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STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. WILLIAM SPLITTGERBER ET AL., APPELLANTS.

FILED FEBRUARY 28, 1930. No. 27060.

1. **Animals: TUBERCULIN TEST: POLICE POWER.** The legislature may in the exercise of the police power require that the owners of breeding cattle submit such animals to the tuberculin test and may adopt reasonable measures for carrying out the requirement.
2. **Constitutional Law: ANIMALS: CLASSIFICATION: TUBERCULIN TEST.** The legislature may use its discretion in adopting a classification making a distinction between the testing of breeding cattle and feeding cattle when the object to be accomplished is for the public interest.
3. **Animals: TUBERCULIN TEST: POLICE POWER.** "It is within the province of the legislature in the exercise of police power to require the examination, inspection and testing of cattle for bovine tuberculosis, and if such disease is found to exist, to make provisions for the summary destruction of the diseased animals." *State v. Heldt*, 115 Neb. 435.

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

North, Caldwell & Gillogly, for appellants.

C. A. Sorensen, Attorney General, and *Peterson & Devoe*, *contra.*

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

DEAN, J.

This action was begun by the state, in the district court for Wayne county, on the relation of O. S. Spillman, then attorney general, as plaintiff, to enjoin William Splittgerber and Gus Splittgerber, defendants, from "obstructing or preventing by force or otherwise any member or agent of the department of agriculture," hereinafter called the department, from applying the tuberculin test to defendants' cattle, pursuant to the provisions of chapter 12, Laws 1927. Defendants contend that the act is unconstitutional, and they seek by cross-petition to have the agents of the de-

partment enjoined and restrained from entering their premises for the purpose of applying the tuberculin test to defendants' cattle. The court found for the plaintiff and the defendants Splittgerber have appealed.

Section 1, art. I, ch. 12, Laws 1927, follows:

"The department of agriculture shall be vested with the power and charged with the duties of protecting the health of live stock in Nebraska, of determining and employing the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, infectious, contagious or otherwise transmissible diseases among domestic animals, and to that end of placing in quarantine any county or part of any county, or any private premises, or private or public stockyards, and of quarantining any domestic animal or animals infected with such disease or which have been, or are suspected of having been, exposed to infection therefrom, and of killing any animal so infected, and of regulating or prohibiting the arrival into and departure from and movement within the state of animals infected with such disease or exposed, or suspected of having been exposed, to the cause, infection or contagion therefrom, and, at the cost of the owner, of detaining any domestic animal found in violation of any departmental or statutory regulation or prohibition."

Article II, ch. 12, Laws 1927, provides generally that, when a petition signed by 60 per cent. or more of the owners of 51 per cent. of breeding cattle in a county, as disclosed by the last assessment rolls, shall be presented to the department asking that all breeding cattle herds be tested for tuberculosis, the department shall fix a time for a hearing upon the petition and shall cause a notice to be published in the county for three weeks previous to the time fixed for such inspection. The act also provides that, when the petition is declared sufficient, the department shall thereupon declare the county in which the petitioners reside an area for the inspection, examination, and testing of the breeding cattle therein for tuberculosis. When such area is established, a time shall be fixed and a notice thereof

published for the inspection of such breeding cattle. The act also provides that steers and other cattle in feed lots, being fed for market, and steers brought in for feeding and grazing purposes, shall be exempt from such test when kept apart from the tested cattle under the rules of the department. And the law also provides for compensation to the owner for any animals found affected with tuberculosis and subsequently slaughtered. The foregoing requirements were substantially complied with by the department in apt time for making the inspection complained of.

The record discloses that from January 10 to July 30, 1927, a total of 1,188 herds of breeding cattle, numbering 17,426 cattle in all, were tuberculin tested, and all of this testing was performed in Wayne county on a cooperative basis between the United States bureau of animal industry and the state department.

A test of defendants' cattle was commenced May 16, 1927, and completed May 21, and 80 head of cattle were tested, and of this number five were classified as reactors to the tuberculin test and were shipped to Omaha. The chief of the bureau of animal industry testified that these five cattle were appraised as to their value, but the records of the department do not show whether payment has been made in part by the federal government and in part by the state government, as the defendants had not then signed the necessary papers. A witness, being called in respect of this feature, testified that, so far as they were able to discover, the testing of all of the herds of breeding cattle in Wayne county had been completed, with the exception of the defendants' cattle, and that an order was issued accrediting the county. This witness also testified that, after the discovery of tuberculosis among defendants' cattle, such cattle were placed in quarantine.

Denial is made by defendants that all of the herds of cattle in Wayne county have been tuberculin tested, and the contention is made that tubercular cattle are feeding on each side of the pasture in which defendants have their

breeding cattle, and that the feeding cattle mingle with defendants' cattle and no effort has been made by the department to test any of such feeding cattle for tuberculosis. They also contend that the law governing the testing of breeding cattle is unconstitutional, in that it discriminates between such cattle and feeding cattle, and that both feeding and breeding cattle are susceptible to tuberculosis. We do not think the omission by the legislature to provide for the inspection of feeding cattle is a discrimination against the owners of breeding cattle as asserted. Feeding cattle are of course raised for market and must necessarily pass through many stages of inspection and the like before the meat product finally reaches the public for consumption. That the existence of tuberculosis in breeding and dairy cattle is a menace to the public health both of infants and adults is a matter of common knowledge.

The act in question here has been construed by us in *State v. Heldt*, 115 Neb. 435, wherein this court, in a well-reasoned opinion by our late lamented associate, Judge George A. Day, announced the following rule:

"It is within the province of the legislature in the exercise of police power to require the examination, inspection and testing of cattle for bovine tuberculosis, and if such disease is found to exist, to make provisions for the summary destruction of the diseased animals."

And in the present case, as in *State v. Wallace*, 117 Neb. 588, we reaffirm the pronouncement in the *Heldt* case in every material particular. See, also, *State v. Kistler, ante*, p. 89.

It must appeal to every unbiased mind that the legislature is warranted in its solicitude for the public health and welfare as disclosed by the facts in the present case. The legislature may in the exercise of the police power require that the owners of breeding cattle submit such animals to the tuberculin test and may adopt reasonable measures for carrying out the requirement. *Fevold v. Board of Supervisors*, 202 Ia. 1019. And the legislature may use its discretion in adopting a classification making a distinction be-

tween the testing of breeding cattle and feeding cattle when the object to be accomplished is for the public interest. In *Schulte v. Fitch*, 162 Minn. 184, the Minnesota court made this timely observation: "Statutes to promote and protect the public health by suppressing tuberculosis among domestic animals are for a public purpose. Laws for promoting and protecting the public health are liberally construed to accomplish the intended purpose."

