right to do that if she really desired that he should have it in preference to the others. The most that can be said for the evidence on the part of the plaintiffs is that it shows the defendant had a desire to have the property and he had an opportunity to use his influence in order to get it. There is no direct evidence, however, that he did so use his influence at any time, and the plaintiff's case in that respect rests upon circumstantial evidence alone. * * * Whether her action was right or wrong is not a question for us to decide. The court is not the keeper of her conscience. The question for us to determine is whether she acted freely and voluntarily in the matter. If she did, her action was final and is binding upon the court, no matter what we may think of its justice or equity."

This is a case in equity, and under the statutes this court is required to try the issues *de novo* without reference to the findings of the trial court. As has been stated already, the vital issues have been contested at every point and the conflicting testimony cannot be entirely reconciled. Under these conditions this court is justified in giving weight to the conclusions reached on these controverted issues by the trial judge who observed the witnesses and their manner of testifying. *Shafer v. Beatrice State Bank,* 99 Neb. 317; *McEntarffer v. Payne,* 107 Neb. 169; *Gaunt v. Smith,* 103 Neb. 506; *Maryland Casualty Co. v. Geary,* 123 Neb. 851.

While the testimony presented on the controverted questions of fact in this case is difficult of reconciliation, we believe that it establishes a desire of long standing to transfer the real estate to his sons and, upon the death of one, to the survivor. Under these circumstances we would not feel justified in coming to a different conclusion

than did the trial judge who saw the witnesses and heard them testify. The judgment of the district court is therefore

AFFIRMED.

FLOYD MONASMITH, APPELLEE, V. COSDEN OIL COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 4, 1933. No. 28327.

1. **Negligence**: GROSS NEGLIGENCE. Leaving an unlighted vehicle on highway, on dark night, without any warning, constitutes gross negligence, within the meaning of the comparative negligence statute.
2. **Trial**: INSTRUCTIONS. Where one testifies to an estimate of distance, and at the same time testifies to other facts from which an inference may fairly be drawn that the estimate is inaccurate, it is not proper for the court, in an instruction, to assume that the estimated distance is correct.
3. **Negligence**: QUESTION FOR JURY. Where an object on a highway in front of one driving a motor car thereon at night is so nearly the color of the road or highway that it is difficult to distinguish it therefrom until quite close thereto, it cannot be said, as a matter of law, that such person was guilty of more than slight negligence in his failure to see the object in time to stop his car or to prevent running into it. Under such circumstances, a question of fact is presented for determination by the jury.
4. **Automobiles**: NEGLIGENCE. It is not negligence, as a matter of law, for one to drive a motor car at night upon a good highway at the rate of 30 to 35 miles an hour, when his car is equipped with adequate brakes and lights.
5. **Trial**: INSTRUCTIONS. It is not error for the trial court to refuse to define the words "gross" and "slight" in an instruction, since they are words of common use, readily understood by people of ordinary intelligence.
6. ———: REFUSAL OF INSTRUCTION. No error is committed in refusing to give a requested instruction which is, in substance, similar to one given by the court on its own motion.
7. **Damages**. The record does not show that the verdict is excessive.

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

Rosewater, Mecham, Burton, Hasselquist & Chew, for appellants.

Prince & Prince and *Louis W. Heyde, contra.*

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

GOOD, J.

This is a personal injury action arising out of an automobile accident. Plaintiff recovered judgment, and defendants have appealed.

Numerous errors are assigned for reversal. They may be properly considered under three general headings: (1) Is the verdict supported by sufficient evidence? (2) Did the court err in refusing to give requested instructions? (3) Is the verdict excessive?

There is evidence tending to prove the following pertinent facts: Defendant Crawford is an employee of his codefendant Cosden Oil Company, and on the night of July 11, 1930, in the conduct of his master's business, he was traveling east on the Lincoln Highway. A mile or two west of Shelton, Crawford had tire trouble and stopped his car, without lights, on the south part of the traveled highway, which was 36 feet wide at that place. Crawford's car was a coupé, and at the time of the collision the lid of the rear compartment was raised, so that it covered the rear window of the car. In color the car was a faded light green, and was dusty and nearly the color of the graveled road. The night was dark. Plaintiff in a car was traveling east on the same highway, and as he approached the vicinity of Crawford's car he met a truck, coming from the opposite direction, with only one headlight. Being unable to tell whether the lighted lamp was on the right or left side of the truck, plaintiff drove to the extreme right of the road, to avoid collision with the truck, and immediately thereafter he discovered Crawford's car in front of him. Plaintiff was traveling at the rate of from 30 to 35 miles an hour. He

applied his brakes and turned his car to the left, but was unable to avoid collision with Crawford's car, and sustained the injuries of which he complains.

Plaintiff testified that he did not know how far he was from the Crawford car when he first discovered it. Being further pressed to approximate the distance, he answered: "I should judge seventy feet." Immediately thereafter, through his counsel, he asked permission to explain or correct his answer. Over objection by defendants, his request was denied. The lights and brakes on plaintiff's car were in good condition. The headlights would throw their rays on the road for a distance of 90 to 100 feet when set for ordinary driving, and 50 feet when the lights were turned to courtesy position. Whether plaintiff had turned his lights to the courtesy position at the time of meeting the truck is not disclosed. The evidence tends to show that plaintiff's car could have been stopped by the application of brakes within the distance of 50 feet when going at the rate of from 30 to 35 miles an hour.

Leaving an unlighted vehicle on highway, on dark night, without any warning, constitutes gross negligence, within the comparative negligence statute. *Giles v. Welsh,* 122 Neb. 164. The question then arises: Do the facts disclosed by the record show that plaintiff was guilty of more than slight negligence as a matter of law?

Defendants argue that it must be taken as an accepted fact that plaintiff discovered the Crawford car when he was 70 feet therefrom, and that, as his car could be stopped within the distance of 50 feet when traveling at the rate of from 30 to 35 miles an hour, plaintiff was guilty of more than slight negligence in failing to bring his car to a stop, or turning it sufficiently to the left to pass the Crawford car without collision. Whether plaintiff discovered the Crawford car when he was 70 feet distant from it we think is in doubt. He first testified that he did not know the distance, and his later answer, that he judged it to be 70 feet, was, of necessity, a mere

estimate or guess. As opposed to this guess, the evidence tends to show that his car could be stopped within the distance of 50 feet by application of the brakes, and it further shows that the brakes were applied, but that the car did not stop within the distance, from which the jury might infer that plaintiff was closer than 70 feet to the Crawford car when it was discovered; and, further, that he attempted to turn to the left to avoid the Crawford car, but was unable to turn sufficiently to avoid a collision, which might also justify the inference that plaintiff was nearer than 70 feet to the Crawford car when first seen by plaintiff.

Defendants contend that plaintiff was guilty of more than slight negligence in driving at such a rate of speed that he could not stop his car within the distance that the rays of his head lamps lighted the roadway in front of him. It may be conceded that the contention states a general rule. However, we think the precise question before us is: Under the conditions disclosed, was the plaintiff guilty of more than slight negligence in failing to see the Crawford car in time to either stop his own car or turn sufficiently to the left to avoid a collision?

Where an object on a highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish it until quite close, it cannot be said, as a matter of law, that such person was guilty of more than slight negligence in his failure to see it in time to stop his car or to prevent running against it. Under such circumstances, it presents a question of fact, to be determined by the jury. *Giles v. Welsh, supra; Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585; *Day v. Metropolitan Utilities District,* 115 Neb. 711; *Pratt v. Western Bridge & Construction Co.,* 116 Neb. 553; *Cromwell v. Fillmore County,* 122 Neb. 114. It cannot be said, as a matter of law, that it is negligence for one to drive at night upon a good highway at the rate of from 30 to 35 miles an hour, when his brakes and lights are in good condition.

From every point of view, we are clearly of the opinion that the evidence was such as to require the submission of the question of contributory negligence to the jury, and its finding thereon is binding upon this court. The court did not err in refusing to direct verdict for defendants, or in overruling their request for judgment notwithstanding the verdict. The evidence is sufficient to warrant the findings of the jury on the subject of negligence and contributory negligence.

Defendants complain of the refusal of the trial court to give the whole of a requested instruction upon the subject of comparative negligence. The complaint relates to the fact that the court did not give the requested definition of slight negligence and gross negligence. The court did, however, properly define negligence, but did not undertake to define the terms "gross" and "slight," and we think it was not incumbent upon it so to do. The words "slight" and "gross" are words of common use which are understood by every one of ordinary intelligence. An attempt to define these words would have been superfluous. Any one of common sense knows that slight negligence actually means small or little negligence, and that gross negligence means just what it indicates, gross or great negligence. No error was committed in the refusal to define words of ordinary meaning which are in common, every-day use.

Complaint is also made of the failure of the court to give the sixth instruction requested by defendants. The same subject-matter was fully contained in another instruction requested by defendants and which was given by the court. There was no error in refusing to give two instructions covering the same question.

Finally, it is contended that the verdict is excessive. The amount of the verdict was $4,250. The evidence tends to show that plaintiff suffered a slight contusion of the brain, a cut on his chin, which left a scar that will last during his lifetime; that two ribs were fractured; that one of his ankles was sprained, and that one

of the semilunar cartilages in his right knee was fractured; that as a result of this fracture plaintiff, after 16 months have elapsed between the time of the injury and the trial in the court below, is still unable to use the knee without great pain, and that, unless great care is exercised, the knee will not sustain him, in consequence of which he frequently falls down; that this condition is permanent unless plaintiff submits to a surgical operation which may or may not remedy the defect and may result in leaving him with a stiff knee. There are other injuries which need not be mentioned. The evidence discloses that plaintiff was totally disabled from performing his duties for a period of several months. Under the facts as shown by the record, we think that it cannot be said that plaintiff's recovery was excessive.

No error prejudicial to defendants has been found. Judgment

AFFIRMED.

GEORGE EDWARD MACDONALD V. STATE OF NEBRASKA.

FILED FEBRUARY 10, 1933. No. 28189.

1. **Indictment and Information.** An indictment or information need not use the exact words of the statute, if words equivalent in meaning are employed in charging the commission of an offense.
2. **False Pretenses: INFORMATION.** In an information for obtaining money by false pretenses, a charge that the defendant received a certain sum of money is equivalent to a charge that he obtained it.
3. **Indictment and Information.** It is better pleading to use, in an information or indictment, the words of the statute, rather than other words chosen by the pleader.
4. *Anthony v. State*, 109 Neb. 608, distinguished and approved.
5. **False Pretenses: INFORMATION.** An information for obtaining money by false pretenses under section 28-1207, Comp. St. 1929, need not allege specifically that the complainant suffered actual loss, as that is not an element of the offense.
6. **Criminal Law: FORMER JEOPARDY.** Defendant had previously been put upon trial under a defective information, attempting to charge the same offense, a demurrer to which the court sus-

tained and thereupon dismissed the jury. *Held*, that in a trial under a valid information this did not constitute former jeopardy.

ERROR to the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

A. W. Jefferis, for plaintiff in error.

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

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

GOSS, C. J.

Defendant, George Edward MacDonald, was convicted of the crime of obtaining money by false pretenses. His principal contention is that the information upon which he was tried failed to charge an offense under the statute, section 28-1207, Comp. St. 1929. This was raised by demurrer to the information and was preserved throughout the record. The point stated in the language of the demurrer is:

"Because the information fails to charge explicitly and positively that the defendant obtained any sum of money as a result of the alleged false pretenses pleaded with the intent to cheat and defraud Mary Gercke."

The information satisfactorily charges the intent to cheat and defraud Mary Gercke, sets out certain representations as to the Platinum Metals Corporation, alleges that the representations were false, and then charges in these words that to which the demurrer is directed:

"That relying upon said false pretenses and false representations of the said George Edward MacDonald, the said Mary Gercke did then and there give to the said George Edward MacDonald and the said George Edward MacDonald did then and there receive from the said Mary Gercke the sum of $2,900, of the value of $2,900, the said Mary Gercke thereupon receiving from the said George Edward MacDonald two certificates of stock of the Plat-

inum Metals Corporation, a Wyoming corporation, for a total of five thousand shares of the capital stock of said corporation."

The statute begins: "Whoever by false pretense or pretenses shall obtain from any other person," etc. Defendant's argument is that the word "receive," used in the information, is not the equivalent of the word "obtain," used in the statute. It is established that, in charging the commission of an offense in an indictment or information, it is not necessary that the exact words of the statute be used, if words of equivalent meaning are employed. *Whitman v. State,* 17 Neb. 224; *Hodgkins v. State,* 36 Neb. 160; *Peterson v. State,* 64 Neb. 875; *Smith v. State,* 72 Neb. 345; *Hase v. State,* 74 Neb. 493; *Clark v. State,* 102 Neb. 728. Under an indictment that alleged the defendant "induced said county" to pay him a certain sum, it was held that the words in their ordinary acceptation mean the same as an allegation that the defendant "obtained" from the county that sum. *State v. Brown,* 143 Wis. 405. Even an information charging that defendant induced one to part with a stock of goods in exchange for a note and mortgage satisfies the language of the statute making it an offense to "obtain" such property. *State v. Underwood,* 17 Okla. Cr. Rep. 443. In *West v. State,* 63 Neb. 257, the information recited that the complaining witness, relying upon the false representations, "sold and delivered" to the defendant certain horses and did "accept" from defendant a certain note. The substance of this part of the information, like that under consideration, did not further explicitly recite that the defendant obtained the property by means or as a result of the representations, or that the complaining witness was caused or induced thereby to part with his property. It was held that the information charged sufficient facts to constitute the crime of obtaining property by means of false pretenses.

On this point now under consideration, the chief reliance of defendant is in *Anthony v. State,* 109 Neb. 608.

There it was held that in an indictment charging defendant with obtaining a note by false pretenses the causal connection between the pretenses and obtaining the note must be positively stated. The part of the indictment corresponding to that in the instant or *MacDonald* case recites that, relying upon the representations, she (complainant) "did purchase, take and receive" the shares of stock, and "did then and there execute and deliver to" defendant her negotiable promissory note in the sum and value of $6,300. This does not charge that the defendant received or accepted the note. In the *MacDonald* case it was expressly alleged that the complaining witness not only gave but that the defendant received from her the sum of $2,900. That is the vital difference between the two cases. There was lacking in the *Anthony* case the positive and explicit statement that defendant received the note. On the same principle this court has held in a civil case, involving an oral contract for corn, that a delivery alone by the vendor is not sufficient to take the contract out of the statute of frauds, but there must also be a receipt and acceptance by the vendee of the thing sold, to have that effect. *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339. As the Anthony indictment did not charge that Anthony received the note, that element of causal connection between the false pretenses and the obtaining of the note was missing. The decision reversing the conviction there was right. It does not support appellant's point here.

Defendant claims the information was defective because it did not allege any completed fraud resulting in loss to Mary Gercke. The statute did not call for such an element. The rule is stated in 25 C. J. 635: "An indictment for obtaining property by false pretenses need not allege specifically that prosecutor suffered loss by reason of the false pretense, except when, as under a few statutes, actual loss is an element of the offense."

We think the information was sufficient, though we would recommend to pleaders the use of the words of the

statute, rather than those of the pleader's choice. This will avoid the danger lurking in a decision as to what are equivalent words.

Defendant contends that his plea in bar alleging former jeopardy should have been sustained. Defendant had been charged previously on account of the same offense. Defendant demurred to that information and the court overruled his demurrer. After the trial had been duly entered upon before a jury, the county attorney asked permission to amend the information, whereupon the court reversed his former ruling, sustained defendant's demurrer to the defective information, and dismissed the jury without a verdict.

In *State v. Priebnow,* 16 Neb. 131, after a jury was impaneled, defendant's objection to any testimony was sustained for the reason the indictment did not charge a crime. Held, that did not constitute an acquittal which could be pleaded as a bar to a subsequent indictment. For other cases, see *Steinkuhler v. State,* 77 Neb. 331; *Roberts v. State,* 82 Neb. 651; *McKay v. State,* 90 Neb. 63; *Gragg v. State,* 112 Neb. 732; 16 C. J. 246. We think the plea of former jeopardy was properly overruled.

There are other assignments, but we think they are fully disposed of by the observations already made. The judgment of the district court is

AFFIRMED.

ERNEST TEGLER, ADMINISTRATOR, APPELLANT, V. FARMERS UNION GAS & OIL COMPANY, APPELLEE.

FILED FEBRUARY 10, 1933. No. 28312.

1. Action in Tort: PRIVITY OF CONTRACT. Generally, no cause of action in tort can arise from the breach of a duty existing by virtue of contract, except as between the parties thereto.
2. ———: ———. An exception to the general rule, that privity of contract is essential to right of action for a tort, may occur when a third party is injured by reason of a failure in the duty of inspection and of the use of ordinary care on the part of a manufacturer or dealer to see that a manufactured article

is not put upon the market in a defective condition, where such condition makes the article imminently dangerous to persons who will use it.

3. **Evidence.** There is a presumption that an official oil inspector did his duty and that kerosene inspected by him comes up to the official test.
4. **Affirmance.** Assigned errors considered, and *held* that the judgment for defendant should be affirmed.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Benjamin J. Cunningham, for appellant.

Cleary, Suhr & Davis, contra.

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

GOSS, C. J.

This is an action for damages for alleged negligence causing the death of Juanita Tegler, four year old daughter of Ernest Tegler and Amanda Tegler. The suit is brought by Ernest Tegler, as administrator, against defendant corporation, a dealer engaged in buying and selling gasoline, kerosene and other oils. At the close of evidence offered by plaintiff and defendant the court directed a verdict for defendant.

The death of the child was caused by burning as a result of an explosion while the mother was filling an incubator lamp. On Saturday, April 19, 1930, the father had purchased three gallons of kerosene from Donald Miquez at Ovina, about two miles away, who ran a store and had a gasoline pump and a kerosene pump outside. Tegler himself got it at the kerosene pump at the instance of Miquez, who was busy in his store. He took it home in his can used for that purpose. On Sunday, without mishap, the mother filled from this can three lamps used to furnish heat for an incubator. This was done in a small room called the incubator room, next to the kitchen. Two of the lamps held hardly a quart each, but the third held about a half gallon. The lamps furnished heat to the incubator Sunday night and Monday.

On Monday afternoon about 5 the mother undertook to fill the two smaller lamps; the one of larger capacity did not need it. She set all three lamps in a row on the top of the incubator, which was 36 inches long. She left the large lamp burning. The child was close beside the mother, who had filled one of the smaller lamps and was filling the other, when, as the mother testified, she first "noticed a fire in the funnel," the room was filled with smoke and fire and Juanita's clothes caught fire. She was taken to a hospital and died the next day. The three-gallon can was wrecked, but the incubator lamps remained intact with kerosene still in them.

Defendant maintained storage tanks near the Burlington tracks at Grand Island, including one storage tank for kerosene with a capacity of about 12,000 gallons. It furnished petroleum products, including kerosene, delivered by truck, to Miquez, at Ovina, a few miles away, and to other retail dealers. Plaintiff claims Miquez was defendant's agent, but fails to point out the specific evidence from which this might be inferred. On the contrary, the evidence indicates that Miquez was a customer only, who bought his kerosene from defendant. It is shown by the evidence that all the kerosene bought by Miquez came from defendant's said tank at Grand Island.

All kerosene purchased by defendant from September 16, 1929, to April 21, 1930, the date of the accident, was traced. In that period defendant received from the refiner and unloaded into its kerosene tank four tank cars of kerosene, each car containing more than 8,000 gallons. This was all bought from Champlin Refining Company of Enid, Oklahoma, as kerosene and was so billed. The statute (Comp. St. 1929, secs. 66-301 to 66-317) puts all petroleum products as to tests and inspection, offered for sale in this state, under the state department of agriculture. Section 66-304, Comp. St. 1929, requires that illuminating oils offered for sale "shall not give a flash test below one-hundred twelve degrees Fahrenheit when tested by the oil tester known as the Foster apparatus."

This is a tort action. "It is a general rule that no cause of action in tort can arise from the breach of a duty existing by virtue of contract, except as between the parties thereto. Privity of contract is essential to the right of action. 20 R. C. L. 49, sec. 44." 42 A. L. R. 1249, stating the foregoing rule and the reasons therefor in the annotation, and suggesting a rule affording a basis for liability, not inconsistent with the present trend of the courts to liberalize rules of liability for negligent acts which result in injuries to third parties. Briefly sketched, that enlarged rule suggests a duty of inspection and the use of ordinary care to see that a manufactured article, which, if defective, is imminently dangerous to persons the manufacturer knows will come in contact therewith, is not put upon the market in that condition. There was not privity of contract or of dealing between the parties hereto, but plaintiff has brought himself by his pleadings under the liberalized rule above suggested that, if the kerosene was actually inherently or imminently dangerous by reason of its content, then defendant would be liable for negligence to the plaintiff, if such negligence was the proximate cause of the injury.

Plaintiff alleged that the flash test of the kerosene in question was below the requirement of statute, that the product was subject to explosion, was highly dangerous to be so used, and should not have been sold to plaintiff to be used in kerosene lamps; that defendant and its agents negligently sold plaintiff said kerosene, knowing it did not comply with said requirements, or that defendant and its agents could have known such fact by the use of ordinary diligence, but they failed to warn plaintiff the kerosene was highly explosive and dangerous and to inform plaintiff it did not comply with the statutory requirements.

The evidence shows that these cars of kerosene when received by defendant were all duly inspected and tested by the department of agriculture and all showed a flash test of 120 or more degrees. Each test was ended as

soon as it reached 120 without waiting to complete the test for higher temperatures. Defendant was furnished with official certificates of these tests. It had a right to rely upon them. There is a presumption that an official oil inspector did his duty and that oil inspected by him comes up to the test. *Pfarr v. Standard Oil Co.*, 165 Ia. 657.

The next day after the accident to Juanita Tegler a sample was taken from the Miquez pump at Ovina. It showed a flash test of 140 degrees. All flash tests mentioned in this opinion, except those taken when defendant received the original consignments, were taken after the accident.

Besides the incubator lamps, the Teglers had four lamps used in other parts of the home for lighting purposes. One was a round burner lamp using kerosene and the others were lamps using gasoline. The kerosene lighting lamp was used only occasionally when they ran short of gasoline. Mrs. Tegler testified she filled this kerosene lamp Sunday night from the kerosene can and the family used it for lighting purposes as some of the gasoline lamps were out of order. She noticed the lamp "kept running high and had to turn it down several times." A week after the accident a sample was procured from a Tegler house lamp. It was tested officially and showed a flash test of 88 degrees. Another sample taken about a month after the accident from a can containing kerosene, testified to as purchased from Miquez by another customer, showed an official flash test of 110 degrees. The evidence tracing and identifying these samples as having been kept free from mixture is not satisfying.

The explosion happened on Monday. Mr. Tegler admitted that he continued to run the incubators for three or four days, using the same three lamps. He used up the kerosene left in the lamps at the time of the explosion, went to Ovina and secured one gallon out of the Miquez tank on Tuesday, two or three days later obtained four gallons from the same source, and continued thereafter

to get and use from the Miquez tank kerosene for his incubator lamps and for his house lamps. No lack of quality in this kerosene appeared in evidence.

We not only fail to find from the evidence that Miquez was an agent for defendant, but we fail to find therefrom that any officer, agent or employee of the defendant knew, or had any notice whatever to put him upon inquiry, of any defect in the quality of the kerosene purchased, sold and delivered by defendant. Defendant did what the statute required in procuring official tests and certificates thereof when it received and stored the kerosene. Until there is at least some evidence that the kerosene, while in the possession and control of defendant, became more volatile or contaminated so as to be below the statutory flash test, can it be said that defendant failed to exercise such a high degree of care as an ordinarily prudent person would have exercised, or failed to do anything that an ordinarily prudent person would have done to prevent the explosion and consequent damages to plaintiff's intestate?

Plaintiff claims, as a matter of law, that defendant as a dealer is responsible to the ultimate consumer for putting on the market an inherently dangerous article without due warning. This exception to the general rule limiting recovery to one in privity, which we have heretofore stated, is supported by cases cited by plaintiff in which the manufacturer or the dealer knew or should clearly have known of the danger and failed to give warning. While plaintiff pleaded that he purchased the kerosene from defendant, and the proofs show that it was purchased from Miquez, who was doing business on his own account, yet we are disposed to consider the petition, under the course of the trial, as raising the issue of liability of defendant to third parties. There is no inherent danger of explosion of kerosene, having a flash test of 120 degrees plus, when handled with ordinary care for the well-known use for which the product is intended. The proofs were insufficient to show any knowledge on the

part of defendant that the kerosene was below legal test while in its control or to show any notice that it was claimed, at any time before the accident, to be so. Therefore the rule is not applicable.

Errors were assigned relating to evidence, but they were not argued. We deem them abandoned.

The judgment of the district court is

AFFIRMED.

A. E. ALLYN, APPELLEE, V. JOSEPH DREHER ET AL., APPELLEES: HARRY E. BOWMAN, RECEIVER, APPELLANT.

FILED FEBRUARY 10, 1933. No. 28607.

1. Mortgages: VOLUNTARY PAYMENTS. Payments of matured instalments of interest by a mortgagee to prior lienors to protect subordinate liens are not necessarily voluntary in the sense that they discharge liabilities of the debtor.
2. ———: SUBROGATION. The holder of a subordinate mortgage may pay a superior lien to protect his own lien and be subrogated to the rights of the prior incumbrancer to the extent of the payment, where equity requires such relief.
3. ———: ———. In equity, payment by a subordinate mortgagee, to the holder of a prior mortgage, of the amount due on an interest note thereby secured and a surrender to the payer of the note unindorsed and uncanceled do not prove an absolute sale and transfer of the note, with the right of subrogation, where circumstances establish the contrary.

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

Stiner & Boslaugh and *Edmund P. Nuss*, for appellant.

Harry F. Russell, contra.

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

ROSE, J.

This is a suit in equity involving the foreclosure of three mortgages on a quarter section of land in Adams

county and requiring a ruling on a claim by the holder of the third mortgage for a lien ranking with the first mortgage by virtue of interest payments thereon. Mortgagor had no defense and did not appear. The controlling facts pleaded and shown by the evidence are not in dispute.

October 1, 1922, mortgagor executed in favor of Clarke-Buchanan Company, hereinafter called "mortgagee," three mortgages, the first for $6,500, the second for $1,000, and the third for $325. The liens attached separately at different times and remained of record in the order named. The first mortgage secured a bond for $6,500, due December 1, 1927, and 10 interest notes payable semiannually, each for $162.50. The 6,500-dollar bond and interest notes were assigned by mortgagee to A. E. Allyn, plaintiff, without recourse, May 1, 1923. An agreement extending the time for payment of the principal to December 1, 1932, and ten new notes for semiannual payments of interest, each for $162.50, were dated November 1, 1927, and executed by mortgagor, who had paid the interest to June 1, 1927, but thereafter paid neither principal nor interest. Mortgagee paid to plaintiff the interest on the notes which mortgagor failed to pay, eight in all, which matured prior to December 1, 1931, but did not pay the interest then due or make any subsequent payment of interest or principal. These eight interest notes for $162.50 each were surrendered by plaintiff to mortgagee uncanceled and unindorsed.

In an answer to the petition of plaintiff for a foreclosure of the first mortgage, mortgagee pleaded that it paid the interest notes to plaintiff to protect the lien of its third mortgage; that to the extent of such payments of interest it was entitled to be subrogated to the rights of plaintiff and to a lien equal in rank to the lien of the first mortgage.

The second mortgage for $1,000 was assigned by the mortgagee to Hastings College with payment guaranteed. Later the time for payment of the principal was extended

to December 1, 1932. On this debt mortgagee paid Hastings College interest in the sum of $220, which, with interest on the payments so made, amounted to $286.22, for which a lien was sought. The third mortgage was retained by mortgagee. In the foreclosure suit the interests of each mortgage holder were pleaded, with a prayer for equitable relief. In the litigation Harry E. Bowman represented mortgagee as receiver.

Upon a trial of the issues the district court ordered foreclosure; established the liens in the order stated; directed distribution of the proceeds of sale accordingly; found that mortgagee paid plaintiff interest voluntarily in the sum of $1,691.90, including interest on the interest notes from maturity, but denied a lien for the interest so paid; held that mortgagee paid Hastings College interest voluntarily in the sum of $286.22, including interest on the payments of interest, but denied a lien for the interest so paid. Mortgagee appealed.

The ruling that interest payments by mortgagee to plaintiff and to Hastings College were voluntarily made is challenged as erroneous and inequitable. In this respect error is obvious. The contract to pay interest was the obligation of mortgagor, but after June 1, 1927, he did not pay the interest as the instalments fell due. His defaults, when made, except for the payments by mortgagee, would then have entitled plaintiff to a foreclosure. To protect the lien of the third mortgage, mortgagee made payments of interest on prior mortgages, but thereby did not intend to discharge the debts or existing liens for unpaid interest as to mortgagor and did not give him credit for such payments or surrender to him any paper evidencing payment of any part of his indebtedness. Self-interest prompted mortgagee to protect its subordinate lien by paying interest and preventing foreclosure of prior liens. Under the circumstances the payments of matured instalments of interest by mortgagee to prior lienors were not voluntary in the sense that they discharged liabilities of the debtor. It is well-settled law

that the holder of a subordinate mortgage may pay a superior lien to protect his own lien and be subrogated to the rights of the prior incumbrancer to the extent of the payment, where equity requires such relief. *Seieroe v. Homan,* 50 Neb. 601; *Skinkle v. Huffman,* 52 Neb. 20; *United States Trust Co. v. Miller,* 116 Neb. 25; *First State Bank v. Niklasson,* 116 Neb. 713.

The principal question presented by the appeal, however, is raised by the controverted issue that mortgagee is entitled to a lien equal in rank to the lien of the first mortgage for the amount of the eight payments of interest to plaintiff. The affirmative view of this proposition seems to be that plaintiff sold to mortgagee and transferred to it by delivery eight interest notes, and consequently, to that extent, plaintiff lost and mortgagee acquired by right of subrogation the first mortgage lien. If plaintiff lost and mortgagee acquired a portion of the first lien, the transaction must be justified in equity. *Seieroe v. Homan,* 50 Neb. 601. The solution of the problem depends upon the facts and circumstances and the intention of the parties. An absolute sale or assignment of interest notes secured by mortgage is a contract upon which the minds of the parties meet. In the present instance there was no writing or direct oral testimony evidencing a sale or assignment of the interest notes. In equity, payment by a subordinate mortgagee, to the holder of a prior mortgage, of the amount due on an interest note thereby secured and a surrender to the payer of the note unindorsed and uncanceled do not prove an absolute sale and transfer of the note, with the right of subrogation, where circumstances establish the contrary. When the mortgagor, maker of the interest notes, made default in the payment of interest, plaintiff was not acquainted with that fact, but it was known to mortgagee. When an instalment of interest matured, mortgagee mailed its check to plaintiff for the amount due without any comment as to the nature of the transaction. Upon receipt of a check for interest, plaintiff sent the matured note uncanceled

and unindorsed to mortgagee without any statement indicating his purpose in doing so. This was the course pursued in regard to each of the eight interest notes. Plaintiff did not know that the interest which he received came directly from mortgagee, and not from mortgagor, until the former went into the hands of a receiver. He had purchased the 6,500-dollar bond and the interest notes on recommendation of mortgagee, the payee named therein. He did not agree to make mortgagee his agent, but he sent the interest notes to it because the checks to pay them came from that source. The eight notes bore 10 per cent. interest from maturity. If plaintiff sold them and transferred them by absolute assignment, thereby parting with a proportionate share of his first lien, the incumbrance of the first mortgage increased as 10 per cent. interest on the matured notes accumulated. Acceptance of interest with that result would divide the security for the principal bond to the disadvantage of plaintiff. In ordinary business transactions payment and acceptance of interest as the instalments mature do not increase the debt. It is fair to infer that plaintiff, by cashing the checks for interest and by surrendering the notes therefor without comment, did not intend to part with a portion of his security for the unpaid principal. Mortgagee's payments of interest without disclosing any default of mortgagor prevented plaintiff from then foreclosing his mortgage pursuant to its terms. The proper inference from the circumstances shown without dispute is that in equity mortgagee did not acquire a lien equal in rank to the first mortgage or the right of subrogation pleaded.

From the conclusion reached, however, it does not follow that mortgagee, as against mortgagor, is not entitled to a lien on the latter's land. As already explained, the instalments of interest were debts of mortgagor which he failed to pay and which mortgagee involuntarily paid to protect subordinate liens.

The judgment of the district court is modified to allow the receiver of the Clarke-Buchanan Company, mortgagee, a lien for $1,691.90, and a lien for $286.22 subordinate to the first, second and third mortgages, and is thus affirmed.

AFFIRMED AS MODIFIED.

ALBERT S. MONTGOMERY, APPELLEE, V. MILLDALE FARM & LIVE STOCK IMPROVEMENT COMPANY, LTD., ET AL., APPELLANTS.

FILED FEBRUARY 10, 1933. No. 28661.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: CONSTRUCTION. The workmen's compensation law is liberally construed to give effect to its purposes.
2. ———: ———: TIME FOR FILING CLAIM: LATENT INJURY. Proceeding to recover workmen's compensation for a latent progressive permanent injury *held* not barred, where the claim therefor was made within six months from the time the real nature of the injury was first discovered by X-rays, the employee having been previously advised by physicians that the injury was a temporary muscular strain.
3. **Evidence.** Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue.

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

Story & Thomas, for appellants.

J. C. Alexander and *Deutsch & Stevens, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101, 48-161. Albert S. Montgomery, employee, is plaintiff. The Milldale Farm & Live Stock Improvement Company, employer, and the Maryland Casualty Company, carrier of compensation insurance, are defendants.

While plaintiff was engaged in the duties of his employment, mowing hay on a farm operated by his employer in Logan county, he was thrown from a tractor August 23, 1930. He claimed that in falling he struck the rim of the tractor seat with his back and that he thus sustained compensable injuries causing at first muscular spasms and later traumatic arthritis in the sacroiliac area. He applied to the compensation commissioner for relief and recovered an award of $15 a week for 300 weeks for a temporary total disability. Defendants appealed to the district court, where plaintiff was allowed $15 a week for 300 weeks and thereafter $12 a week during his life; also attorney fees of $300, and expenses of physicians as follows: W. W. Graham, $42; Orr & Thompson, $15; Roscoe L. Smith, $25; H. C. Crabtree, $37; Campbell Clinic, $37.50. From the judgment of the district court defendants appealed to the supreme court.

It is earnestly argued by defendants that the proceeding was barred on the ground that plaintiff did not make a claim for compensation within six months after the occurrence of the injury. The statutory provision invoked by defendants follows:

"No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." Comp. St. 1929, sec. 48-133.

Following is a chronology of events: August 23, 1930, accidental injury of employee and notice of accident to employer; May 25, 1931, employee first learned his employer carried compensation insurance; June 4, 1931, notice of claim for compensation given; August 12, 1931, permanent disability of employee first discovered by means of X-rays at Campbell Clinic, Norfolk; June 3, 1932, employee recovered award by compensation commissioner; October 11, 1932, judgment of district court in favor of employee.

Defendants insist that the statute barring a claim for workmen's compensation, if not made within six months, is mandatory and jurisdictional; that the time begins to run when an accident causes a compensable disability; that the compensable disability occurred on the date of the accident, August 23, 1930; that the claim for compensation was not made until June 4, 1931, a period of more than six months; that consequently the proceeding for compensation is barred.

On the other hand, the employee contends that the accidental injury was latent and progressive; that its true nature was not discoverable at first and was not known until revealed by X-rays August 12, 1931; that the claim for compensation was made in time June 4, 1931, within the meaning of the rule that the proceeding may be commenced within six months from the time the employee acquires knowledge of a compensable disability, as held in *Flesch v. Phillips Petroleum Co., ante,* p. 1, and cases cited therein.

In support of the defense that the proceeding was barred, defendants refer to testimony of the physician first consulted by the employee three days after the accident and assert that it shows the employee had definite knowledge in October, 1930, of the seriousness of the injury and that the claim for compensation was not made within six months from that time. It is true that, for the purpose of urging an X-ray examination, owing to the uncertainty of a diagnosis without it, the employee was warned of the danger of bone injuries, but he was not told his own were of that nature. On the contrary, he was advised that the trouble was muscular and confined to soft tissues and that he would soon recover. Two other physicians who treated him later gave similar advice. He was diligent in continuously seeking medical advice and treatment. There was testimony tending to prove that, before disease of a bone develops, X-rays may not disclose injuries to the periosteum or to other soft tissues, though ultimately resulting in incurable arthritis

and permanent total disability. The injury was latent and progressive. The evidence shows without conflict that employee did not know that bones of his back were diseased until that fact was revealed by X-rays August 12, 1931. The true import of the evidence is that, while he was totally disabled from the start, he relied in good faith upon the advice of his physicians that his injuries were muscular and temporary, but that he nevertheless pursued diligently his efforts to learn the true nature of his infirmity. The delay in making a claim during this period, while he had reason to believe his injury was temporary and not of a serious nature, did not bar the proceeding for compensation until six months from the time he discovered through scientific examination by his physician by means of X-rays that his disability was total and permanent, the workmen's compensation law being liberally construed to give effect to its purposes, as it should be. In this view of the facts and the law, the compensation commissioner had jurisdiction and the proceeding was not barred for want of a claim within six months from the date of the accident. *Flesch v. Phillips Petroleum Co., ante,* p. 1, and cases cited in opinion.

Defendants argue further that a preponderance of the evidence requires a finding that the employee's disability resulted solely from infectious arthritis which existed before the accident. On this issue the testimony of physicians is conflicting. Total permanent disability as a result of arthritis was recognized by the expert witnesses on both sides, who were about equally divided in numbers, but the cause of the arthritis was vigorously contested. From physical examinations, X-rays and the history of the case, the physicians who testified on behalf of defendants expressed the opinion, in substance, that the disabling arthritis was caused by infection independently of the accident and was not aggravated by it, but a definite focus of infection was not pointed out. Employee on advice of a physician had his tonsils removed by surgery about January 8, 1931, without improving his

condition. Physicians who testified on behalf of employee were firm in the conviction that the accidental injury caused the arthritis. The better reasons and the circumstances confirm this view. The evidence is clear to the effect that prior to the accident the employee was free from pain and performed the duties of his employment comfortably to the satisfaction of his employer and immediately thereafter suffered severe pain and was totally disabled. The conclusion is, after considering all the evidence from every standpoint, that he made a case for compensation.

Attorney fees allowed by the district court for the benefit of plaintiff in the sum of $300 are challenged as excessive. His counsel took depositions in widely separated places and performed arduous duties in preparing and trying the case. The allowance is fully sustained by evidence which proves that the services were necessary and the fees reasonable.

The record, however, shows that the award of $12 a week for life exceeds the amount authorized by statute, which provides that after the first 300 weeks of total disability the employee shall receive for permanent total disability thereafter for life 45 per cent. of his wages at the time of injury, not exceeding $12 a week nor less than $4.50 a week. Comp. St. 1929, sec. 48-121. His weekly wage when injured was $24, and 45 per cent. thereof is $10.80, his weekly compensation for life. The judgment below is modified to make this correction and as thus modified is affirmed.

Since the recovery is reduced on appeal an attorney fee for plaintiff is not allowable for services in the supreme court.

AFFIRMED AS MODIFIED.

OSCAR H. PETERSON, APPELLEE, V. SCHOOL DISTRICT NO. 68, LINCOLN COUNTY, APPELLANT.

FILED FEBRUARY 10, 1933. No. 28397.

1. **Statutes:** CONSTRUCTION. In the interpretation of a statute, the court will endeavor to ascertain the legislative intent and, if lawful, to give it effect.
2. **Highways:** "PRACTICABLE TRAVELED ROAD." A "practicable traveled road" is one that is not only conveniently accessible, but one that is recognized by the public and maintained in a reasonably safe and proper condition for travel.
3. ———: ———. A road that is not publicly maintained and which is located over private property, where it is necessary to open and close gates to prevent the escape of cattle and over which travel is precarious, cannot be said to be a "practicable traveled road," within the meaning of section 79-1902, Comp. St. 1929.
4. **Appeal.** A judgment in a civil case will not be reversed by reason of error in instructions which do not substantially affect the rights of the complaining party and where such judgment is sustained by a preponderance of the evidence.

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

Beeler, Crosby & Baskins, for appellant.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

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

DEAN, J.

Oscar H. Peterson, the plaintiff herein, began this action against the defendant school district No. 68, in Lincoln county, pursuant to the provisions of section 79-1902, Comp. St. 1929, to recover from the defendant district transportation charges of five cents a quarter mile for each day of actual attendance of four of his children in adjoining school district No. 67. Upon submission, the jury found for the plaintiff and against the defendant district in the sum of $380, with interest at the rate of

7 per cent. per annum from October 25, 1930, such sum being for transportation charges for 40 quarter miles in excess of the three-mile limit as provided under section 79-1902. From the judgment so rendered, the defendant district has appealed.

Section 79-1902, above cited, and so far as applicable here, provides that, where a child lives more than three miles from the public schoolhouse, which he or she is authorized to attend, by the nearest practicable traveled road, where no free transportation is furnished such child, a transportation rate of five cents per family for each day of actual attendance for each one-quarter of a mile or fraction thereof covering the distance of the residence from the schoolhouse in excess of the three-mile limit shall be paid each family by the district on the basis of the record of attendance. And it is also provided therein that any child whose family is entitled to pay for transportation may attend another school, if more convenient, or may reside with relatives or friends within three miles of the schoolhouse of his own school district, and in such cases, if entitled thereto, the family of such child shall be paid the transportation rate above mentioned.

The plaintiff's home is 13 miles distant from the defendant district's schoolhouse by a publicly maintained highway, but only 6 2/10 miles distant over a less traveled road.

The principal question for determination here is what constitutes the "nearest practicable traveled road," within the meaning of section 79-1902.

The plaintiff has been a resident of the defendant district for almost 14 years and, during the period in question, there were 4 children of school age in his home, the youngest being 6 and the eldest 11 years of age. During the years 1929 and 1930, the defendant school district furnished no free transportation for the plaintiff's children, although request therefor was made. The school next nearest the plaintiff's home was located at or near

Ingham, five miles distant, where the plaintiff moved with his family. It does not appear, however, that a permanent residence was there established, but it is disclosed that the plaintiff leased a house in that vicinity during the school term and that, at the expiration thereof, he obtained an extension of the lease because of his wife's illness. The plaintiff meanwhile spent much time at his farm home in the defendant district and the family subsequently returned to the farm.

During the 1929 and 1930 term of school, as disclosed by the record of attendance, the plaintiff's children attended school in the adjoining district a total period of 172 days. During the 1930 and 1931 term, however, the plaintiff was unable to pay the required tuition and his children were therefore in school a total of only 18 days during that term. The plaintiff thereupon began this action to recover for expenses necessarily incurred by him in placing his children in the most convenient school on the basis of the distance they would otherwise have had to travel in going to and from school in their own district over the nearest practicable traveled road.

It is the contention of the defendant district that the road referred to as the six-mile road is the nearest practicable traveled road, within the meaning of the statute, and that recovery should therefore have been allowed the plaintiff on that basis instead of on the basis of the thirteen-mile road, as found by the jury.

In respect of the six-mile road, the evidence discloses that the road leaves the highway at a point two or three miles from the plaintiff's home and winds through a canyon which is about a mile long. At the head of the canyon is a steep hill and the road at this point is very narrow and it is impossible for two vehicles to pass thereon at the same time. It appears that the road was built into the bank on one side, and that, on the other side, there is a sheer drop at one point of from 40 to 50 feet, unprotected by any guard railing. The road is through privately owned ground and has never been main-

tained by public authorities. It passes through pasture land where cattle graze and where it is necessary to open and close at least three gates before the highway leading on to the schoolhouse in the district is reached. And it also appears that the clay soil becomes very slippery during wet weather, and that the road at times is impassable after a heavy rain or snowfall.

Witnesses on the part of the plaintiff testified that the road is unsafe for children, and that the canyon hill is so steep that it is impossible to see the approach of another vehicle from the opposite direction in time to turn back, and that the road is too narrow for two vehicles to pass at the same point. One witness testified that he resided within the defendant district, but that he also sent his children to school in the adjoining district from the fact that he did not think they could safely get through the six-mile road alone, and another testified that the road is nothing more than a "cow-trail."

Witnesses for the defendant testified that the road is narrow and some times impassable in wet weather, and that deep ruts often remain in the road after a heavy rain or snow and until some person voluntarily removes them. And they also testified that the road is not maintained by public authority, but that they anticipate no trouble if the car they are driving is equipped with good brakes. Several, however, testified that they did not consider it safe for children to go over the road alone.

In respect of the longer route, known as the thirteen-mile road, however, the evidence generally is that such road is regularly traveled and maintained, and that it is used for the delivery of mail and is passable throughout most of the year.

The ultimate purpose of the act here in question, of course, is to provide that every child of school age may have and enjoy the opportunity afforded by the public schools, and to provide that children living a long distance from school may avail themselves of the same privileges and the same opportunities that are afforded

those living in close proximity thereto. And to equally distribute the burden of such educational opportunities among all the taxpayers, the legislature has provided for the payment of transportation allowances to reimburse the parents of children who live more than three miles from the school in their own or another district.

The consequences that will result from construing the provisions of a statute should be taken into consideration in determining the intent of the legislature. *Howard v. Jensen,* 117 Neb. 102; *Andrews v. School District,* 183 Wis. 255; *Pagel v. School District,* 184 Wis. 251. Surely the beneficent purpose of the act is defeated if one of the parents of children living more than three miles from a school must, by reason of the dangers attendant on a route such as that in question, each day accompany his or her children. In the interpretation of a statute, the court will endeavor to ascertain the legislative intent and, if lawful, to give it effect.

The six-mile road was apparently established by some individual for his own convenience and it has subsequently been used by others living in the community. There are none who are not more or less familiar with a "short cut" route in any locality, but clearly the legislature did not have such a road in mind in the transportation of school children, whether they are accompanied or alone. In the use of the term "practicable traveled road" the legislature must have contemplated a road that is not only conveniently accessible, but one that is recognized by the public and maintained in a reasonably safe and proper condition for travel. See *Derichs v. Lake Creek School District,* 57 S. Dak. 586, and *Eastgate v. Osago School District,* 41 N. Dak. 518. A road that is not publicly maintained and which is located over private property, where it is necessary to open and close gates to prevent the escape of cattle and over which travel is precarious, cannot be said to be a practicable traveled road, within the meaning of the statute. Nor can a road be "practicable" if it is necessary for a parent to daily leave his

work and accompany his children to school merely because the road is unsafe for them to go over alone. Such was not the intent of the legislature.