In view of the facts before us and of the law applicable thereto, we conclude that the judgment must be and it hereby is

AFFIRMED.

STATE, EX REL. ELEANOR A. OLESON, APPELLANT, V. BEN F. GRAUNKE, COUNTY TREASURER, ET AL., APPELLEES.

FILED FEBRUARY 28, 1930. No. 27334.

1. Automobiles: LICENSE TO DRIVE. Section 5, ch. 148, Laws 1929, construed, and *held* to deny to any person, under 16 years of age, the right to a license to drive a motor vehicle.
2. ———: ———: POLICE POWER. The state, in the exercise of its police power, may limit the operation of motor vehicles on its highways to persons who have attained a specific age, if the age limitation is not arbitrary or unreasonable. Limiting to persons who have attained the age of 16 years the right to a license to operate motor vehicles is neither arbitrary nor unreasonable.
3. ———: ———: CONSTITUTIONAL LAW. A statute that denies to persons under 16 years of age the right to a license to drive a motor vehicle does not have the effect of depriving persons, under 16 years of age, owning automobiles, of property without due process of law.

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

A. R. Oleson, for appellant.

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

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

GOOD, J.

Relator, a young woman under 16 years of age, sought a peremptory writ of mandamus to compel the county treasurer of Cuming county and the secretary of the department of public works of the state of Nebraska to issue to her an automobile driver's license. The trial court denied the writ, and relator appeals.

The appeal involves a proper interpretation of section 5, ch. 148, Laws 1929, which is as follows: "If the application to operate a motor vehicle required by this act discloses that the applicant for such license suffers from a physical defect or defects of a character which may affect the safety of operation by such applicant of a motor vehicle, the examiner may require such applicant to show cause why such license should be granted, and may require such applicant through personal examination and demonstration as may be prescribed by the department of public works to show the necessary ability to safely operate a motor vehicle on the public highways; and if the examiner be satisfied, after such demonstration, that such applicant has the ability to safely operate such motor vehicle, a license may be issued to the applicant, subject, however, to a limitation to operate only such motor vehicles as the license shall designate at the discretion of the department of public works. No license shall, under any circumstances, be issued to any person who has not attained the age of full sixteen (16) years: Provided, however, that prior to January 1, 1930, licenses shall be granted without examination to all applicants as a matter of course, who have driven an automobile for more than six months prior to the date of application, and who shall so state in said application."

The record discloses that relator is a competent driver and had driven an automobile for a period of more than six months prior to the time of making application for a license. She contends that, under the proviso of section 5, she is entitled to a driver's license as a matter of course. We do not think the contention is sound.

Section 8391, Comp. St. 1922, which has been in force

for many years, makes it unlawful for any person, under 16 years of age, to operate a motor vehicle upon the highway. The legislature of 1929 was of course familiar with that statutory provision. It seems incredible that the legislature would authorize the issuance of a license for any person to do an unlawful act. Moreover, said section 5 specifically provides: "No license shall, under any circumstances, be issued to any person who has not attained the age of full sixteen (16) years." In view of this specific provision and the then existing legislation, making it unlawful for any person under 16 years of age to operate a motor vehicle upon the highways, it seems clear that the proviso in section 5 was intended to relate to the taking of the examination, and other matters, in the earlier part of the section, and was not intended to authorize the issuance of a license to any one under 16 years of age.

Relator contends that because she had, in previous years, been granted an owner's automobile license she was entitled to a driver's license, so that she, herself, might operate her car, and that to deprive her of a driver's license is in violation of the Fourteenth Amendment to the Constitution of the United States and violative of the Constitution of Nebraska, in that it deprives her of her property without due process of law.

The refusal of a driver's license does not operate to deprive relator of her automobile. She may sell the vehicle or permit its use by any one who is authorized by law to drive it upon the highway. The act, however, restricts driving of the car on the highways to those who possess a driver's license.

In the exercise of its police power, the state, by appropriate legislation, may control and regulate the manner in which motor vehicles may be operated, and may prescribe reasonable limitations as to the classes of persons that may operate them. A motor vehicle, while not in use, is a harmless instrument, but when put in operation upon the highway it may become, in the hands of the incompetent or inexperienced, a danger and menace to the public. We

think no one will contend that it would be an improper exercise of the police power to prohibit persons under 10 years of age, or those whose sense of hearing or sight is seriously defective, from operating a motor vehicle. The question is whether the classification is reasonable. It is quite possible that some persons under the age of 16 years are more apt than others in learning to operate motor vehicles, and perhaps more apt than many adults, but the fact remains that, as a class, they have not, at that age, attained the discretion and judgment which would make it safe for them to operate motor vehicles upon the highway. The line must be drawn somewhere, and the only question is whether the legislature acted arbitrarily or reasonably in drawing the line at 16 years of age.

We are of the opinion that the limit of 16 years is not arbitrary but is a reasonable exercise of the police power, and that the act, restricting automobile drivers to persons over 16 years of age, is not violative of either the state or federal Constitutions, which forbid the taking of private property without due process.

The record is free from error, and the judgment is

AFFIRMED.

JERRY R. VRBSKY, APPELLANT, V. GEORGE ARENDT ET AL., APPELLEES.

FILED FEBRUARY 28, 1930. No. 26841.

1. **Fraud**: TIME OF DISCOVERY: QUESTION FOR JURY. In an action at law to recover damages sustained through fraud, the question as to time when plaintiff discovered the fraud, or facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which would lead to the discovery, is one of fact for the determination of the jury in the same manner as other questions of fact.
2. **Trial**: DIRECTION OF VERDICT. The trial court should not direct a verdict of the jury unless the evidence is so clear upon every point upon which the verdict may depend that reasonable minds cannot come to any other conclusion. *Bank of Cortland v. Maxey*, 102 Neb. 20.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed.*

John E. Mekota, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg,* for appellant.

C. C. Flansburg, W. T. Thompson, Perrin & Kier and *M. V. Beghtol, contra.*

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

DAY, J.

The plaintiff brought an action at law to recover $14,000 damages alleged to have been sustained by virtue of a conspiracy to defraud by misrepresentation on the part of the defendants in a real estate trade. At the close of the plaintiff's evidence, the trial court directed a verdict for defendants on the theory that the action was barred by the statute of limitations.

The evidence in this case is wholly that on behalf of the plaintiff, and in reviewing the action of the trial court we must regard as conclusively established every point favorable to the unsuccessful party which the evidence tends to establish. *Curtice Co. v. Estate of Jones,* 111 Neb. 166; *Bank of Cortland v. Maxey,* 102 Neb. 20.