Complaint is made in the giving of certain instructions and also in the refusal of the court to give those tendered by the defendant. Upon examination we do not find reversible error in the ruling of the court thereon. It is elementary that a judgment in a civil case will not be reversed by reason of error in instructions which do not substantially affect the rights of the complaining party and where such judgment is sustained by a preponderance of the evidence. Comp. St. 1929, sec. 20-853; *Vandervert v. Robey*, 118 Neb. 395; *Stiefler v. Miller*, 120 Neb. 6, 11; *City of Schuyler v. Verba*, 120 Neb. 729. The judgment appears clearly to reflect the intent of the legislature, and it is therefore

AFFIRMED.

RUTH FAULHABER, APPELLEE, V. ALFRED J. GRISWOLD ET AL., APPELLANTS.

FILED FEBRUARY 10, 1933. No. 28343.

1. **Evidence.** No proof is required as to the existence of a fact admitted by the pleadings.
2. **Appeal: VERDICT: CONFLICT OF EVIDENCE.** The verdict of a jury in a law action, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong.

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

L. R. Doyle and *O. B. Clark*, for appellants.

George I. Craven, contra.

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

GOOD, J.

This is an action to recover damages for personal in-

juries in which plaintiff recovered judgment, and defendants have appealed.

The injuries of which plaintiff complains are alleged to have been sustained as the result of a collision between an automobile, owned and driven by plaintiff's father, in which she was riding as a passenger, and a truck owned by Griswold-Comstock, Inc., (hereinafter called the company) and being driven by defendant Alfred J. Griswold. Plaintiff alleges that the truck, at the time of the collision, was being operated in the business of the company and by Griswold as its agent, and that the negligence of Griswold was, therefore, imputable to the company. The defendant company's answer contains the following admission: "Admits that on or about the 28th day of May, 1931, at about the time stated by plaintiff, at the intersection of 29th and O streets, city of Lincoln, Lancaster county, Nebraska, the automobiles driven by *said* defendant and Alex L. Faulhaber collided;" denies all the other allegations in the petition; and alleges that at and prior to the time of the collision plaintiff was suffering from dementia præcox and that the accident neither caused nor contributed to said ailment. Defendant Griswold in his answer admits the collision at the time, but alleges that it was due solely to the negligence of plaintiff's father who was driving the car in which she was riding; denies the other allegations of plaintiff's petition, and makes substantially the same averment with respect to plaintiff's ailment as does the company.

At the close of all the evidence the company moved for a directed verdict, on the ground that there is no evidence tending to prove that at the time of the collision the truck was being used in any business of the company, and on the ground that the evidence shows that the truck was being driven solely for the use and personal convenience of defendant Griswold. The motion was overruled. This ruling is complained of as error, and it is also contended that the court erred in failing to instruct the jury that the company could not be liable unless the

evidence showed that at the time of the collision the truck was being used in the business or on behalf of the company.

We think the trial court did not err in this respect. As above noted, the admission in the answer of the company is that the truck, at the time of the collision, was being driven or operated by the company. Consequently, there was no issue presented by the pleadings upon this question to be submitted to the jury. In view of this admission, the plaintiff was not bound to offer any evidence upon this subject. Since no issue was presented by the pleadings, there was no occasion for any instruction by the court upon this question.

Defendants contend that the evidence is insufficient to establish that the collision was the result of the negligence of defendants. The evidence on behalf of plaintiff was that defendant Griswold drove his truck directly into and against the car in which plaintiff was riding. The evidence on behalf of defendants was to the effect that plaintiff's father drove his car into or against the truck being operated by Griswold. The evidence is in sharp and irreconcilable conflict.

Defendants argue that the evidence is insufficient to prove that the plaintiff suffered any injury as the result of the collision, and that the evidence establishes that the ailment from which plaintiff is suffering is due to an inherited disease and not to any injury sustained in the accident. The evidence on behalf of plaintiff tends to prove that at the time of the collision she was thrown forward in the car and received a bump on the top of her head; that almost immediately thereafter she was suffering from shock, fright and severe headaches, and that she continued to suffer therefrom and became extremely nervous. Within a few days she showed mental disturbance, and a few weeks thereafter she was committed to the state hospital for insane where she now remains. The evidence on behalf of plaintiff tends to prove that the injury, shock and fright which she suffered

as the result of the collision contributed to and caused her mental condition.

The evidence on behalf of defendants is to the effect that plaintiff is suffering from dementia præcox; that it is an inherited mental disease, and that the injury, shock and fright did not cause or contribute to her condition. Medical testimony on behalf of plaintiff tends to show that she might have gone through life without ever developing dementia præcox but for the injury, resulting in the shock and fright, and that, in the opinion of such witness, the injury, shock and fright caused the development of the disease.

There is a conflict in the evidence with respect to the negligence of defendants and as to whether plaintiff's mental condition was caused by the injury and as a result of defendants' negligence. These were questions of fact for the jury to determine. The verdict of a jury in a law action, based on conflicting evidence, will not be disturbed unless clearly wrong. From the record presented, we are unable to say, as a matter of law, that the verdict is clearly wrong.

Defendants complain of the admission of evidence, but in this respect no error has been found.

No valid ground for reversal of the judgment appears. It is therefore

AFFIRMED.

RETAIL MERCHANTS SERVICE, APPELLANT, V. JOHN BAUER & COMPANY ET AL., APPELLEES.*

FILED FEBRUARY 10, 1933. No. 28354.

Dismissal. If the answer specifically denies that the plaintiff is a corporation, and no estoppel is either pleaded and proved, or supported by a preponderance of the evidence, then the entire failure to meet such issue may warrant a dismissal of the plaintiff's action.

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

* See opinion on rehearing. 125 Neb. p. ——.

Montgomery, Hall & Young and *J. M. Emmert*, for appellant.

A. L. Tidd, contra.

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

PAINE, J.

After trial in the district court, each party moved the court for a directed verdict. The jury were thereupon discharged, and the court sustained the motion of the defendants and dismissed plaintiff's action for want of proof of its corporate existence.

Plaintiff is engaged in supplying retail merchants with advertising material. Its principal place of business is Des Moines, Iowa. The defendants operate a garage at Plattsmouth, Nebraska. On December 3, 1929, a solicitor for plaintiff secured the defendants' signature to a monthly advertising service, for which they agreed to pay $18 a month for 18 months, which service was to start upon notice from the defendants, and, in addition, they were to supply certain information, each of which defendants neglected to furnish, and material shipped by the plaintiff was refused by the defendants. Plaintiff commenced an action in the county court of Cass county to recover the sum of $88 for breach of contract. Defendants filed answer, and the trial was had to a jury of six, and a verdict was returned in favor of the defendants, from which plaintiff appealed to the district court. The first paragraph of the petition filed by plaintiff in the district court alleges: "At all times hereinafter mentioned, plaintiff was and is a corporation duly organized and existing under and by virtue of the laws of the state of Iowa." The defendants filed their answer thereto, and in the first paragraph denied specifically paragraph 1 of the plaintiff's petition, as set out above. No reply was filed. At the conclusion of the plaintiff's testimony, the defendants moved for a directed verdict on the ground that the

plaintiff had failed to prove that it was a corporation at the time of filing of said suit, or, in the alternative, that said jury be discharged and plaintiff's petition be dismissed. Thereupon, plaintiff also moved for a directed verdict. After argument the court sustained defendants' motion, and entered an order as follows: "It is therefore considered, ordered and adjudged that the defendants' motion be and the same is hereby sustained, and the plaintiff's cause of action dismissed at plaintiff's costs, to all of which plaintiff excepted." A motion for new trial was filed and overruled by the court.

In this case the plaintiff sued as a corporation. The defendants specifically denied its corporate existence in their answer, and no reply was filed. In the case of *Davis v. Nebraska Nat. Bank,* 51 Neb. 401, it was held that, where the plaintiff sued as a corporation and the defendants in their answer specifically denied the corporate existence of plaintiff, this stated a defense, and cast upon the plaintiff the burden of proving its corporate existence, in which case it was stated that, while the defense might be purely technical, yet the plea was one of which the defendants might legally avail themselves, and the burden was thereby cast upon the plaintiff of proving that fact.

It is insisted in the reply brief that the appellees are estopped to deny the corporate existence of the appellant. If the appellant had filed a reply and alleged an estoppel, he would be in a better position to present that question to this court, for in the case of *Nebraska Mortgage Loan Co. v. Van Kloster,* 42 Neb. 746, this court held that an estoppel, to be available as a cause of action or defense, must be specially pleaded, and established by preponderance of the evidence. See *Burwell Irrigation Co. v. Lashmett,* 59 Neb. 605; *Omaha Savings Bank v. City of Omaha,* 4 Neb. (Unof.) 563.

The appellant claims that the recent decision of *American Gas Construction Co. v. Lisco,* 122 Neb. 607, has held otherwise. An examination of the opinion in that case

discloses that the real contention of the defendant was that the plaintiff was not a corporation, for that its corporate life had expired prior to entering into the contract involved, which is entirely different from the proposition before us. And, in the case at bar, there is nothing in the name of the plaintiff, "Retail · Merchants Service," which even implies a corporation, and it was specifically denied, and became a direct issue in the case.

We find no error in the record in this case, and the same is hereby

AFFIRMED.

HARRY KOPP V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1933. No. 28491.

1. **Contempt**: CONSTRUCTIVE CONTEMPT. "The common-law power of the courts to punish for constructive contempts is, in this state, expressly confirmed by legislative enactment." *State v. Bee Publishing Co.*, 60 Neb. 282.
2. ———: ———: PRELIMINARY EXAMINATION. Preliminary examination is a proceeding unknown to the common law, so, in the absence of a statute requiring a preliminary examination on a charge of constructive contempt of court, no preliminary examination is necessary.
3. ———: ———: INDICTMENT: ANSWER: WAIVER. The right of a defendant, under section 29-1802, Comp. St. 1929, not to be required, without his assent, to answer an indictment, until one day shall have elapsed after receiving a copy thereof, may be waived. The failure of the record to show that he made any objection raises the presumption that he waived the right.
4. ———: ———: STRIKING MOTION IN ARREST OF JUDGMENT. The striking from the files, after a hearing thereon, of the defendant's motion in arrest of judgment, which motion contained no meritorious point, did not prejudice the defendant and was not erroneous.
5. ———: ———: SENTENCE. Where the record fails to show affirmatively that the court, before pronouncing sentence, informed defendant that he had been found guilty, and there is no showing in the record to the contrary, it will be presumed that such information was duly given.

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

W. T. Thompson and *H. M. Uttley,* for plaintiff in error.

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

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

GOSS, C. J.

This action was on an information for constructive contempt. The defendant, Harry Kopp, plaintiff in error here, was tried before the district judge, was convicted of contempt of court, was sentenced to be confined in the county jail for four months and to pay a fine of $100 and costs. No bill of exceptions was brought up. Therefore, we have no evidence produced at the trial. The review must be considered upon the transcript alone.

It is first assigned as error that the information does not state facts to charge contempt of court or any offense punishable under the laws of this state. The information was drawn under section 20-2121, Comp. St. 1929, being the first of the three sections of the Code of Civil Procedure relating to contempts. It comes definitely under the fourth subdivision of the above section granting power to every court to punish, by fine and imprisonment, as for criminal contempt, "any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts." The information is couched in understandable language, though it contains some surplusage which, however, does not invalidate it if otherwise sufficient. It informed the defendant that the offense was committed on or about November 24, 1931, during the November term of court; that the case of the State v. John M. Flannigan and James C. Flannigan was set for trial, to be heard before the court and a jury selected from the panel of which Ralph Rosenkrans was a member, and who was

chosen and sworn as a member of the party to try said case; that on or about November 24, 1931, defendant did wilfully attempt to corrupt and influence said Rosenkrans and did wilfully attempt to obstruct said proceedings and to hinder and delay the due administration of justice in said action to be tried; that in furtherance of said purpose defendant requested one Joseph Juracek to inform Rosenkrans that defendant had a hundred-dollar bet and that defendant would furnish Rosenkrans one of defendant's farms "rent free if he would hang the Flannigan jury;" that he offered said Juracek, as payment for said services, to cancel an indebtedness of upwards of $7 and to pay said Juracek the further sum of $50; and that Juracek approached Rosenkrans at the time the latter was a member of the jury sitting in the trial of said case and advised him of defendant's said offer.

The statute is a legislative expression of the common-law power. "The common-law power of the courts to punish for constructive contempts is, in this state, expressly confirmed by legislative enactment." *State v. Bee Publishing Co.*, 60 Neb. 282. We are of the opinion that the information states facts sufficient to charge defendant with contempt of court and to notify him of the particulars of the accusation against him.

Defendant claims the trial court erred in taking cognizance of, and requiring defendant to plead to, the information without defendant first having been given a preliminary examination or the right to waive it. This might be true in the general prosecution of crimes. However, the legislature has provided substantively a method for the punishment for such contempts as this. "Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." Comp. St. 1929, sec. 20-2122. The third section relating to contempts, section 20-2123, Comp. St. 1929, says: "Persons punished for contempt under the

preceding provisions shall nevertheless be liable to indictment, if such contempt shall amount to an indictable offense; but the court before which the conviction shall be had, may, in determining the punishment, take into consideration the punishment before inflicted in mitigation of the sentence." It so happens that the Criminal Code, section 28-737, Comp. St. 1929, provides punishment for one who corruptly or by threats of force endeavors to influence a juror or to impede the due administration of justice. It is apparent, however, that the information in suit is drawn under section 20-2121, Comp. St. 1929. The procedure as for a contempt, being completely provided for by the legislature, did not contemplate the necessity for any preliminary examination and so did not provide for it. "In the absence of a statute no preliminary examination is necessary, the proceeding being unknown to the common law." 16 C. J. 314. The purpose of a preliminary examination when a crime is charged is to ascertain if a crime has been committed, and if so whether there is evidence sufficient to give probable cause for believing that the arrested man is guilty of the crime and that he may not be further deprived of his liberty if there is no probable cause for such belief. 8 R. C. L. 104, sec. 66.

The record shows that the information was filed on January 21, 1932, and that the defendant's plea of not guilty was entered the same day. He forthwith gave his bond for appearance the next day for trial. The case was tried January 22, 1932. Appellant claims the court erred in requiring him to plead the same day the information was filed. Section 29-1802, Comp. St. 1929, provides that one shall not be arraigned or called on to answer an indictment, without his assent, until one day shall have elapsed. This right accorded by the statute may be waived. The failure of the record to show that defendant made any objection to proceed with the trial raises the presumption that he waived the right. *Barker v. State*, 54 Neb. 53, 56.

The record shows the trial was had on January 22, 1932, the state producing witnesses and defendant offering none. The journal entry shows that the court found defendant guilty of contempt as charged in the information and continued the cause for sentence. Later journal entries show it continued the cause for the same purpose from time to time until May 2, 1932, when sentence was pronounced. On the same day another journal entry shows that the court, upon request of defendant for time before beginning his sentence, allowed him to be at liberty upon bond to appear June 2, 1932. June 1, 1932, defendant filed a motion in arrest of judgment, containing ten reasons, most of which are in effect the points set out in the six assignments of error we are now considering. June 2, 1932, the county attorney filed a motion to strike the motion in arrest of judgment for various reasons stated. On the same day it was argued by the parties and the motion of defendant was stricken from the files, defendant excepting. This is assigned as error. Motion in arrest of judgment is provided for in section 29-2104, Comp. St. 1929. A perusal of that section will show that the only phase applicable is that the facts stated in the information do not constitute an offense. We have already disposed of this. It might have been better to overrule the plea, rather than to strike it from the files. The effect was the same. The motion is in the record transcripted for this review. The defendant was not prejudiced by the form of the ruling.

Defendant assigns error, claiming that the trial court failed to inform defendant of what crime he had been found guilty before asking him whether he had anything to say why judgment should not be passed upon him, as provided in the Criminal Code, section 29-2201, Comp. St. 1929. The section in exact words requires that "the defendant must be informed by the court of the verdict of the jury." Here the finding of guilt was by the court, not by a jury. So assuming, merely for argument, as appellant really assumes, but expressly not so deciding,

that this point is controlled by that section of the Criminal Code, yet we cannot agree that the record shows the court did not inform defendant that it had found him guilty of contempt. There was no motion for a new trial filed in the district court in this case so that the district judge might amend his journal entry, reciting the omission to state, if a fact, that defendant was informed, before pronouncement of sentence, that he was found guilty by the court. It was held in *Taylor v. State,* 86 Neb. 795 (see syl. par. 9 and page 814) that where the record fails to show affirmatively that the court, before passing sentence, informed defendant, as required by the Criminal Code, that a verdict of guilty had been found against him, and there is no showing in the record to the contrary, the fact that such information was given will be presumed. This court quoted *Bond v. State,* 23 Ohio St. 349, expressly deciding the precise point, and then said: "Our Criminal Code on this point is a copy of the Ohio statute, and the decision of the court of last resort in that state in disposing of this question may safely be followed by us. We have not overlooked the cases of *McCormick v. State,* 66 Neb. 337, and *Evers v. State,* 84 Neb. 708, and it is not our intention to criticize or overrule them, but we have concluded, because of the purely technical nature of this provision, to require defendant to raise that question by motion for a new trial or otherwise, and thus enable the district court to correct such omission, if it really exists, and literally comply with this formal and perfunctory requirement of the statute. If that is not done, it should be presumed that this formal provision of the statute has been observed." Even if this had been a jury case, instead of a case tried to the court, we would feel that we ought to follow the rule above announced. In *McCormick v. State* and *Evers v. State,* above, the causes were remanded merely for the purpose of rendering judgments containing the recitals omitted.

The last assignment of alleged error claims that the court was without jurisdiction to impose the sentence be-

cause it was in excess of the penalty provided by section 28-737, Comp. St. 1929, heretofore abstracted. This is a section of the Criminal Code making the acts denounced therein substantive criminal offenses and providing that the offender "shall be punished by fine, not exceeding one hundred dollars, or by imprisonment, not exceeding twenty days." Defendant was informed against under section 20-2121, Comp. St. 1929, the Civil Code section. To the extent that the contempt section and the criminal section may apply to the same facts in any given case, our courts have jurisdiction over both remedies. "In the absence of constitutional or statutory restriction, a court has power to punish an act which is a contempt, notwithstanding such act may likewise be punished by indictment." 13 C. J. 55, sec. 77. See *Gandy v. State,* 13 Neb. 445, 451. There is no constitutional or statutory restriction. The contempt section 20-2123, Comp. St. 1929, expressly authorizes the criminal court in which a defendant is convicted for an indictable offense to consider "the punishment before inflicted in mitigation of the sentence." Nowhere is the penalty in the criminal section directed to control or modify the punishment authorized in the contempt proceeding.

We find no reversible error shown in the record on review. The judgment of the district court is

AFFIRMED.

FEDERAL TRUST COMPANY, APPELLANT AND CROSS-APPELLEE, V. JESSIE C. IRELAND ET AL., APPELLEES AND CROSS-APPELLEES: JOHN W. BAXTER, INTERVENER, APPELLEE AND CROSS-APPELLANT.

FILED FEBRUARY 14, 1933. No. 28364.

1. Trusts: ATTORNEY AND CLIENT. An attorney who induces his client to execute deeds whereby the attorney acquires, without consideration, legal title to the client's lands, and thereafter treats the lands as his own, will, in a suit by the client against the attorney, be held to be a trustee, holding the legal title in trust for his client.

2. ———: STATUTE OF FRAUDS. A resulting trust, arising out of the wrongful act of a fiduciary, is not affected by the statute of frauds.
3. ———. A recreant trustee, or those dealing with him with knowledge of the trust, will not be permitted to make a profit out of the trust property at the expense of the beneficial owner.
4. Equity. One coming into a court of equity, seeking affirmative equitable relief, must do equity as a condition to receiving the relief demanded.

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

John J. Ledwith and *Herman Ginsburg*, for appellant.

Stewart, Stewart & Whitworth and *Field, Ricketts & Ricketts, contra.*

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

GOOD, J.

Plaintiff brought this action against Jessie C. Ireland and her husband, Rolland F. Ireland, to foreclose two mortgages, executed by the Irelands, each covering the same realty, one of the mortgages being for $10,000 and the other for $3,000. Orinda M. Johnson intervened, claimed ownership of the 10,000-dollar mortgage, and asked foreclosure in her own name and for her own benefit. John W. Baxter also intervened, alleging that he was the owner of the real estate; that Jessie C. Ireland held title thereto in trust for him at the time the mortgages were given; that the Irelands were without legal authority to mortgage the realty, and that plaintiff, with full knowledge of Baxter's rights, had taken the two mortgages which it sought to foreclose, together with a third mortgage for $7,000; and charged that all of these mortgages were executed and recorded in furtherance of a scheme to defraud him. Baxter prayed for cancelation of all the mortgages and for general equitable relief.

A trial of the issues resulted in a decree finding generally for Baxter and against plaintiff and defendants Ireland, but found that Johnson was an innocent holder of the 10,000-dollar mortgage and was entitled to a foreclosure thereof. The trial court also awarded a money judgment to Baxter against the plaintiff for $3,632.37. Plaintiff has appealed, and Baxter has filed a cross-appeal.

From the record it appears that Baxter was the owner of about 10,000 acres of land located in several counties in Nebraska; that he consulted Rolland F. Ireland, a practicing attorney, with reference to the management of his lands. Baxter feared there might be an attempt made by his relatives to place him under guardianship. Ireland advised him to execute deeds to all of the land, and to leave the name of the grantee and the consideration blank. These were executed and delivered to Ireland, with an oral agreement between them that, in event any proceeding was instituted to place Baxter under guardianship, Ireland should fill in his name as grantee in the deeds and place them on record. There was no consideration for the deeds so executed. These deeds were executed in 1924. Some time later in that year Ireland filled in his name as grantee, caused the deeds to be recorded and informed Baxter of this action. Baxter, relying upon the integrity of his attorney, believed that the deeds were recorded pursuant to the previous agreement between himself and Ireland. No proceeding, in fact, was commenced to place Baxter under guardianship. Ireland afterwards exchanged a part of Baxter's real estate, whereby he acquired title to the land in Lancaster county on which the mortgages in controversy here were given, and caused the title to this land to be taken in the name of his wife, Jessie C. Ireland.

At the time the deeds were executed by Baxter in blank the lands were incumbered to the extent of about $300,000. After Ireland acquired the record title thereto he increased this incumbrance to more than $600,000. There is evidence tending to prove that the president of plaintiff, prior to the time of the taking of any of the mortgages in con-

troversy, had been advised by a brother of Ireland that the real estate did not belong to him, but that he was simply holding it in trust for Baxter. Whether the information given to its president was sufficient to charge plaintiff with notice of Baxter's rights will be discussed later in this opinion.

Plaintiff concedes the ownership of the 10,000-dollar mortgage by Johnson, and alleges that it began the action to foreclose this mortgage for her use and benefit. It is conceded by all parties that Johnson is an innocent holder of the note secured by the 10,000-dollar mortgage, and was entitled to a decree foreclosing that mortgage. This appeal presents only the question of the respective rights of plaintiff and intervener Baxter.

The record discloses that in another action by Baxter against the Irelands he recovered a judgment and decree, finding that Jessie C. Ireland held title to the mortgaged premises in trust for Baxter, and establishing his ownership of said land and other realty. This decree has not been appealed from and is now final. Plaintiff was not a party to that action; it contends that it is not bound by the decree therein rendered, and that such decree cannot operate to affect plaintiff's previously-acquired mortgage interest in the land. We do not find it necessary to determine that question, but shall proceed to the question of whether the evidence in the present case is sufficient to establish a trust relationship between Baxter and Ireland.

Plaintiff argues that the Irelands did not hold the Baxter land in trust, because an express trust in realty cannot be created by parol and will not be enforced if based upon parol evidence alone. We may concede the soundness of the rule contended for, but think it inapplicable to the facts disclosed. Plaintiff contends that failure and refusal to perform an oral contract to hold real property in trust, or to convey it, is not sufficient to establish a trust *ex maleficio*, and many authorities are cited as sustaining this proposition. Again, we think the authorities cited are not applicable to the facts disclosed.

In the instant case Baxter was induced by the advice of his attorney, in whom he reposed confidence, to execute deeds to his land, not intending to give the land to the attorney, but intending that the attorney should hold the deeds, fill in his name as grantee and place them on record under a certain contingency which never arose. The attorney violated the oral agreement with his client, abused his confidence and placed the deeds on record, and was recreant to the interests of his client in mortgaging, selling and exchanging his client's lands.

It would indeed be strange if a court of equity were powerless to afford relief to the wronged client under such circumstances. Equity is not so powerless. Upon a showing, that is satisfactory and convincing to the court, of the existence of such facts, it will declare the existence of a trust *ex maleficio* and will, so far as possible, protect the wronged client against the recreant and unjustifiable acts of his attorney. The facts which distinguish this case from those cited and relied upon by plaintiff are that here there existed not only a confidential but a fiduciary relationship between attorney and client, and the client had a right to rely upon the advice and representations of his attorney.

In *Pollard v. McKenney*, 69 Neb. 742, this court held: "Where a person obtains legal title to real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him." On rehearing of that case, reported in 69 Neb. 753, it was held: "A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced."

In *Doll v. Doll*, 96 Neb. 185, it was held:

"Where one buys real estate for which he pays the purchase price, and for convenience takes the title in the name of another, the person taking the title will hold the prop-

erty in trust for the one who pays the purchase price.

"The trust thus created is what is known as a resulting trust, and is not affected by the statute of frauds."

The applicable rule is stated in 26 R. C. L. 1249, sec. 96, in this language: "Where a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rule of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interests of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relations, and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it, or execute the trust in such manner as to protect the rights of the defrauded party, and promote the safety and interests of society." In the same section it is further said: "When two persons occupy to each other a confidential or fiduciary relation, and a sale is made by the party reposing confidence to the party in whom confidence is reposed, equity raises a presumption against the validity of the transaction. * * * There is a well defined distinction between undue influence arising from acts which the law deems fraudulent, and undue influence resulting from fiduciary relations existing between the parties. The term 'fiduciary or confidential relation,' as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which the influence has been acquired and abused,—in which confidence has been reposed and betrayed. The rule is applied with more or less strictness to all the well-known cases of fiduciary relation, as that of attorney and client, trustee and *cestui que trust,* principal and agent, guardian and ward."

In 39 Cyc. 182, it is said: "One who occupies a fiduciary or confidential relation to another in respect to business or property, and who by the use of the knowledge he obtains through that relation, or by the betrayal of the con-

fidence reposed in him under it, acquires a title or interest in the subject-matter of the transaction, antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for the benefit of the latter, which, as the title or interest so chargeable is not void but is merely voidable, the *cestui que trust* may enforce or renounce at his option. The test of such a trust is the fiduciary relation and a betrayal of the confidence reposed, or some breach of the duty imposed under it. * * * A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person. This statement obviously embraces a large variety of relations. The relations of attorney and client, principal and agent, guardian and ward, * * * are familiar illustrations of fiduciary relations."

Under the quoted authorities, the facts disclosed by the record in this case are sufficient to establish a trust relationship, between Ireland and Baxter, and that, as against the Irelands, Baxter is entitled to have the trust enforced.

Plaintiff argues that, even conceding that a trust relationship exists, the evidence is insufficient to prove that plaintiff had notice of that relationship prior to the time it took the mortgages in controversy. The evidence shows that Ireland had executed and delivered to plaintiff a large number of mortgages upon the Baxter lands. Apparently, Ireland was negligent in paying the interest upon these mortgages, and in paying the taxes upon the mortgaged land. A few months prior to the execution of the mortgages in controversy, plaintiff's president, while eating lunch in a cafeteria, saw a brother of Ireland, and called the brother to him. The brother at the time was employed in the office of Rolland F. Ireland. Plaintiff's president inquired where Ireland was. Ireland's brother then testified: "I told him I couldn't tell him just at that time where he was, and in the course of the conversation regarding Rolland Ireland he said he wanted to see him badly, a great many matters that he was not attending to, that

there was some interest due, I believe, taxes he hadn't paid, matters of that kind, and I said to Mr. Reynolds, 'Mr. Reynolds, you are aware of the fact that Mr. Rolland F. Ireland does not own these lands, never bought them and never paid for them,' and that Mr. Rolland Ireland was acting merely as attorney for Mr. Baxter," to which the president replied: "Of course, that doesn't affect our mortgages." Plaintiff insists this information is insufficient to charge it with notice of Baxter's rights, because the conversation did not occur at its place of business, or in the course of plaintiff's business.

We think the rule is that the place where the information is received is not material. The question is whether or not it was in the prosecution of plaintiff's business. If the official was acting for his company and in its behalf, then the information he acquired would be imputed to his company. Undoubtedly, he was acting for and in behalf of his company in making the inquiries, and while acting for and in behalf of his company, he received the information that the lands which Ireland had acquired from Baxter were not Ireland's but belonged to Baxter. A few months after this conversation the same officer of plaintiff assisted in closing the deal between Ireland and another, whereby Ireland transferred a part of the lands owned by Baxter, and received in exchange the lands covered by the mortgages, and almost immediately thereafter this officer of plaintiff took the mortgages upon the land from the Irelands. The evidence given by Ireland's brother is not controverted. In fairness it should be said that the then president of plaintiff had departed this life prior to the trial of this case in the district court. We are convinced that the evidence is sufficient to charge the plaintiff with notice of Baxter's rights in the premises.

Since plaintiff took its mortgages, charged with knowledge that Baxter was the true owner of the land, it can acquire no rights by those mortgages, except in so far as the proceeds thereof were used to discharge a valid and existing lien on the land at the time Ireland acquired legal

title thereto. Since Baxter cannot have a cancelation of the 10,000-dollar mortgage, because it is in the hands of an innocent holder, he is entitled to a judgment against the plaintiff for the amount of that mortgage, less such part thereof as was used to discharge a valid existing lien on the lands at the time the Irelands took the legal title thereto.

Plaintiff insists that the remainder of the 10,000-dollar mortgage, over and above that necessary to discharge the lien of a mortgage to the Aetna Life Insurance Company, was used to discharge a lien upon other lands owned by Baxter, and title to which was, or had been, held by the Irelands. On the other hand, Baxter, as cross-appellant, insists that he was entitled to a judgment against plaintiff for the full amount of the 10,000-dollar mortgage, held by Orinda M. Johnson; or, in other words, that he was entitled to a judgment for the same amount as the decree in favor of Johnson.

Plaintiff insists that the proceeds of the 10,000-dollar mortgage were used to discharge prior liens upon the mortgaged premises and other lands owned by Baxter. The record discloses that when Ireland acquired the legal title to the mortgaged premises in controversy there was an existing valid mortgage thereon which, with accrued interest, amounted to $6,825, and this mortgage was paid and canceled out of the proceeds of the 10,000-dollar mortgage. We find nothing in the record from which it can be ascertained that Baxter in any wise profited by the payment of any other mortgage or lien on other premises.

Baxter insists that he is entitled to a judgment against plaintiff for the full amount of the decree in favor of Johnson, and invokes the principle that he who traffics with a recreant fiduciary shall take nothing by his fraud, and argues that plaintiff is not entitled to be reimbursed or subrogated to the rights of the Aetna Life Insurance Company. It must not be overlooked that Baxter was not a party to this action when it was begun. He came

voluntarily into it as an intervener, and, in effect, as a plaintiff, seeking affirmative equitable relief from plaintiff. Under these circumstances, another principle of equity is controlling, namely, that he who comes into a court seeking equity must do equity.

Baxter traced a part of his property held in trust into the premises covered by the mortgages in controversy. He was entitled to receive those premises free from any incumbrance, except such as existed thereon at the time Ireland, as trustee, obtained the title thereto. That incumbrance at the time amounted to $6,825. Baxter has paid no interest on this incumbrance, and, had it not been for the discharge of that lien by the money furnished by plaintiff, that mortgage, with interest at the rate which it bore, would have amounted, at the time the decree was entered in the trial court, to $8,535.05. Baxter should take this land burdened with a lien for that amount and that amount only. But it is burdened with a lien in favor of Johnson for the amount of her 10,000-dollar mortgage and interest, amounting, at the time the decree was entered, to $11,800. Since his land is burdened with a lien for this greater amount, Baxter is entitled to a judgment against plaintiff for the difference between $11,800 and $8,535.05, or the sum of $3,264.95. The trial court erroneously awarded Baxter a judgment against plaintiff for a greater sum.

Plaintiff argues that Baxter is entitled to pursue but one of two remedies, either to pursue the trust property, or an action in damages, but may not resort to both at the same time, and insists that, in seeking a judgment against plaintiff for the amount of the Johnson lien, he is seeking to pursue both remedies.

The contention is unsound. Baxter has sought to recover the land from his recreant trustee in the condition that it was at the time the trustee acquired it, and, in asking for the cancelation of the mortgage, or, in lieu thereof, a judgment for an amount sufficient to cancel all of plaintiff's mortgages, he is seeking only to recover

the trust property as it was at the time acquired by the trustee.

The judgment of the district court is hereby modified so as to award to Baxter judgment against plaintiff in the sum of $3,264.95, and as thus modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

THOMAS F. MORAN, ADMINISTRATOR, APPELLEE, V. MICHAEL J. MORAN ET AL., APPELLANTS.

FILED FEBRUARY 14, 1933. No. 28339.

1. **Automobiles**: INJURY TO PASSENGER: LIABILITY OF OWNER. Prior to statute (Laws 1931, ch. 105), where the owner of a private motor vehicle gratuitously carried another person therein as a passenger, he owed such passenger the duty of exercising ordinary care in the operation of the vehicle, and was liable in damages if his failure to exercise such care was the proximate cause of injury to his passenger.
2. ———: ———: VERDICT FOR PLAINTIFF: SUFFICIENCY OF EVIDENCE. Evidence examined, and, in consideration of verdict returned, *held* sufficient to support the rejection of the defense of contributory negligence by trial jury, and ample to justify their determination as to causal connection between the alleged negligence and the death of the plaintiff's intestate.
3. **Evidence**: VALUE OF SERVICES. The husband of the deceased, having detailed the work, labor and services performed by his deceased wife in her lifetime, which he had personally observed, in view of his proprietary interest therein, is competent to testify as to the value thereof without further qualification shown; and when this evidence is uncontradicted it may support a verdict in his favor as administrator of his wife's estate.
4. **Death**: DAMAGES: MEDICAL SERVICES. In an action by husband as administrator of deceased wife's estate for damages occasioned by injuries to his intestate resulting in her death, in absence of proof that she was possessed of a separate estate, other than her present cause of action for damages, no recovery may be had for medical expenses necessitated by such injuries, unless it be established that in the lifetime of deceased she paid the same in whole or in part.

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

Chambers & Holland, Hubka & Hubka and *C. Russell Mattson,* for appellants.

Bartos, Bartos & Placek and *J. A. McGuire, contra.*

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

EBERLY, J.

Action under Lord Campbell's Act by plaintiff as administrator of the estate of Winnifred E. Moran, his deceased wife, to recover damages for her death due to injuries received in an automobile accident. This accident, and the fatal injuries to the deceased caused thereby, it is alleged were due to the negligence of defendant Maurice B. Moran in the operation of the automobile in which Winnifred E. Moran was riding, and also of Michael J. Moran, the owner thereof. The answer admits the occurrence of the accident, denies generally the allegations of negligence contained in the petition, specifically denies "that the accident was caused by the defendants," and pleads contributory negligence on the part of the deceased. Plaintiff, by reply, denied new matter contained in the answer, and on issues thus framed a trial to a jury resulted in a verdict and judgment for plaintiff in the sum of $3,500. Defendants' motion for new trial was overruled, and they appeal.

In this court the sufficiency of the evidence is challenged; error is alleged in the refusal, and in the giving, of certain instructions by the trial court; rulings of the trial court in the admission and exclusion of evidence are complained of; and it is insisted that the defense of contributory negligence was established. This is a law action. In view of the verdict of the jury, who are the constitutional determiners of litigated facts, though the evidence on some questions may be said to conflict, still we find it ample to support the jury's findings. We have exam-

ined the instructions, the giving of which as well as the refusal to give by the trial court is complained of, but find no reversible error committed. Likewise, the rulings of the district court on the admission and rejection of testimony, upon due consideration we find are not properly subject to the criticism made; nor do we find the jury erred in their consideration of the evidence relating to the defense of contributory negligence.

In the light of the jury's verdict, it may be said that the following facts may be deemed to be established by the evidence: Michael J. Moran, defendant, and Thomas F. Moran are brothers, and the deceased and the wife of Michael J. Moran are sisters. Michael lived at Wymore, Nebraska, and owned a Chevrolet automobile, kept by him for business and pleasure, and ordinarily operated by himself and other members of his family. On November 5, 1930, he entrusted this car to his son Maurice, aged 24 years, but who still lived at home as a member of the father's family. This was done for the purpose of conveying Mrs. Michael J. Moran, her sister, and two young men to Eram, Oklahoma, and return. This party made the trip to Eram without incident. On the return journey at one o'clock a. m. on November 9, 1930, this Chevrolet containing this party, with Maurice B. Moran at the wheel, then proceeding northward over an improved and graveled highway, collided with a southbound truck then traveling on the portion of the road west of the center thereof. At the time of the collision the Chevrolet was being driven on its left (or wrong) side of the highway at the rate of 50 miles an hour. No successful attempt to check its speed, or to return to its proper position on the highway, was accomplished by the driver prior to the collision, although the lights of the approaching truck were discernible and actually discovered by the driver and occupants of the car when several hundred yards distant. The result of the collision was that the Chevrolet was deflected into the road ditch, turned clear over and landed on its wheels. From this Winnifred E. Moran re-

ceived the injuries that ultimately caused her death. She was a member of this party by invitation. So far as disclosed by the evidence, she occupied the rear seat during the trip; she "was not accustomed to riding in automobiles very much;" previously had not ridden with Maurice B. Moran as driver; and thought that he was driving too fast on the return trip and "cautioned him several times" to that effect.

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

In the present case the automobile, a family car, was entrusted by the owner to the driver, his son, for a definite purpose, and with knowledge of intended employment, and evidently with actual knowledge on the part of the owner of his son's propensity for rapid driving. He is, therefore, chargeable with the results of the son's negligence, a conclusion which is not seriously questioned in the briefs.

Nor did the jury err in its rejection of the defense of contributory negligence in this case. In *Jones v. Schreiber,* 166 Minn. 177, the supreme court of that state had before it a case wherein "defendant and his wife invited plaintiff, her sister and husband to take an automobile ride. Defendant drove the car, the two gentlemen occupying the front seat and the three ladies the rear. * * * All the parties were of mature years and on friendly terms. * * * The car was traveling between 45 and 50 miles per hour for perhaps a mile immediately prior to the accident, during which time the plaintiff did not talk." As a result of the speed the car went into a side ditch seriously injuring the plaintiff. In discussing the contention of contributory negligence on part of the plaintiff, the

Minnesota court said: "She (plaintiff) had never driven a car, but realizing that they were traveling at a dangerous speed became frightened. But being defendant's guest and apparently in fear of being considered officious, she did not protest. There is no rule that decides where silence under such circumstances should cease. Plaintiff had no physical control of the car and no authority to direct its operation. Upon such facts it cannot be said that plaintiff was guilty of contributory negligence as a matter of law." See, also *Johnson v. Evans,* 141 Minn. 356; *Lochhead v. Jensen,* 42 Utah, 99; *Glick v. Baer,* 186 Wis. 268.

In *Marks v. Dorkin,* 105 Conn. 521, a guest who hesitated about accepting the invitation to ride by reason of having considered the driver careless on a previous occasion was held not negligent in consenting to go along, particularly where he asked the defendant to slow up while the latter was speeding at the rate of from 55 to 60 miles an hour, which resulted in the accident in which the litigated injuries were sustained. See, also, *Carlson v. Millisack,* 82 Colo. 491; *Krause v. Hall,* 195 Wis. 565; *Stenstrom v. Blooston,* 177 Minn. 95; *Truso v. Ehnert,* 177 Minn. 249; *Brown v. Davis,* 84 Cal. App. 180.

Indeed, in view of the situation of the plaintiff's intestate immediately prior to the accident, her repeated protests to the driver as to his excessive speed fully, if not more than, complied with the requirement of the law. She was not required to leave the car, rather than continue therein, in view of the situation then existing. *Thomas v. Carter,* 218 Ala. 55.

On the questions just discussed, the verdict of the jury finds ample support in the evidence.

Defendants, in their supplemental typewritten brief, advance that in this case the "causal connection between the alleged negligence and the result sustained" has not been established. A careful consideration of the evidence leads to the conclusion that the injuries sustained in this accident in suit were the proximate cause of the death of

plaintiff's intestate. She was 49 years of age at the time of the accident. She had borne and raised ten children, the eldest 26 and the youngest 4½ years. Her general health before the accident was good. Prior to this time she did all the work about the house for the family, raised chickens, took care of cream, butter and eggs, and did the family sewing. There were 500 chickens raised by her on the home farm at the time of her death. She was a school teacher at the time of her marriage and assisted the children in their studies. She had had no previous accidents, at least none of a serious character. When she arrived home after this accident she could hardly walk, could not use her left arm at all, and thereafter complained of pains in her shoulders and "right chest" so long as she lived. She complained of no such symptoms prior to the accident. Her illness was practically continuous thereafter. She spent part of the time in bed, and lost weight. The family physician, who had been such four or five years previous to the accident, testifies that prior thereto her health was very good the last five years; and aided by X-ray films taken after the accident, and from his personal examinations and observations, such physician testifies that her death was due to pneumonia, not a distinct lobar pneumonia, but an inflammatory condition over the whole chest, attributable to the results of the injuries received in the accident in suit. The testimony of this physician, in the light of the facts of the record, fully establishes the necessary causal connection.

The defendants further challenge the competency of the evidence establishing the pecuniary loss. The husband of deceased, first detailing the work she performed in the home during her lifetime, testified affirmatively that he had continuously observed and knew the fair value of her services prior to the accident, and that the fair value of the same was from $25 to $30 a week. Her expectancy of life was established by the usual tables, admitted in evidence without objection. It may be said that the husband had a proprietary interest in the services of his

wife. Such services are personal in their nature. This jurisdiction is committed to the doctrine that an owner of property is permitted to testify to its value, without further qualification shown, and when uncontradicted, will support a verdict in his favor. *Gibbons v. Chicago, B. & Q. R. Co.*, 98 Neb. 696; *Anderson v. Estate of Akins*, 99 Neb. 630. See, also, *Chicago, R. I. & G. R. Co. v. Groner*, 43 Tex. Civ. App. 264; *Chicago, R. I. & T. R.* Co. *v. Armes*, 32 Tex. Civ. App. 32.

The defendants further challenge plaintiff's right as administrator of his wife's estate to recover for medical services and medicines furnished the deceased, as well as for cost of X-ray films which appear to have been secured as part of the treatment. This jurisdiction is committed to the view that in an action for personal injuries, "In the absence of proof that she was possessed of a separate estate other than of her cause of action for damages for personal injury, a married woman is not entitled to recover for medical expenses, etc., upon trial of such cause, unless she shows that she has paid the same in whole or in part." *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273. See, also, *Pomerene Co. v. White*, 70 Neb. 177. No proof of separate estate is disclosed by this record, and payment by the wife is negatived.

It would seem that this rule applies to actions brought by the wife's administrator under Lord Campbell's Act. In the instant case the facts establish a cause of action to the extent of $74 of the husband in his individual capacity, but not in the husband as administrator. It follows that to the extent of $74 the judgment must be deemed erroneous in the instant case.

The judgment of the district court will be reversed unless appellee files a remittitur in the sum of $74 within thirty days. In case remittitur is filed, judgment in the sum of $3,426 in favor of the appellee will be affirmed.

AFFIRMED ON CONDITION.

W. A. WELLS, APPELLEE, V. FARMERS STATE BANK OF OVERTON: E. H. LUIKART, RECEIVER, APPELLANT.

FILED FEBRUARY 14, 1933. No. 28315.

1. **Banks and Banking**: RECEIVERSHIP. Receiver of an insolvent bank takes and holds assets subject to preexisting liens.
2. ———: ———: PRIORITY OF LIENS. Priority of lien for benefit of depositors in an insolvent bank under section 8-1,102, Comp. St. 1929, is fixed by status at time of adjudication of insolvency.
3. **Mortgages**: RECEIVERSHIP. Funds in the hands of receiver of mortgagor are wholly subject to court's order; the receiver is but an officer of the court.
4. **Receivers**. "Where a receiver disburses funds in his hands or does any other act by the order and according to the direction of the court, he will be protected in carrying out such instructions, and the court order under which he acted will be a complete defense to personal liability in any action or proceeding." 23 R. C. L. 79, sec. 85.

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

Frank M. Johnson, F. C. Radke and *Barlow Nye*, for appellant.

James E. Bednar, contra.

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

DAY, J.

This is an appeal from an order of the trial court, approving the report of a receiver appointed in a mortgage foreclosure.

The plaintiff brought a suit to foreclose a second mortgage on farm land, and in connection with the proceeding procured the appointment of a receiver. The title to the land involved in the suit was in the Farmers State Bank of Overton. The bank was insolvent and the secretary of the department of trade and commerce was the receiver of the bank. The bank receiver appealed from the order appointing the foreclosure receiver. *Wells v. Farmers*

State Bank, 121 Neb. 462. The question presented to the court was the power of the court to appoint a foreclosure receiver, where a bank receiver was in possession of the property. Answering this question, this court held that, where mortgaged property of an insolvent bank is under the control of a receiver for the bank, the court is without authority to appoint a receiver in a foreclosure suit. The judgment of the trial court in appointing a receiver was reversed, with directions to discharge the receiver. Pursuant to the mandate of the court, the trial court ordered the receiver to render an account to the court of "his acts and doings as receiver," and that the income from the premises consisting of rents, profits, moneys, and other things of value be paid to the bank receiver. That part of the report necessary for a discussion of the issues is:

"I have collected for hay $826.85; for corn $173.65; total $1,000.50. * * * I have paid out for interest on the first mortgage * * * $793.50; for alfalfa seed $50; for lumber and repairs to buildings $29; for grasshopper poison $3; to our receiver for time and mileage $125. Total paid out $1,000.50. No money on hand."

The bank receiver objected to all items in this report except the item of $125 allowed the foreclosure receiver for his time and expense, for that "the depositors of the Farmers State Bank, Overton, Nebraska, have a first lien and a prior claim to all of the income derived from the assets of said bank, including the income from the above described premises, and that all other moneys paid out by (foreclosure) receiver Smith as shown by said report are contrary to law." The trial court overruled the objections and approved the report.