With this rule of law definitely in mind, the following statement of facts is delineated: The defendant Arendt was the owner of property in Lincoln, Nebraska, known as the Clayton Apartments, which he traded, with the assistance of defendants Nickles, Douthett, and Pardee, to the plaintiff, a Bohemian farmer, for 80 acres of land in Saline county and a mortgage on other land for $22,000. The mortgage was paid in full and the trade valuation of the land, $14,000, was realized, so that in truth the defendant Arendt received $36,000 for his apartment. The deal was consummated after negotiations between the parties for a period of several weeks, during which time numerous interviews were had between the plaintiff and the defendants, individually and collectively. Nickles, Douthett, and Pardee were real

estate men, to whom the plaintiff paid a commission upon, and as a part of, the consummation of the deal. The defendant Arendt, the owner of the apartment, had a joint office with the other defendants.

The defendants represented to the plaintiff that the apartment cost $42,000 to build and that it was worth more than $36,000. To add color to this representation and to inspire confidence in the plaintiff, he was told that Douthett was the superintendent in construction and knew the cost thereof. Douthett told him many times that the actual cost of the construction of the apartment, plus the cost of and the value of the ground, $18,000, was more than $42,000, and that the value of the apartment was more than $36,000. The apartment, according to the testimony of defendant Douthett, did not cost over $18,000, and the ground was worth only $3,500. It is clearly evident that, as a result of this trade, plaintiff sustained a loss of approximately $14,000. The plaintiff was not interested in the apartment because, as stated in his own words, "I am no good with city property." He was ignorant as to values of city property and knew not how to handle it. But the defendants sustained their contact with him by evincing their interest in assisting him to dispose of certain properties he owned. But they continuously and repeatedly centered his attention upon this particular deal. It was the controlling motif of their activities. The plaintiff, ignorant and inexperienced as to city property, believed and relied upon the representations made to him and closed the deal February 19, 1922. He did not discover the falsity of the representations until about December 8, 1926. This action was started June 22, 1928.

The principal assignment of error is that the trial court erred in finding, as a matter of law, that the plaintiff's cause of action was barred by the statute of limitations, and in directing a verdict for the defendants. Section 8512, Comp. St. 1922, provides that an action for relief on the ground of fraud shall be brought within four years, but the cause of action in such a case shall not be deemed to have

accrued until the discovery of the fraud. This statute has been construed by this court, the leading case being *Parker v. Kuhn*, 21 Neb. 413. There the rule is announced as follows: "An action for relief on the ground of fraud may be commenced at any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery." It cannot be doubted that this is the well-settled rule, since it has been adhered to by this court in an unbroken line of decisions, including among others: *Coad v. Dorsey*, 96 Neb. 612; *Bank of Miller v. Moore*, 81 Neb. 566; *Raymond v. Schriever*, 63 Neb. 719; *Horbach v. Marsh*, 37 Neb. 22; *Wright v. Davis*, 28 Neb. 479.

This transaction occurred February 19, 1922, while this suit was started June 22, 1928. The plaintiff alleges in his petition, and testifies in support thereof, that he first discovered the fraud December 8, 1926, meaning, under our construction of the words of the statute, that he then first discovered the fraud or facts constituting such fraud sufficient to put a person of ordinary intelligence and prudence upon an inquiry, which, if pursued, would have led him to such discovery. The defendants contend that the plaintiff in this case prior to four years from the date of bringing the action discovered such facts. The trial court followed their view. The defendants attribute knowledge to the plaintiff, first, because he went into possession February 23, 1923. The evidence upon this point is that he went into possession, but did not personally manage the apartment, nor collect the rent, but did visit the property a number of times. The plaintiff testifies that he did not discover through his possession of the property any facts constituting fraud. Even his living in the apartment would not necessarily put him in possession of such knowledge. In *Carson v. Greeley*, 107 Neb. 609, where the plaintiff lived on the land for an entire year, this court held that an action brought five years afterward was not barred. The plaintiff here, a Bohemian, was born in Heskov, Hungary, coming

to this country when eight years of age, with little education, and lived upon a farm almost up to the time of this transaction. Paraphrasing the language of Dean, J., in *Carson v. Greeley, supra,* the plaintiff knew nothing about city property; he placed great reliance in defendants, and did not have an understanding of business affairs that would enable him to cope with the defendants. Just as in the last cited case, he was lulled into a feeling of security by the defendants, who continued to represent to him that he had secured a property for less than at cost, and less than it was worth. Some of them secured another trade, which they represented to him as making him a $1,000 profit. This, no doubt, sustained his feeling of security and prevented a suspicion from arising. He was under no duty to have the property appraised until he had knowledge which would put him on inquiry. *Gerner v. Mosher,* 58 Neb. 135; *Raymond v. Schriever,* 63 Neb. 719. In the latter case, Mr. Justice Holcomb said: "The test is not whether the defrauded party has the opportunity or power to discover the fraud, but whether he was in possession of such facts as were sufficient to demand an investigation, which, if pursued, would have disclosed the fraud."

Next it is argued that one Humpe, a real estate man, was his agent for managing the apartment and collecting the rents. Plaintiff asked him to find a buyer, but price was not discussed. This man knew the value of said apartment, but testified that he never told plaintiff, because, as he said, it was none of his affairs. This corroborates the plaintiff's testimony. It is evident that knowledge of facts constituting fraud cannot be imputed to the plaintiff from this circumstance. Particularly is this true since at this time plaintiff would not have believed him as against defendants, as is evidenced by the fact that, when some of the apartments became vacant and Humpe did not immediately lease them, he turned the property over to Douthett to manage.

The final contention of defendants, in this regard, is that on August 2, 1923, he traded with defendants Nickles and Douthett, representing an owner of a hotel in Belgrade,

Nebraska, wherein he traded the apartment for said hotel, and within two weeks thereof discovered that he had been defrauded, and that this transaction should have put him upon inquiry in the former deal. We consider this subsequent transaction only as it bears upon the plaintiff's knowledge of such facts constituting fraud as would start him upon a course of inquiry which would lead him to the ultimate discovery of such fraud. The second deal only included two of the defendants in this case. It was not the same transaction. For the purpose of that trade, his apartment was valued at $36,000. He thought it was worth that and so averred when he brought action on that tort. He testified in that case that this apartment was worth $36,000. It was not until the case was tried, December 8, 1926, when defendant Douthett, and many other real estate men, testified that the value was around $21,500, and not $36,000, that there is any direct evidence that knowledge of the fraud was brought to him. There is no case, as far as we are aware, which holds that a man must be so keenly on the scent of efforts to defraud him that, without knowledge of any fact which would lead a prudent man to suspect he had been defrauded, he is required to make investigations merely because it is in his power to do so. *Raymond v. Schriever*, 63 Neb. 719.