The basis of the bank receiver's position is that section 8-1,102, Comp. St. 1929, impresses the assets of an insolvent bank with a first lien for the benefit of the depositors and holders of exchange. The nature of this lien was determined in *Guaranty Fund Commission v. Teichmeier,* 119 Neb. 387, and later modified in *State v. Thurston*

State Bank, 121 Neb. 407, as to the time when the lien attaches. In the latter case, the court held: "Under section 8-1,102, Comp. St. 1929, priority of unsecured deposits in a state bank is fixed by their status at the time of the actual closing of the bank when the court, under section 8-190, Comp. St. 1929, adjudges it to be insolvent and orders it liquidated." When an insolvent bank is closed by the court and a receiver appointed, such receiver takes over all property for the benefit of the depositors. The receiver takes and holds the assets subject to liens against them as they exist at the time the court enters a decree of insolvency. *State v. Farmers & Merchants Bank*, 114 Neb. 378. The statutory lien provided by section 8-1,102, Comp. St. 1929, attaches to the assets of the bank and is limited to its interest in the property, which interest is decreased by the amount of valid prior liens. The receiver of an insolvent bank does not take land owned by the bank free and clear of such liens. *Guaranty Fund Commission v. Teichmeier*, 119 Neb. 387. In the instant case, the receiver took the land in question, which was the property of the bank, subject to the mortgage liens against it. In reality, the bank receiver took an equity of redemption. The second mortgage, which was the subject-matter of the suit, is a lien prior to the lien in favor of the receiver for the benefit of depositors. The appointment of a receiver in a foreclosure action is ancillary to the main action. The receiver is appointed for the purpose only of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage. *Prudential Ins. Co. v. Bliss*, 123 Neb. 578. The plaintiff in this case was adjudged to be entitled to a receiver to conserve the property and to apply the rents and profits of the mortgaged premises to the satisfaction of the debt, as provided by section 20-1081, Comp. St. 1929. Upon the previous appeal, the court was of the opinion that, where the bank receiver was in control of the property and where such receiver was an officer

of the court and subject to the court's orders, another receiver in the foreclosure was superfluous. The theory adopted at that time was that the bank receiver might just as well collect and hold the rents and profits and pay them out upon order of the court as a foreclosure receiver. There is nothing in that opinion to support the argument that the depositors have a lien superior to that of the mortgagee. The views expressed in *Wells v. Farmers State Bank,* 121 Neb. 462, were reexamined in *Prudential Ins. Co. v. Bliss,* 123 Neb. 578, and in part overruled. Of course, the former opinion in this case has become the law of the case. Even so, the claims of depositors and holders of exchange against an insolvent state bank are a lien subject to prior existing liens. The second mortgage involved in this foreclosure is a valid subsisting lien prior to the lien of the receiver for the benefit of stockholders. The bank receiver, who, by a former opinion of this court, since overruled, but controlling in this case, was permitted to serve in a dual capacity as foreclosure receiver also, holds funds subject to the orders of the court. Funds in the hands of receiver of mortgagor are wholly subject to court's order; the receiver is but an officer of the court. *Chicago Joint Stock Land Bank v. Hargrove,* 234 N. W. (Ia.) 801; *Carlon v. City Savings Bank,* 91 Neb. 790. The items in the foreclosure receiver's report, to which objection was made, were payments which were expressly authorized by previous orders of the court. The expenditures were made in direct obedience to such orders, and the foreclosure receiver is not liable for having so disbursed the money in his hands. As has been previously noted, the receiver is an officer of the court. He was obliged to comply with its orders directing payment of the money. Obedience to the order and direction of the court is sufficient protection to the receiver, and he will not be held personally liable for acting pursuant to such orders and directions. The orders authorizing the expenditure have not been attacked and still stand unimpeached. The rule has been

well stated as follows: "Where a receiver disburses funds in his hands or does any other act by the order and according to the direction of the court, he will be protected in carrying out such instructions, and the court order under which he acted will be a complete defense to personal liability in any action or proceeding." 23 R. C. L. 79, sec. 85. The rule is also stated substantially in the same form in 2 Tardy's Smith on Receivers, p. 2082. The following cases support this rule: *Willis v. Sharp,* 124 N. Y. 406; *Hilliard v. Sterlingworth R. Supply Co.,* 236 Pa. St. 82; *People v. Manhattan Fire Ins. Co.,* 85 N. Y. Supp. 221; *United States Fidelity & Guaranty Co. v. McCain,* 136 Miss. 30; *Killeen v. Boland, Gschwind Co.,* 157 La. 566; *Missouri & K. Interurban R. Co. v. Edson,* 198 Fed. 819; *Edee v. Strunk,* 35 Neb. 307. Furthermore, there is no complaint in this case that the expenditures were not made for the benefit of the mortgaged premises.

It therefore follows that it was not error for the trial court to approve the final report of the foreclosure receiver, and the judgment of the trial court is

AFFIRMED.

W. A. WELLS, APPELLEE, V. FARMERS STATE BANK OF OVERTON: E. H. LUIKART, RECEIVER, APPELLANT.

FILED FEBRUARY 14, 1933. No. 28316.

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

Frank M. Johnson, F. C. Radke and *Barlow Nye,* for appellant.

James E. Bednar, contra.

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

DAY, J.

This case was argued before the court at the same time as *Wells v. Farmers State Bank of Overton, ante,* p. 386,

and is similar in all respects, except that it involves the foreclosure of a mortgage of a different tract of land. Following the opinion in that case, the judgment is

AFFIRMED.

JIMMIE WISE, APPELLEE, V. GRAINGER BROTHERS COMPANY, APPELLANT.

FILED FEBRUARY 14, 1933. No. 28398.

1. **Automobiles: USE BY EMPLOYEE: PRESUMPTION: REBUTTAL: DIRECTION OF VERDICT.** Presumption that truck in charge of employee is in service of employer is not sufficient to prevent directed verdict when rebutted by convincing and undisputed evidence.
2. **———: ———: LIABILITY: INSTRUCTION.** Instruction that defendant's employee was not using truck in performance of any duty for employer, yet if employee's use for his private purpose was with employer's knowledge and consent, defendant is liable for damages caused by negligent operation, is erroneous.

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

Chambers & Holland and *C. Russell Mattson,* for appellant.

Arthur Balis, Albert P. Schwarz and *John E. Mockett, contra.*

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

DAY, J.

This was an action to recover for injuries received by the plaintiff, a minor, when he was hit by a truck of the defendant, a corporation, engaged in the wholesale grocery business and operating trucks in its business. At the time of the accident the truck was being used by the driver, an employee, for the purpose of going home for his dinner, and the said employee was not engaged in the performance of any duty for his employer, the

defendant. The plaintiff does not allege in his petition that the employee of the defendant was engaged in the performance of any duty for his employer at the time of the accident, and there is no evidence in the record, except to the effect that defendant's employee had borrowed the truck and was using it for his own convenience and pleasure. The plaintiff contends that there is a presumption that an automobile in charge of an employee is in the owner's service. This identical question was argued before this court in *Ebers v. Whitmore,* 122 Neb. 653. After careful consideration, this court announced the rule in an opinion by Leslie, District Judge, to be "that a presumption is not evidence and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed." Upon this question, this case is controlled by the opinion in that case, and the trial court should have sustained the motion of the defendant for a directed verdict.

While the determination of the foregoing issue is sufficient to dispose of the case, one of the assignments of error is based upon the giving by the court of an instruction which might well be considered here. After instructing the jury that the defendant's truck at the time of the accident was being driven by an employee in going to his home for dinner and was not then engaged in any performance of a duty for his employer, the court proceeded to further instruct the jury that, if they found the driver of the truck was using it for his own convenience with the knowledge and consent of his employer, the defendant, defendant would be liable for damages caused by the negligent operation of the truck. The plaintiff in his brief does not defend this instruction, but admits that the evidence in this case "does not warrant the application of the family automobile purpose doctrine." The plaintiff relies upon the presumption that the driver of the truck was engaged in the employer's business at the time of the accident. As heretofore stated, that presumption is not sufficient to support a verdict where the evidence to establish the contrary is convincing and un-

disputed. This theory of the case was not presented to the jury by the instructions of the court, since the court instructed the jury that at the time of the accident the defendant's truck was being used by an employee for his own personal and private purpose and not in the performance of any service for the employer. An employer is not liable for damage resulting from the negligence of an employee in the operation of a motor vehicle when not engaged in the performance of any duty for his employer. This view finds support in *Ebers v. Whitmore,* 122 Neb. 653; *Keebler v. Harris,* 120 Neb. 739, and other Nebraska cases.

While the court is unanimously of the opinion that the evidence upon the question of negligence is not sufficient to support a finding that the driver of the defendant's truck was negligent, it is unnecessary to discuss this assignment of error because of the conclusions which we have reached upon other questions presented by the record.

Judgment of the trial court is reversed, and the case is dismissed.

REVERSED AND DISMISSED.

SOREN PETERSON ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 91, HAMILTON COUNTY, ET AL., APPELLANTS.

FILED FEBRUARY 14, 1933. No. 28627.

Constitutional Law: TRANSFER OF LANDS FROM ONE SCHOOL DISTRICT TO ANOTHER: ESTOPPEL. In the year 1912 the county board, the county clerk, and county superintendent of Hamilton county, acting under the apparent authority of section 79-130, Comp. St. 1929, transferred some tracts of land from adjoining school districts to school district No. 91, a high school district; from and after that date the owners of the land so transferred paid taxes to district No. 91, voted at school elections, and educated their children in district No. 91, without payment of tuition. *Held,* that, after such acquiescence and laches for 20 years, such landowners cannot maintain action for the purpose of restraining district No. 91 from collecting school taxes thereon, on the ground that the law under which the transfers were so made was unconstitutoinal and void.

APPEAL from the district court for Hamilton county: HARRY D. LANDIS, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Prince & Prince, for appellants.

Craft, Edgerton & Fraizer, Allen & Requartte and *Charles L. Whitney, contra.*

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

RAPER, District Judge.

School District No. 91 of Hamilton county was organized many years prior to the year 1912, it embracing the village of Hampton, and maintained a high school. On May 7, 1912, the county board, the county clerk, and county superintendent took certain lands belonging to plaintiffs and interveners from school districts Nos. 8, 40, and 48, and incorporated them within the limits of School District No. 91, and ever since said date School District No. 91 has exercised taxing jurisdiction over such lands, and has levied and collected a large amount of school taxes therefrom. The action of said officers in adding to district No. 91 the lands of the plaintiffs and interveners was taken under the provisions of section 79-130, Comp. St. 1929, which the court in the case of *Ruwe v. School District,* 120 Neb. 668, held to be unconstitutional. Ever since 1912 the plaintiffs and interveners have paid their school taxes to district No. 91, and most of them have participated in the annual school meetings; some have held office in district No. 91; their children attended school, some of the pupils finishing the high school courses, and no tuition has been paid for any of said pupils, and generally these complaining landowners and district 91 conducted themselves in their mutual relation as if there was no question or doubt as to the legality of the right of district No. 91 to have these lands made part of that district, nor was attempt made before the institution of these suits to have the order of May 7, 1912, set aside or abrogated.

In April, 1932, there were two actions begun by different plaintiffs, and some others intervened, which actions were by agreement consolidated and tried together. These plaintiffs and interveners were owners of the lands that had been taken from districts Nos. 8, 40, and 48 and added to district No. 91. These landowners allege that the acts of the county officers on May 7, 1912, were void, because the law under which they acted was unconstitutional, and that their lands never were in fact a part of district No. 91, and they pray for an injunction against district No. 91, and the officers of the county whose duty it is to levy and collect school taxes, restraining district No. 91 from exercising any jurisdiction over the lands of plaintiffs and interveners, and from levying or collecting any school taxes for district No. 91, and they also allege that district No. 91 has levied and received taxes largely in excess of what the district to which they claim they properly belonged would have required them to pay, and they ask for an accounting of these excessive taxes and pray for judgment against district No. 91 for such amounts so found.

School District No. 91, in its answer, in so far as necessary to state, conceding that the law under which the lands in question were added to its territory was unconstitutional and void, alleges that the plaintiffs and interveners knew at all times that said changes had been made; that they made no objection thereto for 20 years; that they had educated their children in district 91, had paid taxes to said district for 20 years without protest; that some were for years officers of the district; that they acquiesced in such proceedings during all said time, voted to levy taxes in said district; and claims that plaintiffs and interveners are barred by the statute of limitations, and were guilty of such laches and negligence as to bar any recovery; and as to claim for recovery of taxes, no objection had been made to the taxation of their property; that said taxes were not paid under protest, nor had any demand been made for such taxes, and their claim is barred by statute of limitations.

The county board and county clerk, who were made parties, answered by general denial.

The trial court granted the plaintiffs and interveners a perpetual injunction restraining district No. 91 and the county officers from exercising school and taxing jurisdiction over these lands. The court refused the claim of plaintiffs and interveners for an accounting, and denied the request for judgment for taxes that had been paid. School District 91 appeals from the decree awarding the injunction, and the plaintiffs and intervener appeal from the order denying their claim for the taxes paid.

The plaintiffs and interveners claim they were laboring under a mistake of fact when they paid their taxes, and were misled because they were relying upon the legality of the legislative act when their property was added to district 91, and that they began their action promptly after this court held the law unconstitutional in *Ruwe v. School District,* 120 Neb. 668. That was not a reliance upon a mistake of fact but on a question of law. They knew that their lands had been transferred from other districts to district No. 91. On the legal phase of the matter, the courts were open to adjudicate their rights at all times.

School District No. 91 pleads estoppel, acquiescence, ratification, and laches.

The decisive principle here involved is whether under the facts the plaintiffs and interveners are estopped by their actions and 20 years' delay in attempting to now assert a right which they might have obtained at the time of the transaction. The principle thus invoked has been passed on by many courts, and whether it is called ratification, or laches, or estoppel by acquiescence, has been given rather wide application; probably most of the cases refer to questions arising in municipal corporations, but the principle has also been frequently applied to school districts.

"Acquiescence, especially if long continued, will ordinarily estop one from attacking the validity of proceedings

for transferring his property to or including it in a school district or other local school organization." 56 C. J. 252.

"Taxpayers or inhabitants may be estopped to question the validity of the annexation or detachment of territory to or from a municipal corporation as by long continued acquiescence in the annexation, or by failure to exercise the rights of * * * appeal given them by statute. So, also, a municipality may be estopped." 43 C. J. 138, and cases cited.

The question is not a new one in this state. In *Sage v. City of Plattsmouth,* 48 Neb. 558, opinion by Commissioner Irvine, where there was seven years' delay in bringing the action, it was held that landowner could not maintain action to restrain collection of city taxes on the grounds that land had been illegally taken into the city, where he had paid taxes during all that period. In that case the owner had not received any benefits from the city. In *State v. Several Parcels of Land,* 80 Neb. 11, (on rehearing vacating the opinion of that case in 78 Neb. 703) Judge Letton, while not basing his conclusion entirely upon the doctrine of laches, in his opinion says: "Further, the defendant is plainly guilty of laches. He paid the city taxes from 1888 to 1894, inclusive, and has taken no steps to question the validity of the incorporation, though the ordinance was passed 19 years ago. If the defendant desired to contest the validity of the annexation of his property to the city, he should have done so long ago. *Strosser v. City of Fort Wayne,* 100 Ind. 443." And in paragraph 3 of the syllabus, the court announces: "Nor can the validity of the annexation proceedings be tested in such a suit, where the evidence shows acquiescence in the proceedings and the payment of taxes levied by the corporation for several years." That was a proceeding to prevent the city from collecting taxes, and it appears that the property taxed had never in fact received any benefits from the city.

A case almost directly in point is *School District v. School District,* 81 Mich. 339, in which the Michigan court

lays down the rule that the acquiescence of a school district for six years in the action of the joint board of school inspectors detaching a part of its territory and attaching it to defendant district estops the former from claiming either the territory itself or taxes collected thereon during those years. See, also, *State v. City of Pierre,* 15 S. Dak. 559; *State v. McLean County,* 11 N. Dak. 356; *State v. City of Des Moines,* 96 Ia. 521.

The plaintiffs cite the case of *Chicago, B. & Q. R. Co. v. Cass County,* 51 Neb. 369. In that case the railroad company had listed and paid taxes upon certain property for several years to the school district before 1895, then began an action to restrain the collection of the tax for 1895 on the ground that the property was not, nor ever had been, either legally or illegally in the district. The court found that the property never had been included in the boundaries of the district, and that the district had no right to levy tax thereon, and that prior payment of taxes did not estop the plaintiff from maintaining the action after discovery of the fact. Other cases of similar import are cited. There is a clear distinction in those cases from the case at bar. In those cases the wrongful assessments were made on property that was not within the limits of the district.

Under the situation and facts shown herein, we hold that the laches, acquiescence, and participation of these landowners for 20 years estop them from now claiming the relief prayed for.

This holding necessarily disposes of all the other issues raised.

The decree of the district court is reversed, in so far as it grants the injunction against School District No. 91 and places the lands in question in their original districts; and the decree denying claimants their prayer for taxes paid is confirmed. The cause is remanded to the district court, with directions to dismiss plaintiffs' and interveners' petition at their cost.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

HELEN BELLHEIMER, ADMINISTRATRIX, APPELLEE, V. V. V. RERUCHA, APPELLANT.

FILED FEBRUARY 17, 1933. No. 28342.

1. **Pleading**: PETITION: AMENDMENT. Plaintiff, as administratrix, filed petition for damages for wrongful death before appointment as administratrix. Later, after appointment and before answer, an amended petition was filed, to which defendant entered voluntary appearance and answered. *Held* proper practice under Code. Comp. St. 1929, sec. 20-852.
2. **Parties**: PETITION: AMENDMENT. Mistake in beginning an action in the name of one as administratrix, who in fact is not, may be corrected by an amended petition after appointment as such.
3. **Trial**: JURORS: EXAMINATION. Questions by plaintiff, of jurors on *voir dire* and of defendant on cross-examination as to their connection with the insurance carrier, were within the rule of practice promulgated by this court.
4. **Physicians and Surgeons**: MALPRACTICE: SUFFICIENCY OF EVIDENCE. Examination of record reveals sufficient evidence of negligence to support verdict.
5. **Evidence**: MALPRACTICE. In an action for malpractice against an osteopathic physician and surgeon, testimony of a physician and surgeon of another school of practice properly received, where practice is recognized by both schools as the same.

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

Finlayson, Burke & McKie and *Sampson & Dillon*, for appellant.

Kennedy, Holland & De Lacy, contra.

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

DAY, J.

This was an action brought by the widow as administratrix of the estate of Francis Bellheimer to recover damages for his death, which she alleges was the result of malpractice by the defendant, Dr. Rerucha, an osteopathic physician. From a judgment on a verdict in favor of plaintiff, defendant appeals.

The defendant treated the deceased for hemorrhoids by what is known as the "infiltration method." The treatment began on the 26th day of February, 1930, and continued until the 15th day of March, 1930, at which time the deceased suffered hemorrhages of blood from the rectum which continued through the 16th and 17th, when the deceased began to weaken from loss of blood and fainted. The defendant was advised of the condition of the deceased, and on March 18, when the defendant did not come and treat the deceased, it was necessary to employ another physician. The deceased died from the effects of the loss of blood.

The plaintiff alleges that the death of deceased was caused by the negligence of the defendant. The negligence charged is that defendant did not employ methods usually and customarily used by osteopathic physicians and surgeons in the vicinity to treat such condition, and that he was negligent in failing to call and treat deceased when he was hemorrhaging and that he did not stop the bleeding. The defendant denied the allegations of plaintiff.

When the plaintiff filed her petition as administratrix, by some mistake, she had not been appointed. Not having been so appointed by the probate court, her capacity to sue is questioned. When this defect was mentioned by the defendant, the appointment was made, and thereafter an amended petition was filed. Whereupon the defendant filed a voluntary appearance and later filed an answer. At the time of trial the defendant challenged the right of the plaintiff to amend her petition by changing, as he contends, the party plaintiff. Under our practice, "The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant, or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition." Comp. St. 1929, sec. 20-849.

The plaintiff filed her amended petition before the defendant filed his answer. Our Code further provides: "The court may, either before or after judgment, in furtherance of justice * * * amend any pleading * * * by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case." Comp. St. 1929, sec. 20-852.

In *Weekes Grain & Live Stock Co. v. Ware & Leland*, 99 Neb. 126, this court held: "A mistake in beginning an action in the name of a domestic corporation after its charter has been forfeited for nonpayment of an occupation fee may be corrected by an amended petition showing that the managing officers or directors, as trustees, are plaintiffs." See, also, *Omaha Furniture & Carpet Co. v. Meyer*, 80 Neb. 769.

However, at a time subsequent to plaintiff's appointment as administratrix, she filed an amended petition. At the time of the filing of the amended petition, the plaintiff could have filed a new cause of action. The record does not disclose that the statute of limitations had run or that any defense was lost, prejudicial to defendant. The defendant submitted himself to the jurisdiction of the court by filing a voluntary appearance. Under the Code, a new action could have been started by filing a petition, followed by the defendant filing voluntary appearance. As heretofore noted, the defendant not having been prejudiced, necessity does not require any further consideration of this question.

The prevailing modern tendency is not toward such inconsequential technical refinements. "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the first party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.

The appellant presents the question as to the right of plaintiff to examine jurors on *voir dire* as to their con-

nection, if any, with the defendant's insurance carrier, or to cross-examine the defendant as to his indemnity insurance. In a recent case, *Nichols v. Owens Motor Co.*, 121 Neb. 105, the previous decisions of this court were reviewed. The discussion in that opinion is applicable here and need not be repeated. The only novelty in the presentation here is that the defendant's attorneys, before the trial judge at chambers prior to impaneling the jury, made a disclosure as to the identity of the insurance carrier and some facts concerning it. However, this did not so negative the possibility that certain jurors might be disqualified as to foreclose further examination of prospective jurors. And it did not deprive the plaintiff of cross-examination of witnesses as to credibility.

There is sufficient evidence to support the verdict of the jury. As is usual, in cases of this nature, involving technically scientific matters, there is a conflict in the evidence. The appellant presents an able argument supporting his conclusions drawn from the evidence. This same argument was no doubt properly made to the jury. But the jury resolved the question of fact as to negligence against the defendant. The testimony of lay witnesses as to physical facts, together with the opinions of medical experts who testified for plaintiff, fortified by cogent reasons that strengthen their opinions as experts, no doubt influenced the determination of the issue. *Flesch v. Phillips Petroleum Co., ante,* p. 1. The opinions of these experts were in many respects supported by the testimony of experts called as witnesses by defendant. It is not within the province of this court to substitute its judgment for that of a jury upon a question of fact. "Where the evidence is in substantial conflict, but sufficient to sustain the finding of the jury, their verdict on the issue of fact is conclusive." *Exchange Nat. Bank v. Schultz,* 113 Neb. 346.

Testimony of surgeons of another school may be received against an osteopathic surgeon where the operation in question is recognized as the same in both schools.

The evidence, including the testimony of defendant himself, is that the treatment of this case would be the same in both schools. *Cook v. Moats,* 121 Neb. 769, a recent case, contains a comprehensive and careful statement and analysis of this proposition which is applicable to this case.

There are other assignments which are not discussed in the brief and were not argued orally before the court. Such errors are waived and will not be considered. *Hackney v. Raymond Bros. Clarke Co.,* 68 Neb. 624; *Hoch v. Schlattan,* 76 Neb. 522.