Taking into consideration the evidence upon the question as to plaintiff's knowledge of the facts which should have put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud, we are of the opinion that it became a question of fact for the jury as to whether or not he was apprised of any fact which imposed upon him the duty to resort to an appraisal of the property. No general rule can be announced covering all cases, but it is a question under all the circumstances of each case for the determination of the jury. *Raymond v. Schriever, supra*; *Carson v. Greeley, supra*; *Comfort v. Robinson*, 155 Mich. 143; *Oleson v. Oleson*, 90 Neb. 738.

The trial court should not direct a verdict of the jury

unless the evidence is so clear upon every point upon which the verdict may depend that reasonable minds cannot come to any other conclusion. *Bank of Cortland v. Maxey*, 102 Neb. 20. The evidence in this case, as examined and discussed herein, is not so clear that reasonable minds could not come to a different conclusion than the trial judge. Whereupon, it follows as a practical conclusion that the trial judge usurped the function and invaded the province of the jury when he determined the question of fact as to the time when the plaintiff in this case discovered facts constituting fraud sufficient to place him upon an inquiry which would lead him to a discovery of the fraud as contemplated by the statute.

Some confusion attended the trial of this case, both on the part of the trial judge and the parties, most of which arose out of the fact that many of the cases decided by our court are in equity, wherein the court determines the fact as well as the law. In a law action to recover damages for fraud, the question as to the time of the discovery of the fraud is a question of fact, and is to be determined, as other questions of fact, by the jury.

We have carefully read the record, have given diligent attention to the briefs and oral arguments, and find no other question necessary for our determination. The court should have submitted the case to the jury, and erred in directing a verdict for defendants. The judgment is reversed and the cause remanded.

REVERSED.

ROSE, J., dissenting.

The decision will permit the jury to find that plaintiff, during a period of four years, did not discover he had been defrauded by false representations of value in a transaction through which he acquired title to an apartment house with the resulting right to rentals therefrom in lieu of former income from the consideration paid by him. The effect of such a finding by a jury will prevent the running of the four-year statute of limitations against an action at law to recover damages for the fraud, assuming fraud was com-

mitted. The law applicable to the facts of this case has been stated as follows:

"If the fraud ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery ought to have been made." 17 R. C. L. 858, sec. 218; *Wright v. Davis,* 28 Neb. 479.

In my view of the evidence, the exercise of reasonable diligence would, as a matter of law, have resulted in the discovery of the alleged fraud within the statutory period of four years. Definite facts disclosing a reasonable excuse for the failure to discover the truth within four years are wanting. There is nothing in the record to show that plaintiff did not have ordinary intelligence. He accumulated, and for years preserved, a considerable fortune. The plea that he did not discover fraud within four years is at variance with the common impulse of rational men to contemplate the value and earning capacity of their property, when income therefrom is a means of livelihood. Rentals from the apartment house were measures of value. They imparted to plaintiff notice of fraud inducing the purchase for a fraudulent consideration, if fraud were committed. Unavoidable knowledge of facts disclosing fraud is equivalent to a discovery of the fraud. Credulous reliance on the vendor of the apartment house and on the agents who represented him in the making of the sale is no excuse for plaintiff's failure to discover within four years misrepresentations of value in that transaction. The law recognized the competency of plaintiff to testify to the value of his own property when acquired and did not permit him to disregard the promptings of his own senses, his own sources of information and his own right to redress and, by denying knowledge of the fraud, escape the consequences of his own failure to exercise reasonable diligence.

In my view of the record, the decision of the majority delegates to the jury a power committed to the courts alone.

Since the jury are now permitted to prevent the bar of the statute in cases of this kind, I think the purposes of the

legislature in limiting the time in which actions at law for fraud may be commenced will often be defeated and the right to litigate stale claims preserved until witnesses disappear. I agree with the district court that the action is barred on the face of the record.

JOHAN A. ANDERSON ET AL., APPELLANTS, V. FRANK LEHMKUHL, COUNTY CLERK, ET AL., APPELLEES. STATE, EX REL. FIRST FARMERS ELECTRIC DISTRICT, APPELLEE, V. FRANK LEHMKUHL, COUNTY CLERK, ET AL., APPELLANTS.

FILED MARCH 19, 1930. No. 26836.

1. **Appeal:** JUDGMENT ON REHEARING. A judgment of this court, entered after a rehearing seasonably requested and allowed, becomes a final judgment and entirely supersedes the former judgment, which is thereby suspended and vacated and is of no force or effect.
2. **Constitutional Law:** CURATIVE ACT. A curative act is one intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law. 12 C. J. 1091.
3. ———: LEGAL PROCEEDINGS: IRREGULARITIES. Defects in legal proceedings which are mere irregularities may, in the absence of constitutional limitations, be corrected.
4. ———: ———: VOID STATUTE. Retroactive statutes may legalize unauthorized acts which could have been authorized in the first place, but the legislature has no power to legalize a defective proceeding based on a former act which has been held to be unconstitutional.
5. **Statutes:** UNCONSTITUTIONAL LAW. Courts appear to be divided upon the question as to the extent to which moral obligations may be recognized as arising out of unconstitutional enactments. This court holds that, since an unconstitutional law is void, it imposes no duty and confers no power nor authority upon any one, and no obligation is created which can be enforced by subsequent legislation.
6. ———. "In all cases where a general law can be made applicable, no special law shall be enacted." Const. art. III, sec. 18.

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

Peterson & Devoe, Charles H. Slama, Wymer Dressler, Joseph F. Berggren and *C. F. Galloway,* for appellants Anderson and others.

J. H. Barry and *Rose, Wells, Martin & Lane, contra.*

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

PAINE, District Judge.

Two suits were consolidated by the district court for Saunders county, and both were appealed to this court. In the first suit the district court denied an injunction against the defendants, which had been asked by the plaintiffs. The second suit comes here on appeal from an order of mandamus issued by the district court against the defendants. It is impossible to present the issues involved without giving a statement of the facts in the two cases and then a brief summary of the pleadings.

The First Farmers Electric District of Saunders county was organized under sections 7147-7154, Comp. St. 1922, for the purpose of building an electric line to distribute light and power to the farms within the electric district, and bonds of $30,000 were issued and sold to construct a transmission line of poles and wires within the district, which corporation proposed to buy electricity at wholesale from the municipal plant of the city of Wahoo at the rate of 6 cents per kilowatt, and in turn to sell this electric current to the users living in said district at retail at an increased price of from 9 cents to 14 cents per kilowatt. Said electric district consisted of about 21 sections of farm land running up to the city of Wahoo on all except the west side of said city, and in addition thereto the officers of the light district contracted to sell electric current to the village of Ithaca, which was two miles beyond the boundaries of said electric district, thereby contracting to furnish power and light to users who were residing outside of the electric district. Upon its construction said electric district began to do business and has since continued to function

in spite of continuous litigation, and is now furnishing light and power to its customers. The directors of said electric district assessed and levied taxes against the real and personal property within such district and certified the same to the county clerk of Saunders county, Nebraska, and such levy was spread upon the tax rolls by order of the commissioners of said county against all of the property located within such light district.