It, therefore, necessarily follows that the judgment of the trial court is affirmed.

AFFIRMED.

ROY SENTOR, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED FEBRUARY 17, 1933. No. 28634.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: "EMPLOYEE." "In the workmen's compensation law the provision that the word 'employee' shall not be construed to include 'any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer,' means conjunctively both casual employment and usual course of trade." *Sherlock v. Sherlock,* 112 Neb. 797.
2. ———: ———: ———. Performance of a duty required by law is a part of the business of the city of Lincoln, within the contemplation of the compensation law.
3. ———: ———: COMPENSABLE INJURY. Injury received while employee is engaged in work incidental to his employment arises out of and in the course of his employment.
4. ———: ———: ———. From evidence, determined that plaintiff's disability due to injury resulting from accident.

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

Perry, Van Pelt & Marti, for appellant.

Max Kier and *Lloyd E. Chapman, contra.*

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

DAY, J.

This is a suit brought under the workmen's compensation act to recover for an injury received in the course of plaintiff's employment by the city of Lincoln. The city employed plaintiff, with others, to clean the snow and slush from street intersections. The city owned a machine for this purpose, but in order to relieve unemployment at the time in question was doing the work by hand labor. For the same reason and to benefit a greater number, the employment was for one day at a time. The trial court was of the opinion that at the time of the accident the employment of the plaintiff was casual, within the meaning of the workmen's compensation law. Section 48-115, Comp. St. 1929, in so far as applicable to the present situation is: "It shall not be construed to include any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.'" This section of the statutes has been construed in *Sherlock v. Sherlock,* 112 Neb. 797, as follows: "In the workmen's compensation law the provision that the word 'employee' shall not be construed to include 'any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer,' means conjunctively both casual employment and usual course of trade."

It is argued by the attorneys for the city of Lincoln that the employment of the plaintiff was not within the regular trade, business, profession or occupation of the employer. The basis of this argument is that it had been the custom to clean the snow and slush from the intersections with a machine, and that it was not within the regular business of the city to do this work by hand labor.

Although this argument is ingenious, it is not persuasive. Section 15-263, Comp. St. 1929, enjoins upon the city of Lincoln the duty to care for the streets. The nature and extent of this duty has been discussed by this court in *Chapman v. City of Lincoln,* 84 Neb. 534, and *City of Lincoln v. Janesch,* 63 Neb. 707. The performance of a duty required by law is a part of the business of the city of Lincoln, within the contemplation of the compensation law. In so far as this case is concerned, it is immaterial whether the city performs this task by hand labor or by machinery. The test is whether the employment was in furtherance of the business of the city, and not in the manner or method adopted in the performance of said duty.

The evidence in this case is that the injury occurred while the defendant was on his way from the building of the street department to the place where he had been assigned to work. He had reported for work at the street department building, had been furnished with tools, and was sent to the place where he was to perform the work. *Siedlik v. Swift & Co.,* 122 Neb. 99, is relied upon to support the proposition that an employee injured while on his way to work cannot recover compensation. Siedlik was employed in the packing plant of Swift & Company. On his way to the plant, he suffered an injury which this court found to have occurred independent of the relation of master and servant. This case presents a different situation. The plaintiff had reported for work at the city street department building, been furnished with tools for the purpose of doing the work, and at the end of the day was to return the said tools to the building. The carrying of the tools from the building in which they were kept to the place at which they were to be used was a part of his duties, just as much as using the tools when he arrived at the place where he was assigned to work. An injury which is received while employee is engaged in work incidental to his employment arises out of and in the course of his employment.

Tragas v. Cudahy Packing Co., 110 Neb. 329; *Speas v. Boone County*, 119 Neb. 58. It is therefore determined that the plaintiff was an employee engaged in the work of his employer at the time of the accident.

The evidence preponderates in favor of a finding that an accident occurred and that the plaintiff was injured. However, there is some dispute as to the extent of the resultant disability. A medical expert testified for the plaintiff and one for the defendant. Numerous lay witnesses testified to physical symptoms of the plaintiff. There is but little conflict in the evidence as to the fact that plaintiff was disabled. Even the testimony of the medical expert called by the city supports a finding of disability.

It is more difficult to determine whether or not the disability was caused by the accident. Immediately after the accident the plaintiff showed the effects of the fall. The night after, he became worse. The disability followed the accident. Lay witnesses testify as to the accident and the disability. The conflict occurs only in the opinion evidence of the medical experts. The disability of plaintiff was caused by a bent coccyx and hemorrhoids. One physician testified that the hemorrhoids were caused by the fall, a common cause, while the other physician testified that it was unusual for such a fall to cause them. The fall was of sufficient force to bend plaintiff's coccyx. In the state of the evidence, we are constrained to find that plaintiff's disability was the result of the accidental injury.

Since the trial court did not reach a consideration of the extent of disability and the amount of compensation due therefor, and because plaintiff's condition may have since improved, the judgment is reversed and the cause remanded, with instructions to determine upon a hearing the extent of disability and the compensation therefor and to enter a judgment for the same. Plaintiff allowed $75 as attorney's fee in this court.

REVERSED.

J. J. JOHNSON, APPELLANT, V. MARTIN MAYS, APPELLEE.

FILED FEBRUARY 17, 1933. No. 28317.

1. Justices of the Peace: CHANGE OF VENUE. Section 21-603, Comp. St. 1929, provides a simple method for a change of venue from a justice court.
2. ———: ———: COUNTY COURTS. Only justices of the peace being designated in said section, it is *held* that such provisions do not authorize a change of venue from a county court, even though the amount involved is within the jurisdiction of a justice court.

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

J. E. Wilson, for appellant.

H. A. Bryant, contra.

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

PAINE, J.

An appeal is brought to this court from the sustaining of a special appearance. Suit was brought in the county court of Saunders county by plaintiff and appellant upon a promissory note for $82.90 against the defendant and appellee. On the return day of the summons, the defendant appeared before the county judge and took a change of venue to the justice court of W. J. Lehr. The case was adjourned several times before this justice, and upon June 13, 1931; which date had been agreed upon by both parties for trial, the defendant filed a special appearance and objected to the jurisdiction of the court over the subject-matter, upon the ground that the transcript had not been filed in justice court within one day after the return of the summons, nor was the trial set within the time provided by law. This special appearance was overruled by the justice, and the case was tried to a jury, and a verdict was rendered for plaintiff for $41.45 and costs. The dates involved in the case are as follows: The return day of the summons in the county

court was April 20, 1931, upon which day the defendant took a change of venue to the justice court. Upon April 24, 1931, the county judge certified to all of the original papers and transcript of proceedings, and upon the same day the justice set the trial for May 30, 1931, and, this being a legal holiday, the transcript shows that the cause was continued to a date to be agreed upon by all parties. The transcript shows: "June 13, 1931, 10 o'clock a. m. Now at this time the cause came on to be heard, the same having been agreed upon by all parties."

Upon the case being taken to the district court, the defendant again filed a special appearance, setting out the facts as above stated, and that the justice to whose court the case was taken failed to set said cause for trial within two days after the trial date as originally fixed, and setting up that, by reason of the failure of the county judge to deliver or transcript said papers and proceedings to the justice of the peace within the time provided by law, the justice court was without jurisdiction over the subject-matter of the action, and that the district court is also without jurisdiction to hear and determine the cause, and that the objection to the jurisdiction of the lower court over the subject-matter, which was raised therein, was renewed in the district court, which special appearance was sustained in the district court upon January 5, 1932, whereupon the plaintiff and appellant gave cost bond of $75 and brought his appeal to this court.

In this case it appears that the defendant assumed that the provisions of section 21-603, Comp. St. 1929, were sufficient authority for him to secure a change of venue to a justice court from the county court, and he has briefed the case on the theory that, if the suit was brought in a county court and was within the jurisdiction of a justice of the peace, this section of the statute gave him the absolute right to obtain a change of venue. *Tyler v. Baxter*, 29 Neb. 688; *Paul v. Ziebell*, 43 Neb. 424; *Moss v. Lindsey*, 62 Neb. 829.

While neither party has cited us to the case, and while it is not given in the annotations under this section in the statute, there appears to be one case in Nebraska directly in point, which is the case of *McCarthy v. State,* 10 Neb. 438, in which Chief Justice Maxwell held that, as justices of the peace were specially designated in this act, therefore these provisions, in the opinion of the majority court, apply only to causes pending before a justice of the peace, and do not apply to county courts, although he hesitated to give his full assent to that construction of the statute. This decision has never been overruled, and has never been cited but once, which was in the case of *Seay v. Shrader,* 69 Neb. 245, so that this precedent appears to be in full force and effect.

We are, therefore, faced with the proposition that, with no right to do it under the decision of this court, the defendant took this case to the justice court, and we must credit the defendant's act with good faith; but his action was unauthorized. The defendant thereby made the justice his agent in a way, and attempted to authorize him to do an act which was not legal. It appears that, in endeavoring to perfect this appeal, his transcript was not marked filed, by the justice to which he transferred it, within the time provided by law, yet we must attribute to him good intentions, and not attribute to him a desire to take the case from the proper jurisdiction of the county court, and then, by taking advantage of a technicality, have it out of the justice court, as that would tend to show bad faith on his part.

In *Reed v. Mott,* 2 Neb. (Unof.) 450, it was held that, if a party had agreed to all of the continuances, and voluntarily took part in all of the proceedings up to the time of final judgment, he had waived the error, if any, committed by the justice in overruling his objection to the jurisdiction of the court. Many other irregularities also took place in this case.

In *Huff v. Babbott,* 14 Neb. 150, a judgment which was not rendered by a justice immediately upon the re-

ceipt of the verdict was upheld on the theory that too narrow a construction of the statute should not be given.

In the case of *Fischer v. Cooley,* 36 Neb. 626, it was held that the justice had jurisdiction of the subject-matter and over the person of the defendant, and this was not lost by several continuances which carried it over the 90-day period, since they were granted upon his procurement or with his consent. To permit defendant to take advantage of the error or irregularity in adjournment would be to allow him to reap a benefit from his own acts.

It appears that adjournments were had several times in this justice court, and both parties appeared in court upon June 13, 1931, it being the day upon which they had agreed to try the case, and then the defendant filed his special appearance, objecting to the jurisdiction of the court over the "subject-matter" of the action for the reason that said action had not been transferred to that justice court, within the time provided by law, nor was it about to be tried within the time provided by law.

It will be noted that in this special appearance he made no mention of objecting to the jurisdiction of the court over his person, but only the subject-matter, and, therefore, this court will hold that, under the circumstances, the justice court had jurisdiction over his person and over the subject-matter, and that the justice was right in overruling the special appearance, as the defendant had made a general appearance by agreeing to trial upon that day. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance herewith.

REVERSED.

THOMAS W. MOFFITT, APPELLEE, V. GERTRUDE D. REED, APPELLANT: VERNETTA MARIE HANSEN ET AL., APPELLEES.

FILED FEBRUARY 17, 1933. No. 28318.

1. **Judgment: RES JUDICATA.** When a question has been litigated before between the same parties, and the court has determined

the question between them, that judgment is an absolute bar to that same matter, as well as to every matter offered to sustain or defeat that contention. Former judgment is now binding upon these parties, it having never been modified or reversed.

2. **Life Estates**: CONVEYANCE: FORFEITURE. The conveyance of a certain tract of land by the life tenant conveys to the grantee such estate as the life tenant holds, and for such conveyance the remaindermen cannot ordinarily declare a forfeiture, as their rights are not usually affected thereby.
3. **Taxation**: TAX LIEN: FORECLOSURE: PROOF. The party foreclosing a lien for taxes under section 77-2040, Comp. St. 1929, may, under proper pleadings, make out a *prima facie* case by the introduction of his tax certificate and receipts. If the defendant landowner has set out proper defenses thereto and introduced sufficient competent evidence in support thereof, he thereby overcomes the presumption of regularity of the proceedings. But the burden of proof is upon the plaintiff throughout to establish his case by a preponderance of the evidence.

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

Gertrude D. Reed, pro se.

Walter L. Anderson, H. N. Mattley, Walton B. Roberts and *Beghtol & Foe, contra.*

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

PAINE, J.

Plaintiff brought action to foreclose a tax certificate against 80 acres of land in Lancaster county. All parties having an interest in said 80 acres, so far as plaintiff could ascertain, were made defendants. Several answers and cross-petitions were filed, and trial was had upon June 4, 1931, and upon December 3, 1931, a decree was entered in the district court, finding that $766.56, with 12 per cent. interest, was due the plaintiff on his tax certificate, and the same was decreed to be a first lien. The decree also provided for an attorney's lien of 10 per cent. thereof to Walter L. Anderson. The court allowed

$75 to Walton B. Roberts as guardian *ad litem,* to be taxed as part of the plaintiff's costs. All of the claims of Cora O. Berge and H. N. Mattley, cross-petitioners, were dismissed. The possession of the property was continued in receivership until after sale by the sheriff. The decree found that Gertrude D. Reed had a life estate in the property, and directed that the property be sold and the proceeds applied in the manner set out in the decree. The pleadings in the case are exceedingly voluminous, and it is impossible in this opinion to set out but a very brief summary of them.

The plaintiff, Thomas W. Moffitt, in the fourth cause of action of his petition, alleges that he purchased a tax certificate upon the east half of the southeast quarter of section 15, township 8, range 8, in Lancaster county, Nebraska, for delinquent taxes for the year 1924, amounting to $57.25, and thereafter paid as subsequent delinquent taxes to said certificate, for 1925, $61.88; for 1926, $58.91; for 1927, $78.03; and upon June 5, 1929, paid the delinquent taxes for 1928, of $143, and upon May 20, 1930, paid the delinquent taxes for 1929, of $148.70. Plaintiff then sets out that Charles Monk and wife were the tenants in actual possession of the property, and that Gertrude D. Reed, Gertrude Reed, assignee, William D. Way, Victor C. Rasmussen, Zella Rasmussen, Vernetta Marie Rasmussen, Emma Lois Rasmussen, Merle Warren Rasmussen, Victor Reid Rasmussen, H. N. Mattley et al. all claim some interest in said real estate.

Plaintiff further alleged that Mary Rasmussen in her lifetime was the owner of the property, and that, as her estate was being probated in Lancaster county, he was unable to ascertain the interests or rights of her respective heirs. That H. N. Mattley and George W. Berge were the attorneys in said estate proceedings, and have a claim for their fees therein; that Zella Rasmussen has now remarried, and her present husband's name is Wayne Rogers. Plaintiff asks for an accounting, and that his tax lien be declared a first lien against said property, and

for other relief. Upon December 12, 1930, Walton B. Roberts was appointed guardian *ad litem* for the three minor defendants, each over the age of 14 years.

Upon February 10, 1931, Gertrude D. Reed filed her answer to plaintiff's petition, and a cross-petition against all other defendants, and alleged among other things that Mary Rasmussen was during her lifetime the owner in fee simple of the 80 acres of land hereinabove described, and the said Mary Rasmussen died on March 10, 1910, leaving a last will, in which, in the second paragraph thereof, she devised the said 80 acres to her husband, Lars Rasmussen. Other paragraphs of said will are set out as follows:

"Third. After the death of my beloved husband, I desire that the above described farm become the property of my beloved son, Victor C. Rasmussen.

"Fourth. The widow of Victor C. Rasmussen, Zella Rasmussen, is to have the use of the above described farm so long as she shall remain single and his widow.

"Fifth. At the death of the widow, Zella Rasmussen, the heirs shall sell the farm above described and divide the proceeds of the sale equally between them."

Cross-petitioner states that Lars Rasmussen died December 23, 1916, intestate, and alleges that the county court of Lancaster county determined that Victor C. Rasmussen was the only heir at law of Lars Rasmussen, and inherited said land in fee simple from his father. She further alleges that on May 17, 1923, execution was issued upon two judgments against said Victor C. Rasmussen, and the sheriff of Lancaster county levied on said land, and at the sheriff's sale thereon the cross-petitioner, Gertrude D. Reed, purchased the same, and sheriff's deeds were delivered to her and recorded October 10, 1923, and claims that she thereby became, and is now, the fee owner of said land, and took possession thereof on July 14, 1923. Cross-petitioner further sets out that Zella Rasmussen, now Zella Rogers, claims some interest in said land by reason of the said fourth paragraph of

the will of Mary Rasmussen, and that said claim casts a cloud upon the title, which should be removed; that the children of Victor C. Rasmussen and his first wife, Zella Rasmussen, claim some right in said property under the fifth paragraph of said will, by reason of being the "heirs" of Mary Rasmussen, but Miss Reed alleges that the fifth paragraph of said will is void, and asks to have the cloud cast by the claims of such heirs removed. The cross-petitioner alleges that certain defendants claim an interest in said land by reason of a pretended judgment rendered May 8, 1926, in the district court for Lancaster county in the case of Gertrude D. Reed v. Victor C. Rasmussen et al., and claims that the court was without jurisdiction and the same is void, and subjects the title to the land in question to constant litigation by each and every grandchild or great-grandchild who makes a claim thereto, and prays that the pretended judgment which casts a cloud upon her title be removed. Cross-petitioner insists that the interests of all other defendants in this case are junior and inferior to her rights, and asks that the title of said 80 acres be forever quieted in her, subject only to the taxes that are lawfully levied and assessed against the land.

For answer to plaintiff's petition, she specifically denies that the taxes levied for school purposes for the years 1929, 1930 and 1931 were lawfully levied or assessed against said land. She alleges that Charles Monk, who was the tenant thereon, without her authority or knowledge made application for the transfer of 40 acres of her land from school district 116 to district 8; that said application showed upon its face that none of the several provisions in section 79-2101, Comp. St. 1929, were fulfilled or complied with, and that such application for transfer was void, and that plaintiff has notice of the defects of the levy and assessment of said school taxes. She further alleges that, acting upon said application, said transfer was made of 40 acres of her land, and without authority of law the taxing officers reappraised the

40 which they had transferred at $5,000, while the 40 that remained in district 116 was appraised at $3,500, which increased her taxes illegally by about $75 per annum.

To this answer the transcript shows no reply filed by the plaintiff, although replies are filed by Vernetta Marie Hansen, Emma Lois Ryan, Merle Warren Rasmussen, Victor Reid Rasmussen, Walton B. Roberts, guardian *ad litem.* That in the answer and cross-petition of Hansen and Ryan against Reed, she is charged with having sold a portion of said premises to the state of Nebraska for $210 for highway purposes, and that a judgment should be entered against her therefor, and, in addition, for $500 damages for this and other waste committed thereon.

This appeal was prosecuted in this court by Gertrude D. Reed, who was allowed extra time for oral argument, and who has been permitted to file five separate briefs herein. For reasons of her own, she has separately briefed and argued her contentions against the plaintiff and against the other cross-petitioners. However, the decree of the district court covered all the separate contentions in one journal entry, and this opinion will discuss briefly each of her contentions, as far as the same can be done within the reasonable limits of an opinion.

The case at bar first appeared before this court when some of the cross-appellants failed to file their transcripts within three months. Gertrude D. Reed, a cross-appellant, filed a motion to strike, and, upon argument and submission, this motion was sustained. *Moffitt v. Reed,* 123 Neb. 420.

1. The first error relied upon for the reversal of this case by Miss Reed is that this court erred in holding in the former case of *Reed v. Rasmussen* (No. 25592, no opinion) that the decree of the district court was right in finding that she was only entitled to a life interest in this 80 acres of land and the fee title was in the heirs who are remaindermen under the will of Mary Rasmussen.

It appears that the appellant, Gertrude D. Reed, pro-

cured her life estate to this 80-acre farm in the following manner: That upon December 11, 1913, C. W. Eggleston & Company recovered a judgment against Victor C. Rasmussen in the sum of $51.74 and costs, which judgment, being subsequently revived in the district court, amounted on January 27, 1920, to $86.48 and costs, which thereupon became a lien against the life estate of Victor C. Rasmussen. That upon February 9, 1921, Orvil D. Hendee recovered a judgment against said Rasmussen in the sum of $508.90 and costs, which, upon being transcripted to the district court, likewise became a lien on said life estate, and that both of said judgments were sold and assigned to the appellant, Gertrude D. Reed, and that, in attempting to sell said life estate, the said Victor C. Rasmussen set up a homestead interest in said life estate as exempt from execution, and about May 31, 1921, deeded his life estate to his wife, Zella Rasmussen, who paid him nothing therefor. That later on the appellant, Gertrude D. Reed, had the same executions levied upon the life estate of said Victor C. Rasmussen, and no objection being made to the sale by the said Zella Rasmussen, who made no appearance, the said Gertrude D. Reed was given a sheriff's deed for said life estate upon October 10, 1923, which conveyed to her the whole of said life estate in excess of the homestead interest which had been acquired by one Way.

The case of Gertrude D. Reed v. Victor C. Rasmussen and others was tried before Frederick E. Shepherd, J. H. Broady and Mason Wheeler, district judges, sitting in *banc*, and she claims this decree was void for lack of jurisdiction, and she now attempts to have that decree set aside in this action. It is found that the decree entered by these three district judges was adverse to the claims of the cross-petitioner, in that it found that Victor C. Rasmussen did not have a fee title to said estate, but had a life estate therein after the death of his father, with the remainder to certain heirs; and, further, that Zella Rasmussen obtained a divorce from Victor C. Ras-

mussen in Independence, Missouri, in 1924, and that, because of said divorce, she took nothing under the will of Mary Rasmussen. That by reason of the execution issued on two judgments against Victor C. Rasmussen, and levied upon his interest in the land, the cross-petitioner, Gertrude D. Reed, acquired by the sheriff's deed a good and sufficient title to Victor C. Rasmussen's life interest in the land, and no more, and that the execution said cross-petitioner caused to be issued in 1925, under which the land was again sold to her, and conveyed by sheriff's deed, was also ineffectual to vest in her a fee interest in said land, as she had no process upon the children of Victor C. Rasmussen, and no guardian *ad litem* had been appointed for them, and that the cross-petitioner herein had recognized the will of Mary Rasmussen as devising only a life estate to Victor C. Rasmussen by pleading that she purchased a life estate therein, and it was held in said decree that because of her acts she is estopped to plead a construction of Mary Rasmussen's will whereby the children of Victor C. Rasmussen take nothing under the fifth paragraph of said will. This decree, entered by three district judges, was appealed to this court by Gertrude D. Reed, and became case No. 25592. In said appeal the present cross-petitioner set up many alleged errors against the decree entered by the three district judges, and the same was contested and briefs filed, and the case argued and submitted to this court, and upon March 26, 1928, the decree of the district court was affirmed without an opinion, and upon May 18, 1928, the motion for rehearing was overruled and the mandate was duly issued.

The cross-petitioner insists repeatedly, in her briefs filed in the case at bar, as well as in oral argument, that this court now set aside its former decision, and decree that she has a fee in this property, and cites us to the case of *Myers v. Myers,* 109 Neb. 230, which holds that, by the rule in Shelley's case, the word "heirs" is to be taken as a word of limitation, and that she has become

vested with a fee through the title of Victor C. Rasmussen.

She also calls our attention to the rule established in *Grandjean v. Beyl,* 78 Neb. 354, holding that, when a former decision of this court has established a rule of property which has been relied upon for many years, the court will not overturn such rule, although it cannot assent to the reasoning upon which it is based, and sets out in her brief that titles depend largely upon previous decision, and frequent changes in interpretation or construction of legal principles would jeopardize titles to real estate, and that when courts of last resort have announced principles affecting real estate such decisions should not be overruled or reversed except by legislative powers of the state, and cites cases holding that, where courts vacillate, and overrule their own decision, or the construction of statutes affecting real estate, titles to property may be injuriously affected, and insists that the former decision of this court, entered by three district judges in Lancaster county, annihilated the rules of property in this state for the purpose of defeating the cross-petitioner's lawful title, and that the district court went far beyond its powers to give the fee title to the heirs, and that the judgment then rendered was void.

It is clear from her argument that this same question, as to whether Miss Reed had a life estate or a fee in this same property, was litigated between these same cross-appellants in this former case, and it is not a case where the court in the former case refused to determine the matter. *Ryan v. Bullion,* 100 Neb. 705. But it was discussed in the briefs and decided in the opinion. A judgment or decree acts as an absolute bar to a subsequent action based upon the same contention, not only as to every matter offered to sustain or defeat such contention, but also as to any other admissible matter which might have been offered for that purpose. *Omaha Road Equipment Co. v. Thurston County,* 122 Neb. 35; *School District D v. School District No. 80,* 112 Neb. 867. And

such a judgment is for all time, unless reversed or modified, binding upon the same parties. *State v. Broatch,* 68 Neb. 687. And this is true even though the second suit is upon a different cause of action. *Turner v. Columbia Fire Ins. Co.,* 96 Neb. 98.

2. Several defendants, and also the guardian *ad litem,* in their replies to the cross-petition of Gertrude D. Reed contend that, because she only acquired the life estate of Victor C. Rasmussen, it was her duty to pay all of the taxes upon this property, and that, having failed so to do, she had thereby wilfully committed waste; that, in failing to keep the buildings in fair condition, and permitting them to go into decay, and in collecting something over $2,500 rent, and refusing to spend anything upon the upkeep of the property, save and except her small expense in shingling the house and making other betterments on the property, she has thereby forfeited her right to a life estate therein.

Cross-appellants, Vernetta Marie Hansen et al., insist that the court erred in decreeing the failure of the life tenant to pay taxes did not constitute waste, and insist that, as the said Gertrude D. Reed conveyed to the state approximately an acre of ground for a highway, for which she received some $210, this conveyance of a portion of the premises entitled the cross-appellants to a judgment against Gertrude D. Reed for the amount received by her for said road, and insist that a life tenant may not keep and use money derived from waste, as to do so would reward the life tenant for wrong-doing.

This is a very interesting point. The state of Nebraska desired to cut in on one corner of this farm to round out a turn in a highway, and it appears that the appellant, Reed, attempted to convey about one acre of land to the state, yet the possession of the state of this land for a road is not adverse to the remaindermen until the termination of the life estate, even though the life tenant conveyed the same by fee title. She did not thereby forfeit her life estate in the remainder of said premises,

and as she was entitled to the proceeds of said acre of ground so long as she was the life tenant, the remaindermen are not entitled to the $210 proceeds for the conveyance of said acre of ground for the road, for the remaindermen have no right of possession thereof until the life estate is terminated. The conveyance of the life estate in a certain tract of land by the life tenant conveys to the grantee such estate as the life tenant holds, and for such conveyance the remaindermen cannot ordinarily declare and enforce a forfeiture of the life estate, as the rights of the remaindermen are not usually affected thereby. *Bohrer v. Davis,* 94 Neb. 367, L. R. A. 1918D, 430, with notes; 3 Neb. Law Bulletin, 398; *Maurer v. Reifschneider,* 89 Neb. 673. Nor did the life tenant become indebted to the remaindermen for said $210, as her conveyance was ineffectual to convey the fee of the remaindermen.

The remaindermen further allege that Victor C. Rasmussen, through whom the defendant Gertrude D. Reed secured her life estate, is about 50 years of age, and that the life estate will not lapse or determine until the death of said Rasmussen, and that said real estate is worth the fair and reasonable value of $12,000, and asked that a receiver be appointed to take charge of the premises. A special appearance was filed by said Reed and overruled, and a motion for security for costs was also overruled. Upon February 17, 1931, William Holt was appointed receiver for said premises, giving a bond in the sum of $1,000 to the defendant Gertrude D. Reed, conditioned according to law. We have examined the proceedings resulting in the receivership, and the objections thereto, and see no error therein.

3. The cross-petitioner attacks with vigor the proceedings leading up to the transfer of the south 40 acres into the Bennett consolidated school district, being school district No. 8, and out of school district No. 116, in which the entire 80-acre tract had been for many years. In her answer to plaintiff's petition she denies each and

every allegation therein, and particularly attacks the taxes assessed against her property for certain years, charging that they are entirely void for that Charles Monk, her tenant, without any authority or notice to her, and without her knowledge, made application in 1928 and transferred 40 acres of her land into another school district, and insists that this transfer was illegal and not in compliance with section 79-2101, Comp. St. 1929, which cross-appellant insists does not authorize a tenant to make application for such transfer. The evidence discloses that C. H. Monk, the tenant, made application on the regular printed form for such purposes, under date of May 2, 1928, to the county superintendent of public instruction to transfer the southeast *half* of the southeast quarter of section 15, township 8, range 8, in Lancaster county, which description is an error, and was doubtless intended to be for the southeast quarter of the southeast quarter. Exhibit No. 50 certified that C. H. Monk resided just one and a half miles from the schoolhouse in district No. 116, and that he resided exactly the same distance from the schoolhouse in district No. 8, to which he wished to be transferred, and made no claim to being the owner of the land, and stated that the land was owned by the Rasmussen estate. Section 79-2101 requires that the person making application must reside *more* than one and a half miles from the schoolhouse in his own district, and, second, that the applicant must reside *nearer* to the schoolhouse in the adjoining district to which he desires to be transferred. That, in spite of these absolutely necessary conditions and requirements being lacking from the application, the south 40 acres of this tract of land was at once transferred by the county authorities out of district No. 116 and into district No. 8, the Bennett consolidated school. The county superintendent, J. J. Correll, testified that the distance from the Monk residence to the schoolhouse in district 116 was just one and a half miles, the schoolhouse in district 116 being on section 16, the adjoining section to the west, and also testified that the dis-

tance from 40 acres transferred into district No. 8 to the schoolhouse in that district was two and a quarter miles directly north. It clearly appears from the testimony in the case that the dwelling-house and farm buildings are in the northeast corner of the north 40 of this land, with the private driveway running from the buildings east, and that therefore, by the erroneous description in the application, the southeast quarter of the southeast quarter, being the 40 acres transferred into district No. 8, had no improvements whatever upon it, and was not the land upon which the applicant lived, and that the 40 acres upon which the buildings, including the dwelling-house, were located remained in district No. 116, while his children attended school in district No. 8.

Examining the exhibits further, it is found that exhibit No. 32 is the tax receipt purchased by the plaintiff for the taxes for 1927. This exhibit shows that the whole tract was assessed for school taxes in district 116, and that the school taxes amounted to $30.60 upon the entire 80 acres for that year.

Exhibit No. 33 is the tax receipt issued to plaintiff for the taxes for the year 1928 upon this land, and shows that the school taxes upon the southeast quarter of the southeast quarter, being the 40 acres transferred into school district No. 8, had a valuation of $5,000, which made the taxes $94.50, and that the other 39.2 acres, upon which he resided, remained in district 116, the deduction of 8/10 of an acre being doubtless for the state highway, and the taxes upon the 40 acres upon which he resided were but $14 upon a valuation of $3,500, so that while the application, exhibit No. 50, to transfer 40 acres was only signed up on May 2, 1928, the taxing authorities made the transfer effective for taxes for the entire year of 1928.

Exhibit No. 34 is the tax receipt purchased by the plaintiff for the taxes assessed for the year 1929, and shows the same valuations, and that the taxes in district No. 8 were $99 and the taxes in district No. 116 were still but $14.

Cross-appellant insists that no person except landowners may make application for this transfer. There is some doubt as to just who are the "owners" of a tract of land. This court has held that this term has no exact technical meaning, but, as used in the law, has generally been treated as including all persons having a claim or interest in the property, although the same might fall far short of absolute ownership. *Board of Commissioners v. Northwestern Mutual Life Ins. Co.*, 114 Neb. 596; *Graf v. State*, 118 Neb. 485.

In *Ure v. Reichenberg*, 63 Neb. 899, it says: "Under such circumstances the legislature has seen fit to relieve the holder of the tax certificate of the necessity, in the first instance, of setting out in his pleadings and producing the assessment rolls and other evidence to prove the liability of the property to taxation, and the regularity of all the proceedings, as he would be required to do to establish a tax title at common law. It is not a hardship upon the property owner to require him to show the reason, if he has any, for his supposed delinquency. If the property was not liable to taxation, or if for any other reason the tax is not a lien thereon, he may avail himself of that defense by proper pleadings and proof."

By statute, section 77-2040, Comp. St. 1929, tax certificates are foreclosed in the same manner as real estate mortgages. The tax certificate is considered to be the same as a mortgage executed by the owner upon his real estate to the holder of such tax certificate, and it is *prima facie* evidence of all proceedings prior thereto, as well as that the land is liable to taxation, and in the case last cited it is said: "In an action to foreclose upon a tax sale certificate, if the land was not liable to taxation for the taxes represented by the certificate, or subsequently paid, such defense would be analagous to the defense of want of consideration in the foreclosure of a mortgage. * * * When the defendant has introduced evidence overcoming this presumption, the plaintiff must furnish other evidence. The burden of proof is upon the plaintiff

throughout to establish his case by preponderance of the evidence. The certificates and receipts are sufficient for that purpose if no other evidence is offered."

In the case of *Darr v. Wisner,* 63 Neb. 305, syllabus 2 states: "Where the levy and assessment are disputed by the pleadings, the presentation of a tax receipt alone does not raise any presumption in favor of the regularity of the assessment or levy of the taxes for which it calls," and cites the case of *Adams v. Osgood,* 55 Neb. 766, holding: "A tax receipt is not sufficient to establish the fact of the levy or assessment of taxes when such levy or assessment is disputed in the pleadings."

In the case of *Grant v. Bartholomew,* 57 Neb. 673, the opinion and the dissenting opinion covering some 30 pages, the defendant in a tax foreclosure set up that the real estate was assessed to a dead man, and therefore void, and that the board of county commissioners, sitting as a board of equalization, raised the assessment without notice to the landowner for the taxes of several different years, and made a number of other objections to the validity of the taxes. It was held that the action of the county board of equalization, raising the values placed upon real estate without notice to the landowner, was a nullity, but that only so much of the tax as arose out of the difference between the valuation placed thereon by the assessor and the value to which it was attempted to be raised by the board of equalization was illegal, and sets out that it is the theory of our revenue law that a purchaser of real estate at a sale thereof made for delinquent taxes shall not lose his money, and that the county is to reimburse the purchaser for any money paid by him if no tax was legally due upon the land so sold. On the rehearing of this case, found in 58 Neb. 839, it is said that the party seeking the foreclosure of a lien for taxes has the burden of establishing their validity, and that there was a failure of proof to show a compliance with stated statutory prerequisites to the assessments and levies.

When the tax is void, either because the person assessed was not subject to taxation, or because it was assessed for an unlawful purpose, or without compliance with provisions of law imposed, it can be recovered back or treated as void in proceedings to enforce payment of tax. 26 R. C. L. 452, sec. 408, citing *McLean v. Jephson,* 123 N. Y. 142, 9 L. R. A. 493.

In *Medland v. Connell,* 57 Neb. 10, being a suit to foreclose a tax lien, the defense that the levy for county purposes exceeded the constitutional limit is not available unless raised by suitable averments in the answer. In this case the final paragraph reads: "The authorities of a city of the metropolitan class possess no power to levy a special tax for street improvement until, as a board of equalization, it has determined the amount to be assessed against the real estate as benefits. Counsel for plaintiff concede the invalidity of these special taxes. The decree is reversed and the cause is remanded to the district court, with directions to render a decree for the plaintiff for the amount of all taxes paid by him on the real estate and interest, excepting the special taxes aforesaid."

Section 79-2101, Comp. St. 1929, was before this court in the case of *State v. McCartney,* 121 Neb. 153. In this case it was held that, to authorize the transfer of children from one district to an adjoining district, strict compliance with the conditions described by said section must be shown, one of these conditions being that the application must show that the children reside with their parents *more* than one and a half miles from the schoolhouse in their own district, and nearer to the schoolhouse in the adjoining district. The intention of the legislature was that they must live nearer to the schoolhouse in the district to which they are to be removed. In exhibit 50, introduced in evidence by Gertrude D. Reed, it is clearly shown that C. H. Monk, in his application to the county superintendent, stated that his residence was just one and a half miles from the schoolhouse in his home district, and that the distance of his residence from the school-

house in district 8 was also just one and a half miles. The evidence supporting the contentions of cross-appellant's answer indicates that the statute was violated in at least two particulars, and the application is void.

In accordance herewith, the judgment and decree of the district court is affirmed, except as to the taxes of school district No. 8. Guardian *ad litem* fee in this court is fixed at $25. The cause is remanded to the district court, with directions to modify the decree and award to the plaintiff the full amount of the taxes paid by him on said real estate, with interest, excepting therefrom the excess amount illegally levied and assessed for school district No. 8. Each party to pay his own costs.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF ERNST ZEHNER.
JASPER LAWRENCE, APPELLANT, V. ARMOND M. CLARK, ADMINISTRATOR, APPELLEE.

FILED FEBRUARY 17, 1933. No. 28360.

Limitation of Actions. To prevent the bar of the statute of limitations, a payment on a note must be considered as of the time of the actual payment, rather than as of the date of the indorsement thereof on the note.

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

Mothersead & York, for appellant.

Wright & Wright, Max G. Towle and *A. F. Young, contra.*

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

PAINE, J.

This is an appeal from a ruling of the district court disallowing a claim filed against the estate of Ernst Zehner upon a promissory note for $5,000, which had been indorsed and sold by Ernst Zehner. The only issue

in the case is whether or not the claim is barred by the five-year statute of limitations.

Byron E. Yoder made and delivered a note for $5,000 to Ernst Zehner, dated at Melbeta, Nebraska, June 5, 1918, and payable at the State Bank of Melbeta one year after date, with interest at 8 per cent., both principal and interest to bear 10 per cent. interest after maturity. The original note appears in the bill of exceptions, and bears seven indorsements of payments between the dates of June 10, 1919, and November 28, 1922, the total amount of said payments being $2,645.65. After the indorsement upon November 28, 1922, under a rubber stamp printing the words, "Demand, notice and protest waived," appears the signature of Ernst Zehner, and immediately thereunder appears two indorsements of payments, as follows: June 6, 1923, paid $210.10; December 29, 1925, paid $556.58. By the indorsement on the back of said note, it was sold to Jasper Lawrence, and upon the death of Ernst Zehner administration of his estate was begun in the county court of Scotts Bluff county, and upon December 26, 1930, Jasper Lawrence filed the note attached to a claim bill against the estate of Ernst Zehner, which claim was allowed by the county judge upon September 22, 1931, for balance due of $5,203.28, with interest at 8 per cent., as shown on the back of the claim bill.

The administrator appealed from this finding to the district court, and on trial of the same issues the district court found in favor of the administrator, and disallowed the claim against the estate, and motion for a new trial being overruled, the claimant, Jasper Lawrence, appeals to this court, and sets out four assignments of error: First, that the judgment is not supported by the evidence; second, that it is contrary to law; third, that the court erred in finding and determining that the claim of Jasper Lawrence is barred by the five-year statute of limitations of the state of Nebraska; and, fourth, that the court erred in overruling claimant's motion for a new trial.

The bill of exceptions, consisting of over 100 pages, discloses that, at the time of giving this note, the maker of it was the cashier of the State Bank of Melbeta, and that on May 10, 1920, Cashier Yoder sold his stock in said bank to Charles F. Lyman, and at the same time G. M. Crabill, who had been president of said bank for many years, also joined in the sale of some of his stock, and later on, to wit, upon February 11, 1922, a guarantee of the principal and interest of ten notes listed therein was given by Crabill and Yoder to Charles F. Lyman, the purchaser of the bank stock. In said agreement Crabill and Yoder agreed that if any of the notes remain unpaid on January 1, 1923, they would take them up or give a new guarantee.

Charles F. Lyman testified that he organized the State Bank of Melbeta in 1913, and sold out his interest in 1918 to Crabill and Yoder, and in 1920 bought all of Mr. Yoder's stock and most of Mr. Crabill's stock, and that when Mr. Yoder ceased to be cashier he was succeeded by John T. Swan, who was the active and managing officer of the bank. He had been acquainted with Ernst Zehner for many years quite intimately, and testified that he was a German, who was not able to read much English, and depended upon other people entirely to keep his accounts, and consulted with Mr. Lyman frequently. When money was collected on the ten notes listed in the written guarantee, the money was to be deposited to the account of Crabill and Yoder and held by the bank to make good Yoder and Crabill's guarantee to Lyman, and that, when Yoder and Crabill's guarantee had been entirely satisfied, then any money remaining in such bank account was to be distributed between Yoder and Crabill. When Ernst Zehner learned of the guarantee of notes signed by Yoder, he became worried about the possibility of collecting his Yoder note, and made complaint to Swan, the cashier, and Lyman, the president, and the claim is made that they got an agreement from Yoder that the State Bank of Melbeta should apply Yoder's part of any money in that

account, after their guarantee to Lyman had been satisfied, upon the Yoder note to Zehner. This written agreement could never be found, and Yoder, on the other hand, positively denied ever making any such agreement, and said no accounting was ever had in regard to the notes paid, and that he did not designate any one as his agent to make the payment of $556.58 upon December 29, 1925, being the last indorsement on said note, and that he knew nothing whatever about any payments that were made on this note after he left the bank in 1920. He testifies positively that the $5,000 note he had given to Zehner was never guaranteed by him in any way in any of these agreements with the bank, and that it was never in the bank while he was there, and that it was an entirely separate transaction between him and Zehner, and upon cross-examination he testified that he never knew that Zehner had sold the note to Jasper Lawrence, and that there was no understanding that any excess should be applied on the Zehner note, and that, if Mr. Crabill so testified, it should be remembered that Mr. Crabill and Mr. Lawrence were very good friends, being brought up in the same county from boyhood. Yoder further testified that he was at Lincoln, and absolutely irresponsible as far as financial obligations were concerned, having been cleaned out by the guarantee given in the sale of his bank stock. Yoder testified that he expected to have an accounting from Swan or Crabill, but that he never heard from them, nor wrote to them, and insisted, on redirect examination, that the payments made upon the note after he left in 1920 were not made with his consent or knowledge. In regard to the disputed indorsement made upon the note on December 29, 1925, it appears that there was $1,113.16 in the Crabill and Yoder account, as shown by the original loose-leaf ledger sheet attached, which arose as follows: There had been a small balance of $5.75 carried in the account for months, and upon December 29, 1925, two deposits were made in said account, one of $1,000, which Crabill had borrowed out of the account

on October 20, 1924, and replaced upon this particular day, and one of $107.41, and upon the same day the original deposit slips show that half of this amount of $1,113.16 was deposited to Jasper Lawrence's account, who owned this note, and half of it was put back in the account of G. M. Crabill, the deposit slips being initialed by Cashier Swan. The $107.41 came from a payment of J. S. Bracken, which was paid Crabill May 21, 1925, on instalments due on a house purchased, of $200 less certain interest and abstract fees and expenses paid out by Mr. Crabill, leaving a balance of $107.41, which it is claimed was a payment upon the Mary B. Dean note, which had been guaranteed in the written guarantee of February 11, 1922, and at the same time that Mr. Swan deposited $556.58 to the account of Jasper Lawrence he indorsed this payment upon the Yoder note. During the time of all of these transactions, Mr. Crabill was president of the State Bank of Melbeta.

In *Sornberger v. Lee,* 14 Neb. 193, the indorsement of $61.55, made January 30, 1877, was a collection upon a note left with them as collateral security for the note upon which it was indorsed. In this case the creditor did just what it was his duty to do in making the indorsement.

In *Bosler v. McShane,* 78 Neb. 86, being the second case cited by appellant, dividends paid on corporation stock deposited with the note were credited as payments thereon, and without such credit the note would have been barred. It clearly appears that such stock deposited by maker was collateral to the note, and the crediting of such dividends within the instructions of the maker.

But when this case was before the court on rehearing (78 Neb. 91) Judge Good, then commissioner, in adhering to the first opinion, set out that the rule is well established in this state that any voluntary payment by the debtor arrests the running of the statute, and states that the vital question in all these cases is: "Were the payments that were credited upon the note voluntary pay-

ments?" He adds that payments made as the result of legal proceedings, or made as the result of operation of law, are not held to be voluntary payments, and adds that it was going too far to state, in the first paragraph of the syllabus: "Any payment upon a written contract for the payment of money made through the arrangement of the maker, or such payment as is the natural and reasonable sequence of his agreement, will stay the running of the statute of limitations;" as it might be construed to cover a case where the money was derived from the operation of law. See *Mizer v. Emigh,* 63 Neb. 245.

In *Dwire v. Gentry,* 95 Neb. 150, Judge Letton discussed the case of *Mayberry v. Willoughby,* 5 Neb. 368, and says that a promise by one joint debtor will not take a case out of the statute of limitations as to his cocontractors unless he is specially and severally authorized for that purpose, and that, when the time limited by it has expired, then in legal contemplation the debt is extinguished, and can only be revived by a new promise by the person sought to be charged, or by some person lawfully authorized by him for that purpose.

In *Borden v. Fletcher's Estate,* 131 Mich. 220, it is said: "It is only when authority is given to one to make a payment on behalf of another that such payment can bind a cocontractor of him who makes the payment."

In 1781 it was held in England by Lord Mansfield, in *Whitcomb v. Whiting,* 2 Doug. K. B. 652, that a payment by one joint debtor was effectual to take the case out of the statute of limitations as to his co-obligors, for it was said that an admission by one is an admission by all, but the majority of states have repudiated this doctrine, and Nebraska is in line with the others in its recent opinions, such as *Dwire v. Gentry, supra,* and *Hall v. Rogers,* 113 Neb. 290.

In 10 Neb. Law Bulletin, 410, there is a discussion of the evolution of this theory in Nebraska, citing several cases. In *Hall v. Rogers, supra,* the first syllabus holds the same as *Dwire v. Gentry,* and the second syllabus is:

"A payment by one of several joint debtors on a note, without the authority or consent of the others, will not toll the statute of limitations as to them."

"Statutes of limitation are treated as statutes of repose, and are considered necessary to the welfare of society. Since the lapse of time carries away with it the means of proof, such statutes are deemed to be in the interest of morals, serving to prevent perjuries, frauds, and mistakes, and to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made, but of which the proof may have been lost." 17 R. C. L. 671, sec. 9.

As set out herein, Crabill received $1,000 on October 20, 1924, and $107.41 May 21, 1925, and kept both of these sums until December 29, 1925, when he arranged to redeposit them to make a payment on this note of $556.58. The last payment on this note, in any event, was received and should have been made upon this note upon May 21, 1925, and the statute of limitations commenced to run on that date, and more than five years had elapsed when this note was filed as a claim against this estate on December 26, 1930. These sums were not paid on the note with reasonable promptness.

There is nothing in this record from which an inference can be drawn that he was authorized to hold this money for months and then make a payment that would prevent the statute of limitations running as against the Zehner estate. 13 Am. & Eng. Ency. Law, 750; *Sweet v. Ellis,* 109 Mich. 460; 17 R. C. L. 935; 37 C. J. 1162; *Scott v. DeGraw,* 90 Neb. 274; *Moffitt v. Carr,* 48 Neb. 403.