Said sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws of 1923, were brought before this court in the case of *Elliott v. Wille,* 112 Neb. 78, and an opinion entered, finding the sections as amended were constitutional, and that such distribution of light, heat and power as was contemplated was for a public use as distinguished from a private use, which opinion was filed April 30, 1924, but upon rehearing an opinion was entered October 20, 1924, and reported in 112 Neb. 86, in which the judgment of affirmance was vacated and the judgment of the district court was reversed, for the reason that upon reargument this court decided that, when a legislative act authorized private individuals to create and fix the boundaries of a district for public improvement to be paid for by taxes levied upon the property within the district, and without any provision for determination whether the owner's property had been arbitrarily or unjustly included within the district, this was invalid in that it authorized the taking of private property for a public use without just compensation. The court decided that by such a law the legislature attempted to delegate to private individuals legislative and judicial functions, and that such act violated both the state and federal Constitutions, and this court issued an injunction as prayed for by the plaintiff.

Thereafter an attempt was made by those interested to validate the action originally taken by securing the passage by the legislature of Senate File No. 106, found in chapter 89, Laws 1925, which law, although couched in general terms, applied specifically to the local conditions of the First Farmers Electric District of Saunders county, as it

attempted to validate proceedings had prior to the passage of the law. Section 3, ch. 89, is as follows:

"The provisions of the two preceding sections shall be considered cumulative and supplementary to article VII, chapter 67, Compiled Statutes of Nebraska for 1922."

Under this law the officers of the First Farmers Electric District of Saunders county endeavored to make valid and legal all of the steps which had been taken under the sections which had been declared unconstitutional by this court in the case of *Elliott v. Wille*, 112 Neb. 86. A suit was immediately brought in the district court for Saunders county to enjoin the validation of the purported bonds and contracts of said electric district. This injunction was denied by the district court for Saunders county and appeal taken to this court. The issues were determined in the case of *Swanson v. Dolezal*, 114 Neb. 540, in which it was held that chapter 89, Laws 1925, attempted to cure the defect in the original provisions, and that the act was not a complete act within itself but was dependent upon the provisions of the former act which had been declared void. The effect of this decision was to wipe out all legislation in reference to this particular electric district, for it was enjoined from assessing or levying any taxes against the real or personal property within the boundaries of the district.

Those interested in establishing this First Farmers Electric District again sought relief from the legislature, and Senate File No. 68 was passed by the next legislature and became chapter 106, Laws 1927. This law to establish light and power districts in terms that would apply to the conditions in which the First Farmers Electric District found itself is carefully drawn and clearly shows the attempt of the one drafting the same to avoid the defects in the two former acts of the legislature as well as to come within the law as stated by this court in its two former decisions. The title of said Senate File No. 68 reads as follows:

"An act relating to and defining the powers of heat,

light and power districts where ineffective proceedings for their formation have heretofore been had; to validate and cure the ineffective proceedings heretofore had for their formation, their contracts and obligations, and their bonds heretofore issued and sold; and to declare an emergency."

The appellees urge vigorously that this act was complete in itself and not dependent in any way upon any prior act, admitting, however, that it assumed the existence of certain physical facts which did exist and gave a method by which the physical property of the former district, the name of which was not to be changed, might be acquired and the bonds issued several years before be ratified, confirmed and paid. Appellees base their procedure upon a statement, which was dictum, used by this court in *Swanson v. Dolezal, supra,* reading as follows: "We do not determine that a curative act may not afford relief desired in this case." With the emergency clause, this law, found in chapter 106, Laws 1927, was approved April 16, 1927, and the said electric district endeavored to proceed to validate the $30,000 worth of bonds and to assess and levy taxes to pay the interest thereon, and upon March 6, 1928, the plaintiffs filed their amended petition in the district court for Saunders county against Frank Lehmkuhl, as county clerk, and others, seeking a permanent injunction against the levy of such taxes on the ground that said act was invalid and unconstitutional. The defendants filed a demurrer to the amended petition, which was sustained by the district court, and the plaintiffs thereupon elected to stand on the amended petition, and the district court entered a decree sustaining the demurrer and dismissing the amended petition, and from that decree the plaintiffs prosecute this appeal to this court.

The second suit involved in this decision was filed on September 15, 1928, by the First Farmers Electric District bringing a mandamus suit against Frank Lehmkuhl, the county clerk, and other county officers to require and compel the taxing authorities to levy taxes against the real and

personal property within the electric district. In this suit Gust Swanson and 23 other taxpayers of said electric district filed their petition of intervention upon September 24, 1928, praying that mandamus be denied on the ground that chapter 106, Laws 1927, was unconstitutional, and upon this petition of intervention a trial was had upon October 8, 1928, and the district court entered a decree in favor of the First Farmers Electric District, and upon the motion for a new trial being overruled the defendants and interveners gave notice of this appeal.

Thus, while there are two distinct suits involving different plaintiffs and defendants, yet the injunction suit and the mandamus suit involve identical issues and both rest upon the primary question whether chapter 106, Laws 1927, is a valid act under the Constitution and Laws. For the purpose of determining this important question the two proceedings have been consolidated by agreement of the parties and all of the records and exceptions preserved in one bill of exceptions, and by agreement both of the cases are to be determined in one appeal by this court.

With this summary of the history of former proceedings we will now examine the pleadings filed. In the injunction case the amended petition filed by the plaintiffs alleges many of the facts hereinbefore set out and then charges that it is the purpose of the board of county commissioners and the county clerk and the county treasurer to levy and collect taxes upon the real and personal property in said district to operate said electric light and power district and to pay the principal and interest of the bonds heretofore issued by said district.

The plaintiffs further allege, first, that the said act of the 1927 legislature is unconstitutional and absolutely null and void, because it is special legislation, granting to this electric district exclusive privileges, immunities, and franchises; second, that it violates section 7, art. VIII of the Constitution of Nebraska, in that it uses the taxing power for a purely private or corporate purpose; third, that it violates the same section of the Constitution of Nebraska

because it attempts to make said electric district a municipal corporation and impose taxes for corporate purposes; fourth, that it violates section 3, art. I of the Constitution of Nebraska, and section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiffs of equal protection of law and deprives them of their property without due process of law; fifth, that it is null and void for the reason that it makes no provision to give any taxpayer an opportunity to be heard except and unless the taxpayer owns real estate in said district, but that the owners of personal property who are taxpayers thereon have no voice whatever in said organization; sixth, that it is null and void because it grants special benefits to lands within the district, and that the legislature cannot impose taxation upon citizens generally for the purpose of paying for benefits to lands of certain individuals only which are especially benefitted thereby; and, lastly, that it is null and void for the reason that it provides for the original hearing to be had before the county commissioners irrespective of whether a majority or any of said commissioners may be residents and members of the light district and users of current therein and interested in the outcome of the proceedings, and fails to provide for a change of venue or a hearing before some other board in the event that any of the commissioners would be interested in or users of the electric current to be furnished by it, and alleges that one of the commissioners of Saunders county was so interested at the time the Senate File No. 68 was passed and ever since that time.

The amended petition further sets out that Senate File No. 68 was enacted in the hope of curing the defects of prior acts which had been held void by the supreme court in the two former cases herein cited, but alleges the fact to be that no district has ever been legally organized under any law whatsoever; that everything done thereunder is null and void for the reason that since the passage of Senate File No. 68 no petitions have been filed by any one for the organization of the district, no elections have been held,

no opportunity given to vote at any election or otherwise, and that Senate File No. 68 is an attempt to supplement former void statutes and to validate contracts and other obligations which were null and void at the time they were performed and executed, and that the distribution of the electric current by said district is not of a public nature nor business in which the public is interested in any manner in a municipal or governmental capacity. To this amended petition appellees filed a general demurrer.

The second case before us is a mandamus case brought by the state of Nebraska, on the relation of the First Farmers Electric District, against the county officers, praying that they be required to extend the levy as taxes in the sum of $4,000 certified, and proceed to collect the same as taxes against the taxable property in the district. To this petition some 24 taxpayers filed a petition in intervention praying that chapter 106, Laws 1927, be declared unconstitutional, null and void, and that the officers be perpetually enjoined from collecting such taxes. The county attorney filed an answer also praying the court to declare said law unconstitutional. These cases were taken under advisement by the district court and a memorandum opinion filed, from which this appeal is taken.

1. This court appreciates the importance of the issues involved and is mindful of the fact that two opinions affecting the same subject-matter are now in the published reports of this court.

Much stress is laid by the appellees upon expressions found in the first opinion published in the case of *Elliott v. Wille*, 112 Neb. 78. It is claimed by appellees that it is conclusively settled by this opinion that distributing this electricity is a public purpose, and appellees rest other contentions upon this decision. But in the later opinion in the same case, as set out in 112 Neb. 86, such opinion of affirmance was vacated and set aside and the judgment of the district court was reversed.

A judgment of this court, entered after a rehearing, seasonably requested and allowed, becomes a final judgment

and entirely supersedes the former judgment, which is thereby suspended and vacated and is of no force or effect.

2. The many issues presented in the pleadings tempt one to weigh the authorities in support or opposition to each contested claim, but because of the fairly extended statement of the facts and issues involved, while we have given attention to each and every issue presented and every challenge interposed, yet our consideration of only the most material thereof will be set out in this opinion in order not to unduly extend the same.

The court finds that under an act set out in sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws 1923, the First Farmers Electric District was organized, its lines built, and bonds of $30,000 issued, and this court in *Elliott v. Wille,* 112 Neb. 86, held that such statutes violated both the state and federal Constitutions because such act permitted the taking of private property for a public purpose without due process of law.

The first curative act endeavoring to validate the outstanding obligations of said district was obtained from the 1925 legislature, and is found in chapter 89, Laws 1925, and upon proper proceedings being taken in the district court for Saunders county this act was brought before this court and an opinion rendered in the case of *Swanson v. Dolezal,* 114 Neb. 540, wherein this court held the first curative act to be expressly supplementary to the original unconstitutional legislation and therefore to be absolutely void; citing decisions from the United States supreme court and from Nebraska as follows:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U. S. 425.

"The general rule is that an unconstitutional statute is invalid from its inception, and as ineffectual as though it had never passed." *State v. Several Parcels of Land,* 78 Neb. 703.

In *City of Plattsmouth v. Murphy*, 74 Neb. 749, this court held: "An act of the legislature amendatory of, or supplemental to, an unconstitutional law is unconstitutional and void."

Now there is presented to this court the second curative act, secured from the legislature in a new attempt to validate the obligations of this district, and such act is found in Senate File No. 68, set out in chapter 106, Laws 1927. Let us consider first a provision found in section 1 of this Senate File No. 68, reading as follows:

"The county board shall give to such district the name theretofore adopted and used for the same: Provided nothing in this act shall be construed as authorizing the organization of new districts."

This discloses an effort by special legislation to confirm and ratify acts done years ago under an act declared to be void, and precludes the organization of any other district under this act. This act provides in section 2:

"The bonds of said district heretofore issued and sold for the purpose of constructing a system for the distribution of light, heat and power, and all of its proceedings therefor, and all of the contracts and obligations of said district, with boundaries so fixed and determined by the county board as in section 1 of this act provided, are hereby confirmed and validated, and any defects and irregularities therein, or in the proceedings therefor, are hereby cured, so that said bonds, contracts and obligations shall and they are hereby made and declared to be the valid obligations and rights and properties of said district."

It appears that this is a special and purely local act, applying only to this particular district, and for that reason, if for no other, is in violation of constitutional restrictions. *State v. Scott*, 70 Neb. 685; *State v. Kelso*, 92 Neb. 628.

A curative act is one intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law. 12 C. J. 1091; *Schamblin v. Means*, 6 Cal. App. 261.

It is generally conceded that the legislature may by a retroactive statute validate acts which are void by reason of informality or because of failure to comply with some technicality. 12 C. J. 1093; *McSurely v. McGrew*, 140 Ia. 163.

3, 4. The appellees, insisting that the present act is a legal curative statute, cite *Gibson v. Sherman County*, 97 Neb. 79, and other cases, but the cases cited do not apply to the facts in this case. Defects in legal proceedings which are mere irregularities may in the absence of constitutional limitations be corrected. Retroactive statutes may legalize unauthorized acts which could have been authorized in the first place, but the legislature has no power to legalize defective proceedings based on a former act which has been held to be unconstitutional. 6 R. C. L. 320.

5. Appellees insist that there is a moral obligation to repay the money borrowed upon the bonds, and that this court should not repudiate these bonds on purely technical grounds but should seek diligently to find a legal ground upon which to validate the bonds. Appellees in support thereof cite the case of *Dawson County v. McNamar*, 10 Neb. 276, but the facts in that case are so entirely different from the case at bar that it cannot be considered a precedent. The courts appear to be divided upon the question as to the extent to which moral obligations may be recognized when arising out of unconstitutional laws. 6 R. C. L. 119. A few courts hold that moral obligations in themselves are sufficient to sustain payment from the public treasury. *United States v. Realty Co.*, 163 U. S. 427. Many other courts take the opposite view. The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Since an unconstitutional law is void, it imposes no duties and confers no power or authority on anyone. It affords protection to no one, and no one is bound to obey it, and no courts are bound to enforce it. A bond or contract which rests on an unconstitutional statute is

void and creates no obligation to be enforced by subsequent legislation.