The district court found generally for the administrator of the estate of Ernst Zehner, and against the claimant, Jasper Lawrence, and found that the statute of limitations had run against the claim of Jasper Lawrence prior to the filing of his claim in the county court, and ordered and decreed that said claim be disallowed. Finding no error in the judgment of the district court, the same is hereby

AFFIRMED.

RUEL MICK, APPELLEE, V. EDWARD OBERLE, APPELLANT.

FILED FEBRUARY 24, 1933. No. 28355.

1. Negligence: JOINT ENTERPRISE. "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto." *Jessup v. Davis*, 115 Neb. 1.
2. Trial: INSTRUCTIONS. Instructions, in a negligence suit, should not submit to the jury elements of damages not embraced within the evidence adduced at the trial.
3. ———: DAMAGES: INSTRUCTIONS. "In an action for personal injuries, it is error to submit to the jury the question of damages for loss of time, when there is no evidence of the value of the time lost." *Carlile v. Bentley*, 81 Neb. 715.

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

Good, Good & Kirkpatrick, for appellant.

George A. Adams, Herman Ginsburg and *Joseph Ginsburg, contra.*

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

GOSS, C. J.

Defendant appeals from a judgment against him for damages arising out of an automobile accident. The main issues relate to the respective negligence of the parties and to the question of joint enterprise.

The accident occurred early Sunday morning, July 20, 1930. Saturday evening, July 19, plaintiff drove up town in the village of Eagle, intending to drive his car to Lincoln. There he invited defendant to go with him. Defendant said his car was a little better, was filled with gas, he intended to go to Lincoln anyway, and plaintiff could just as well ride along with him. Plaintiff accepted. Defendant drove the car to Lincoln, where plaintiff went to a dance and defendant went to a show. They met at the car about midnight and defendant drove it to a

restaurant, where they ate. Defendant requested plaintiff to drive to Eagle, as he was tired. Plaintiff drove, with defendant sitting at his right. As they neared a culvert or bridge about a mile and a half west of Eagle on the road then surfaced with gravel, one of the rear tires blew out. This caused the car to swerve to the left. Plaintiff testified he took his foot off the gas pedal and did not apply the brakes; said he saw the culvert with its guard post on the north side of the road, but saw the ditch on that side was shallow with a rather level slope beyond and was headed for it; but that, about 20 feet before they reached the culvert, defendant took hold of the steering wheel and pulled it over to the right, causing the car to skid and strike the post. The left side of the car struck the post, severely injuring plaintiff and rendering him unconscious. Defendant estimated the blowout occurred about 100 yards west of the culvert, and testified that the car zigzagged first to the northeast, then to the southeast, and the next time it hit the bridge; when he took hold of the wheel the car was going northeast and he tried to keep it in the middle of the road.

The court told the jury there had been some statements in the case in reference to the parties being engaged in a joint enterprise, but instructed the jury that, as a matter of law, plaintiff and defendant were not engaged in a joint enterprise. The court refused an instruction requested by defendant submitting that question to the jury. Defendant claims the question of joint enterprise is a question of fact for the jury, citing only *Judge v. Wallen,* 98 Neb. 154; *Toliver v. Rostin,* 120 Neb. 363; *Dow v. Legg,* 120 Neb. 271. In the *Judge* case it was held: "Whether a person riding in the automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact in the case." In that case there was ample evidence to support a conclusion that the two occupants of the automobile negligently operated were engaged in a joint enterprise. They were traveling salesmen, covering about the same

territory for different wholesale houses. One owned and operated the car, the other contributed sums about equal to the cost of the oil and gas consumed. For their mutual benefit they were engaged in the joint enterprise of transporting themselves over the territory canvassed by both. In the *Toliver* case the defendant complained that the jury were not peremptorily instructed in his favor, on the ground that he and plaintiff were engaged in a joint enterprise, where the evidence showed a clear issue of fact on that point. Consequently it had to be submitted to the jury. In the *Dow* case the assignment of error as to the joint enterprise was discussed, but was not decided, because the judgment was reversed on another fundamental ground.

20 R. C. L. 149, sec. 122, says: "If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others." Citing *Koplitz v. City of St. Paul,* 86 Minn. 373 (which was also cited and quoted in *Judge v. Wallen,* 98 Neb. 154, 157). Continuing, 20 R. C. L. 149, sec. 122, says: "Accordingly it has been held that, where two persons are engaged in a joint enterprise in operating an automobile, the contributory negligence of one will bar a recovery by either, if it is a matter within the scope of the joint agreement." Citing *Beaucage v. Mercer,* 206 Mass. 492.

It is on the asserted fact that the parties hereto were engaged in a joint enterprise and upon the foregoing authority the defendant bases this assignment of error. Plaintiff was invited by defendant to ride from Eagle to Lincoln and back. The defendant furnished transportation in his car. The record is silent as to the expense. Each had his own purposes to serve by a visit to Lincoln. So far as the record shows, they had no common purpose to serve at Lincoln, or on the way. "Parties cannot be

said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto." *Jessup v. Davis,* 115 Neb. 1. See, also, *Yost v. Nelson, ante,* p. 33, as to facts negativing the conclusion of a joint enterprise.

As we find the facts presented on this trial, the plaintiff was a guest of defendant, gratuitously transported, had no community of interest in the objects of the trip to Lincoln and was in no sense a confederate or party to a joint enterprise. There was no evidence upon which the court might properly submit to the jury defendant's theory or claim of joint enterprise, and we find no prejudicial error in his refusal to submit it, nor in his instruction to the jury that the parties were not engaged in such an enterprise.

The court's instruction on the measure of damages authorized the jury to "consider such mental and bodily injuries as are shown in the evidence and the extent and duration of those injuries." Error is assigned as to the element of mental injuries. We find no evidence, nor is any pointed out to us, that the plaintiff suffered any mental injuries. "Instructions should not submit to the jury elements of damages not embraced within the evidence adduced on the trial." *Shiverick & Co. v. Gunning Co.,* 59 Neb. 73. The same instruction authorized the jury to consider plaintiff's "loss of time or earning capacity." While the evidence shows that plaintiff received a grievous injury and was totally disabled for a considerable time and partially disabled thereafter, yet the evidence is scanty as to the earning capacity of the plaintiff and as to the value of his lost time. The plaintiff testified that ordinarily he used to pick as high as 108 bushels of corn a day, yet after the injury and before the trial he worked on a farm three weeks and was able to pick 50 to 52 bushels a day. Whether he picked corn all the time while there is not clear. Corn picking seems to be valued in

his testimony at three cents a bushel. He testified the only work he has been able to do is this corn picking in November, 1930, and shocking wheat and running the binder in the summer of 1930. The only evidence of value of his time we find (and it is the duty of parties in a law case to point out the evidence relied on) is shown above.

"In an action for personal injuries, it is error to submit to the jury the question of damages for loss of time, when there is no evidence of the value of the time lost. The value of such lost time must be proved by what wages the plaintiff usually and ordinarily received, and not by what he received in an isolated instance." *Carlile v. Bentley,* 81 Neb. 715.

We think the indefiniteness of the evidence and of the instruction as to the value of the loss of time or earning capacity erroneously invited the jury into the realm of speculation on these particular elements. The instruction on the measure of damages, after stating the element of damages, closed with the words "and your verdict will be the aggregate sum of all such damages." Just how much of the gross verdict, if any, is attributable to the erroneously included elements relating to mental injuries, of which there was no evidence, to loss of time and to loss of earning capacity, as to which evidence of value is wanting, we are unable to say. The jury may have logically and legally eliminated everything not shown in the evidence. On the other hand, they may have based the verdict upon their own views of the value of all lost time and of earning capacity and upon their own conception of the damages arising from unproved mental injuries, when the evidence itself, upon which a verdict should be grounded, was wanting.

We have discussed the major errors assigned. For the reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

ANN RICHARDS ET AL., APPELLANTS, V. ABE GOLDSTEIN ET AL., APPELLEES.

FILED FEBRUARY 24, 1933. No. 28408.

1. Appearance. A defendant, by the filing of an application for additional time in which to plead, and by the filing of a motion to make the petition more definite and certain and also a motion to strike parts thereof, has thereby invoked the power of the court and will be held to have made a general appearance.
2. Pleading: AMENDMENT: NEW CAUSE OF ACTION. In an action begun originally for the rescission of a contract of exchange of property and for damages alleged to have been sustained thereby, where the petition is subsequently amended by leave of court to provide for damages only, but in a higher amount, such amendment does not create a new cause of action, where the facts alleged are the same and where the cause of action, as in the original petition, is based on the false and fraudulent representations of the defendants in procuring the exchange of property.

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

Edith Beckman and *William McDonnell*, for appellants.

Shotwell, Monsky, Grodinsky & Vance and *Harry B. Cohen, contra.*

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

DEAN, J.

This action presents an appeal by Ann Richards and Catherine J. Moyer, the plaintiffs herein, from an order of the district court for Douglas county sustaining the special appearance of the defendants Abe and Sam Goldstein.

On and before March 21, 1929, the plaintiffs were the owners of certain described real estate in Omaha which they exchanged for real estate owned by the defendants Goldstein. The plaintiffs began this action for a rescission of the contract of exchange and also to recover damages alleged to have been sustained by the plaintiffs

by reason of certain false and fraudulent representations made by the defendants in respect of the property owned by them.

Personal service of summons was had upon Maxwell A. Pirsch and Nathan Watts, also defendants herein, and service by publication was had upon the defendants Goldstein, the notice stating that an order of attachment and garnishment had been regularly made against the building owned by the defendants.

Subsequently, the defendants Goldstein, by their attorneys, sought and were granted additional time in which to plead, and they later filed a motion to have the petition made more definite and certain. Upon leave of court, the plaintiffs' petition was thereafter amended. The defendants Goldstein then filed a motion to strike parts of the petition, but such motion was overruled and, at the same time, the demurrers of the defendants Pirsch and Watts were sustained.

The plaintiffs sought leave of court to amend their petition to an action at law for damages only, and thereafter, on August 7, 1931, an order was entered transferring the cause to the law docket. On August 24, 1931, the defendants Goldstein filed a special appearance, wherein they alleged that they are residents of Chicago; that the original petition herein was one in equity, and that purported service by publication was obtained upon them by reason thereof; that an amended petition stating a cause of action at law, and sounding in fraud, was filed after a demurrer to the amended petition was sustained; that the cause was transferred from the equity docket to the law docket; and that the court, by reason of the foregoing facts, had no jurisdiction over the defendants. The special appearance was overruled on November 19, 1931, and the defendants were given 10 days in which to answer. On January 30, 1932, however, upon notice by the court, the matter was again brought up and an order was entered sustaining the special appearance, from which this appeal has been taken.

The defendants concede that a valid service of summons by publication was obtained upon them in the cause of action alleged in the original petition herein and also in the first amended petition involving the rescission of the exchange of lands. But it is contended that, by their second amended petition, the plaintiffs' cause of action was changed to one of mere demand for a money judgment, and that the provisions of section 20-517, Comp. St. 1929, providing for service of summons by publication upon nonresidents in actions relating to or in which the subject is real or personal property do not apply herein, and that the court therefore did not err in sustaining the special appearance.

We agree with the contention of the plaintiffs, however, that the defendants by their various filings herein mentioned may be deemed to have made a general appearance. On this point we have held:

"If a defendant invoke the judgment of the court, in any manner, upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170.

"A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its power into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *Troyer Furniture Co. v. Orchard & Wilhelm Co.,* 121 Neb. 301. See, also, *Barkhurst v. Nevins,* 106 Neb. 33, and *Maxwell v. Maxwell,* 106 Neb. 689.

And, in an early case entitled *Healy v. Aultman & Co.,* 6 Neb. 349, we held:

"An *alias* summons is not made necessary by the filing of an amended petition. Jurisdiction over the person of the defendant, once acquired, will continue, and can be lost only by an actual dismissal of the action."

After the service of summons by publication on them the defendants Goldstein, by the filing of their application for

additional time, the motion to make the petition more definite and certain, and the motion to strike, thereby invoked the power of the court and hence will be deemed to have made a general appearance.

The facts alleged in the second amended petition are the same as those alleged in the original and first amended petitions, the cause of action being based on the alleged ground that the defendants conspired to and did swindle the plaintiffs out of their property through false and fraudulent representations relied upon by the plaintiffs. The prayer for a rescission of the contract of exchange is omitted in the second amended petition, but, instead, the plaintiffs seek to recover a higher amount for damages alleged to have been sustained by reason of the false and fraudulent representations of the defendants. "Generally, changes in the form of an action or in the character and extent of relief sought, in which the facts remain substantially the same, are amendments to the original pleading and not changes in the cause of action, nor do they create new causes of action." *Finzer v. Peter*, 120 Neb. 389. And in *Scroggin v. Johnston*, 45 Neb. 714, we also held: "The allowing of a petition to be amended so as to change the form of action is permissible where the identity of the cause of action is preserved." And in *Shoemaker v. Commercial Union Assurance Co.*, 72 Neb. 650, it is said: "An amended petition which is no more than a restatement of the *gravamen* of the charge in the former pleading is not a departure, although the petition sounded in tort and the amendment avers a contract liability only."

In an action originally begun for the rescission of a contract of exchange of property and to recover damages alleged to have been sustained thereby, where the petition is subsequently amended by leave of court to provide for damages only, but in a higher amount than that named in the original petition, such amendment does not create a new cause of action, where the facts alleged are the same and where the cause of action, as in the original

petition, is based on the false and fraudulent representations of the defendants. The court erred in sustaining the special appearance of the defendants.

The order of the court sustaining the special appearance is reversed and the cause remanded, with directions that the defendants be given 10 days in which to answer.

REVERSED.

CHARLES R. LYONS, APPELLEE, V. ARTHUR JOSEPH, APPELLANT.

FILED FEBRUARY 24, 1933. No. 28450.

1. **Appeal.** The verdict of a jury, based on conflicting evidence, in a law action, unless clearly wrong, will not be disturbed by this court.
2. ———. An erroneous instruction, unless prejudicial to the complaining party, is not ground for reversal of the judgment.
3. **Evidence: MORTALITY TABLES.** In an action for personal injuries, where the evidence shows that the injuries are permanent, life tables of expectancy may be properly received in evidence.
4. ———. On cross-examination a witness may be interrogated as to his employment by an insurance company, where such company has a financial interest in the determination of the cause.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

William E. Lovely and *McGan & Burbridge, contra.*

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

GOOD, J.

This is an action to recover damages for personal injuries. Plaintiff had judgment, and defendant has appealed.

Plaintiff was injured at the intersection of California and Seventeenth streets in the city of Omaha. He al-

leged in his petition that, while walking east on the north side of California street, he had reached a point near the center of Seventeenth street and stopped to permit a car, coming from the south on Seventeenth street, to pass in front of him, and that, while he was so standing, defendant attempted to pass the car which was in front of plaintiff, drove his car to the left and over the west side of the center of Seventeenth street, and struck plaintiff, inflicting the injuries of which he complains. Plaintiff charged that defendant was negligent in failing to give any warning of his approach, in driving at an excessive rate of speed, in attempting to pass another car at the street intersection, and in failing to drive to his right of the street center. In his answer defendant admitted that plaintiff was injured, denied any negligence on his part, and alleged that plaintiff was intoxicated and was guilty of more than slight contributory negligence.

At the close of all the evidence, defendant requested that a verdict be directed for him, on the ground that the evidence was insufficient to sustain a verdict in favor of plaintiff, and that it showed conclusively that plaintiff was guilty of more than slight contributory negligence. There is abundant evidence tending to prove the following state of facts:

Plaintiff and a lame companion were walking east on the north side of California street. When they reached the west side of Seventeenth street, plaintiff took the arm of his companion to assist him across the street. At this point Seventeenth street, from curb to curb, is 60 feet wide. Plaintiff and his companion had proceeded a distance of 24 or 25 feet into Seventeenth street when they stopped to permit an automobile, going north on Seventeenth street, to pass in front of them. While they were standing, waiting for this car to pass and before it had scarcely passed them, the defendant, also driving his car from south to north on Seventeenth street, attempted to pass the car in front of him, and, driving at a speed of

from 30 to 40 miles an hour, turned to his left and over the center of the street and struck plaintiff and his companion. The latter was killed almost instantly, and plaintiff was severely injured.

The evidence on behalf of defendant is of quite another character. It tended to prove that defendant did not attempt to pass the car in front of him, was not driving more than 12 to 15 miles an hour, and that his car was in close proximity to the car in front of him, from four to eight feet behind it; that defendant saw the plaintiff and his companion and assumed that they would not attempt to pass in front of his car, but that, when the car immediately in front had passed, they lurched forward and were struck by the side of his car. There was some evidence on behalf of defendant from which one might infer that plaintiff and his companion were intoxicated. This evidence was to the effect that they were talking loudly and were staggering as they crossed the street. On the other hand, there was positive evidence that plaintiff had not drunk any intoxicating liquor for a period of three years; that his lame companion, an old man, was very hard of hearing; that plaintiff talked loudly in order that his companion might hear him; that his companion suffered from rheumatism, was lame and walked with a cane, and that plaintiff took his arm to assist him across the street.

There is ample evidence to warrant the jury in finding that plaintiff was not guilty of contributory negligence in any degree, and that defendant was guilty of gross negligence which caused the injuries suffered by plaintiff. In a law action the verdict of a jury, based on conflicting evidence, unless clearly wrong, will not be disturbed by a reviewing court. The court properly denied the request of defendant for a directed verdict.

Defendant alleges that the court erred in giving an instruction which informed the jury that plaintiff alleged defendant violated certain statutes of the state of Nebraska and certain ordinances of the city of Omaha, and

directed them that if they found such violations they did not necessarily prove negligence, but that such facts would be circumstances which they could take into consideration in determining whether defendant was guilty of negligence, proximately causing the collision and the injuries to plaintiff. The court did not inform the jury what were the provisions of any statute which may have been violated. Technically, the instruction may be said to be erroneous, but that is not ground for reversal unless it was prejudicial to defendant. Ordinances of the city were introduced in evidence. They provided that it should be unlawful for any one to drive on the street at a rate of speed in excess of 30 miles an hour, or to attempt to pass another car, going in the same direction, at a street intersection, and required the driver to keep between the center of the street and the curb on his right. The jury might well have found that defendant was violating each of these three provisions of the ordinances. The fact that the court failed to inform the jury what the applicable provisions of the statute were we think could not have been prejudicial to defendant.

The instruction is criticized because the court did not, in its instructions, specify the number of the ordinance. We deem this hypertechnical. It is no more necessary to give the number of an ordinance than it would be to give a section number of the statute to the jury. That the jury should know the provisions of the ordinances was all that was necessary. Other criticisms of the same instruction are made, but we find them without merit.

Complaint is made of the failure of the court to give a number of requested instructions. We have carefully examined the instructions given and those refused, and while a number of the requested instructions are correct statements of the law and pertinent to the issues, we find that the charge given by the court covered all of the issues that were properly submitted to the jury, and we find no error prejudicial to defendant either in the giving or refusing of any instruction.

Defendant complains because the court permitted the Carlisle table of expectancy to be introduced in evidence. The evidence tends to show that plaintiff was and will be disabled, for the remainder of his life, from following his usual occupation; that he suffers dizzy and fainting spells, caused by a concussion of the brain received in the accident, and that this condition is likely to endure during the remainder of his life. In an action for personal injuries, where the evidence shows that the injuries are permanent, life tables of expectancy may be properly received in evidence.

Complaint is made because plaintiff was permitted to cross-examine an expert witness, called by defendant, as to his employment by an insurance company. The court, however, instructed the jury that they should give no consideration whatever to the question of insurance. Moreover, if defendant carried liability insurance and a physician, called by him, was employed by defendant's insurance carrier, it was proper to elicit such fact as tending to affect the weight of his testimony.

Defendant cites many authorities which would be pertinent to a consideration of the case, had the jury accepted defendant's version of the facts. The jury found adversely to defendant's version, and its finding must be accepted by this court. The cited authorities are inapplicable to the facts as found.

From a careful examination of the record, we fail to find any error prejudicial to the defendant.

The judgment of the district court is

AFFIRMED.

VILLAGE OF CEDAR BLUFFS, APPELLANT, V. JOHN KNUTZEN ET AL., APPELLEES.

FILED FEBRUARY 24, 1933. No. 28333.

1. **Evidence** examined, and *held* sufficient to sustain verdict and judgment.
2. **Instructions** examined, and approved as not erroneous.

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

Robins, Yost & Lamme, for appellant.

H. A. Bryant, contra.

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

EBERLY, J.

Action at law by the Village of Cedar Bluffs, plaintiff, as owner of a promissory note payable by its terms to the Bank of Cedar Bluffs, Nebraska, and which had been signed by defendant Knutzen. The note, though not indorsed by the payee thereof, had been purchased by and delivered to the village after maturity. The defense was payment. A trial resulted in a verdict and judgment for defendants. From the order of the court overruling motion for new trial plaintiff appeals.

Two alleged errors are presented for our consideration, viz., (1) that the evidence is insufficient to sustain the verdict; (2) that instruction No. 3 given by the court on its own motion was erroneous.

We have carefully read the record of the evidence as preserved in the bill of exceptions. The evidence is conflicting. It appears without dispute that immediately prior to July 20, 1929, there was in the possession of the Bank of Cedar Bluffs, as its property, a promissory note for the sum of $1,043.33, payable to its order and signed by John Knutzen and Claus F. Jensen. The latter signed as surety only. Certain payments had been made on this note prior to this date, and this formed a part of Knutzen's indebtedness to this bank, aggregating $4,585. According to the evidence in behalf of defendants, shortly prior to July 20, 1929, the cashier of the Bank of Cedar Bluffs visited the farm home of Knutzen, and insisted on the execution of notes to be secured by certain real estate mortgages, to be given by Knutzen "as payment" of the indebtedness then due this bank, a part of which was

evidenced by the note first above referred to. Accordingly, on July 20, 1929, Knutzen and wife came to the bank, and in compliance with the cashier's proposition as previously made, executed a note of $1,000 payable to the bank and due one year after date. This note was signed by John Knutzen and his wife, Alvina Knutzen. The latter, by the terms of this note, charged her own "personal and separate estate." This note was also further secured by a real estate mortgage executed by the Knutzens contemporaneously therewith. In like manner other notes and mortgages were executed at this time, which, together with this $1,000 note, covered the entire indebtedness of defendant Knutzen to this bank. These instruments were, according to the evidence of defendants, executed and delivered by them in reliance on the bank's proposal and as "payment" of the notes that theretofore evidenced the indebtedness.

While the evidence as an entirety is conflicting and presents a question of disputed facts for the determination of the jury, still it fairly appears that the evidence of defendants, if believed, is ample to justify the verdict of the jury.

We have given careful attention to instruction No. 3 given by the court, of which plaintiff complains. Conceding that this instruction may not be considered a model, still in another instruction the trial court informed the jury that "the defense is payment, and as to this defense the burden is upon the defendants to prove payment by a preponderance of the evidence." No instruction covering the matter of which complaint is now made was tendered or requested by plaintiff. Considering instruction No. 3 in connection with instruction No. 2, above referred to, we are satisfied that the rights of plaintiff were not prejudiced by the giving of the instruction complained of. *Howell Lumber Co. v. Campbell*, 38 Neb. 567.

No error appearing in the record before us, the judgment of the district court is

AFFIRMED.