Senate File No. 68 is primarily for the purpose of passing a curative act which will validate $30,000 worth of bonds which have been issued years ago under laws that have been declared to be void and unconstitutional, and a careful study of it impresses the court with the fact that the present legislation is open to many of the same objections as the former legislation, admitting for the purpose of argument that it has been much more carefully drawn and is a studied attempt to avoid the pitfalls of former legislative acts, while at the same time attempting to validate bonds founded upon legislative acts heretofore declared unconstitutional.

It is the duty of courts to exercise extreme caution in deciding constitutional questions and to avoid passing upon them adversely if possible. But when similar facts are presented to this court for the fourth time, twice in the case of *Elliott v. Wille, supra,* and also in the case of *Swanson v. Dolezal, supra,* and now again in this case, and after several sessions of our legislature have been induced to take action in the matter, it must be definitely, and we trust finally, passed upon by this court.

The court is never limited to the exact letter of the law but should ascertain the purpose and effect of the legislation. Under our laws ample provisions exist for municipal ownership lighting plants, and their growth has met the need in many communities in a very satisfactory manner, while in other places municipal plants have been discontinued. However, in this particular case we believe from the act itself it clearly appears that this enactment is only for this especial location and to inject life into bonds issued heretofore under proceedings declared void.

Appellees cite the case of *Cunningham v. Douglas County,* 104 Neb. 405, where, after the Douglas county courthouse was burned by a mob, a special session of the legislature gave relief by allowing several times the usual taxes to be levied to pay bonds by the device of changing the valuation

of property to its full "market value" in place of "assessed value."

There is an old adage, "Hard cases are the quicksands of the law;" and, also, "Hard cases make poor law." In our judgment this act is a special law and violates section 18, art. III of the Constitution, providing that, "In all other cases where a general law can be made applicable, no special law shall be enacted."

In our opinion the general incorporation laws will permit the organization of a company that will give the relief desired and carry out all obligations of the district, legal as well as moral.

Many electrical transmission and distribution lines have been incorporated under our general incorporation law in Nebraska to carry on similar business, by building lines, issuing bonds and retiring them from their earnings instead of from general taxation, and they do all these things without any attempt to secure any special legislation with power of unlimited taxation.

The court finds that the decision and orders entered by the court below were erroneous, and directs that the mandamus proceedings be dismissed; that a judgment be entered in the injunction case in favor of the appellants as prayed.

REVERSED.

K. JACKMAN, APPELLANT, V. CHARLES MILLER ET AL., APPELLEES.

FILED MARCH 21, 1930. No. 27030.

1. **Process: SERVICE BY PUBLICATION: AFFIDAVIT.** In an action to foreclose a tax lien on real estate situate in this state, as in this case, where service by publication of notice is sought as to certain necessary defendants, and plaintiff files an affidavit alleging the above facts, and in addition thereto states therein "that, after a diligent investigation, search and inquiry by the paintiff, she is unable to ascertain and does not know the whereabouts or residence if in this state of the above named defendants," such affidavit, if it reflects facts which satisfy the court or judge that

"diligent investigation and inquiry" have been made, is a sufficient compliance with the provisions of section 8584, Comp. St. 1922.

2. ———: ———: ———: HEARING. In such a case, where the truthfulness of the facts alleged in the affidavit for service is challenged by way of a special appearance lodged by the defendants sought to be served, before default is entered or judgment rendered, it becomes necessary for the court or judge to set the matter for hearing on the issue thus raised.

3. ———: SPECIAL APPEARANCE: FINDINGS. Record examined, and found that plaintiff had not made "diligent investigation and inquiry," as by statute required; hence, the trial court was justified in sustaining the special appearance.

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

Perry, Van Pelt & Marti and *E. E. Jackman,* for appellant.

George N. Gibbs, Cordeal, Colfer & Russell, Horth, Cleary & Suhr and *Halligan, Beatty & Halligan, contra.*

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

THOMPSON, J.

In this action, instituted in the district court for Perkins county, plaintiff, appellant, sought to foreclose a tax lien on certain lands in such county, the petition being in usual form. Service was attempted to be had on necessary defendants, appellees, the Millers, the Miners, and the Meisters, by publication of notice, and, in furtherance thereof, plaintiff filed an affidavit praying for such service, which affidavit, among other things, contained a reference to the petition and its purpose, and the further pertinent allegation: "That, after a diligent investigation, search and inquiry by the plaintiff, she is unable to ascertain and does not know the whereabouts or residence if in this state of the above named defendants." It was the claim of plaintiff that such quoted assertion met the demands of section 8584, Comp. St. 1922. An order of the judge authorizing

such publication was afterwards entered in harmony with our statute, and publication had. However, before default or judgment was entered, these above named defendants, respectively, interposed a special appearance challenging the court's jurisdiction over their persons, making no objection to the formal parts of the affidavit, but alleging that the above quoted facts were untrue, and were made for the express purpose of denying to such defendants knowledge of the pendency of the suit; further, that no personal service was had on them, and neither was there constructive service as provided for by law. On the issue thus raised, hearing was had to the court. At the close of the evidence, as we conclude, the court entered judgment sustaining the special appearance, set aside the order for service by publication, and on plaintiff's electing to stand on the service as made, the action was dismissed. Plaintiff appeals.

Is the affidavit such as is contemplated by the statutes providing for service by publication?

Section 8583, Comp. St. 1922, referred to in the aforesaid section 8584, so far as here material, provides: "Service may be made by publication in either of the following cases: * * * Fourth. In actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation; * * * Sixth. In all actions wherein the subject matter is as described in the first or fourth subdivisions of this section whether the defendant be a resident or nonresident of this state, wherein it is alleged in the petition or other pleading that the plaintiff or person in whose behalf such allegations are made, after diligent investigation and inquiry, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants to such action, and when the court in which such action is docketed

or a judge thereof, being satisfied that sufficient investigation has been made, shall make an order in such action directing that service be had upon such defendant or defendants by publication."

Section 8584 provides: "Before service can be made by publication an affidavit must be filed that the case is one of those mentioned in the preceding section (8583), and that the defendant to be served is a nonresident of this state; * * * or that such defendant's whereabouts, if in this state, and residence are unknown to plaintiff or person in whose behalf such affidavit is made."

Considering these sections together, and in connection with the different situations sought to be covered by such sections, and the purpose which must have impelled the legislature to their enactment, we are impressed with the thought that to meet their requirements it was only necessary that the action be one affecting the properties and such interests therein, as are indicated by the context of these sections; and that the affidavit needs but to contain the language of such statute, or its equivalent, as it did in this case, and that by so doing the plaintiff was entitled to an order for service by publication, unless and until a challenge was interposed. The affidavit for publication, as we have seen, covered the provisions of the sixth subdivision of section 8583, hereinbefore quoted, to wit, that the plaintiff, "after diligent investigation and inquiry, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants to such action." It is our view that such affidavit sufficiently complied with the statutory requirements, and clothed the court with jurisdiction to enter the order for service by publication, providing the allegations in the affidavit were true.

While we have considered the sufficiency of the affidavit, we have done so merely as illustrative of a question of practice, and as an aid in our further discussion herein, as the plaintiff, appellant, has limited our consideration in his brief, as follows: "There is no proposition of law involved

in this case. The only question involved is one of fact, whether the order sustaining the special appearance is sustained by the evidence."

Considering this submission in connection with the aforesaid sections of our statute, and the evidence, it logically follows: When, either before or after the entry of an order for service by publication, and before default is entered or judgment rendered, an objection is filed by an interested party impugning as untrue the facts alleged in plaintiff's affidavit, as in this case, then it becomes necessary for the court or judge to set the matter for hearing, and determine whether or not the challenged allegations are true. *Welch v. Ayres,* 43 Neb. 326. The legislature must have had in mind the far-reaching provisions of this enactment on property rights, and the grave consequences that would follow a careless or wrongful application thereof. Thus, the provision was inserted requiring "diligent investigation and inquiry," not the former alone, but the latter as well, each of which should be made before such an affidavit is entitled to be filed. As we said in *Armstrong v. Griffith,* 94 Neb. 515: "Where jurisdiction in a tax foreclosure case is sought to be acquired by publication, there should be a strict compliance with the provisions of the statute." Further, we might add that the evidence at the hearing was sufficient to, and did, establish that these challenging defendants were at all times involved herein actual residents of this state, and that diligent investigation and inquiry on the part of plaintiff, if made, would have so disclosed. However, the evidence shows that no such investigation and inquiry were made. Thus, the affidavit was false as to these jurisdictional facts, and, being so, was *prima facie* fraudulent.

Under this record, the trial court was justified in sustaining the special appearance, and its judgment is

AFFIRMED.

GOOD, J., dissenting.

I do not agree to the holding that the record fails to show that plaintiff had made diligent investigation and inquiry

as to the residence and whereabouts of the defendants. In my view, the evidence is sufficient to show that the statute was complied with. As held by the majority opinion, the affidavit was sufficient in form. It satisfied the trial judge. He ordered service to be had upon defendants by publication. Pursuant to the order, the notice was published. It must have been brought to the attention of the defendants, because they made special appearance in court and objected to the jurisdiction on the ground that they had not been personally served with summons, and that the allegations of the affidavit for service by publication were untrue. The only evidence offered by defendants in support of their objections was an affidavit of one who was a brother-in-law of one of the parties. This affidavit was received in evidence over objection. Oral evidence was taken in court on behalf of the plaintiff, and an examination of the testimony of these witnesses convinces me that sufficient search and inquiry were made to justify the making of the affidavit.

In my opinion the special appearance should have been overruled, the judgment of dismissal reversed, and the cause remanded, with leave to defendants to file an answer setting up any defense they may have, and permitting a trial of the cause upon the merits.

A. JACKMAN, APPELLANT, V. PETER C. HANSEN ET AL., APPELLEES.

FILED MARCH 21, 1930. No. 27031.

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

E. E. Jackman and *Perry, Van Pelt & Marti,* for appellant.

George N. Gibbs, Cordeal, Colfer & Russell, Horth, Cleary & Suhr and *Halligan, Beatty & Halligan, contra.*

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

THOMPSON, J.

This is a companion case to *Jackman v. Miller* reported, *ante,* p. 463. By agreement of the parties these two actions were argued and submitted to this court at the same time, with the understanding that our holding in *Jackman v. Miller* should be controlling herein. It, therefore, follows that the judgment of the trial court dismissing the action should be, and is,

AFFIRMED.

GOOD, J., dissenting.

The record in this case is identical with that in *Jackman v. Miller, ante,* p. 463, and for the reasons given in the dissenting opinion in the latter case, I dissent from the judgment of affirmance in this case.

OLE JENSEN V. GOLDIE JENSEN.

FILED MARCH 21, 1930. No. 27110.

1. **Constitutional Law**: "DEBT." In a divorce action, an award or judgment of the court directing one of the parties thereto to pay the other alimony, suit money, and attorney's fees, does not create a "debt," as that word is ordinarily understood, or as is intended by its use in section 20, art. I of the Constitution.
2. **Divorce**: ALIMONY: CONTEMPT. It is a power inherent in the

court to enter such an award or judgment, and to enforce compliance therewith by imprisonment for contempt, if necessary.

3. ———: ———: ———. Such contempt proceeding is predicated upon the award and judgment of the court and the refusal without just cause to comply therewith, and not upon evidence forming the basis of such award or judgment.

4. *Cain v. Miller*, 109 Neb. 441, examined and followed.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

John M. Berger, for plaintiff in error.

R. C. Hunter and *C. C. Sheppard, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

THOMPSON, J.

This is a case where the defendant below, Ole Jensen, plaintiff in error here, was adjudged in contempt of court because of his neglect and refusal to pay the amount of an award for attorney's fees in an action for divorce, as provided in a final decree in such action. The sole assignment of error is, in substance, that the court's finding and judgment contravene section 20, art. I of the Constitution of this state. This section provides: "No person shall be imprisoned for debt in any civil action or mesne or final process, unless in cases of fraud." The question is *stare decisis* in this state. This court has determined, upon the husband's refusal, without just cause, to pay or satisfy an order or judgment for alimony, suit money, and attorney's fees for the benefit of the wife in a divorce action, that the order or judgment may be enforced by contempt proceedings, and that such proceedings do not violate the constitutional provision heretofore quoted. *Cain v. Miller*, 109 Neb. 441. The facts reflected by this record bring the action clearly within our holding in the above cited case. This conclusion is not seriously questioned by plaintiff in error, except it is urged by him that in the divorce action the attorneys for plaintiff and defendant agreed before the

decree was rendered that it should be made a part of such decree that the amount of the attorney's fees should be the sum of $200, and that such agreement made the fee an ordinary debt such as is intended by the use of the word "debt" in the above quoted section of our Constitution.

The agreement, if made, was without force except as an evidential fact to be submitted to the trial court for its consideration in determining the fee to be awarded and made a part of its decree. From this record the claimed agreement was so treated by the trial court. This contempt proceeding is predicated upon the award and judgment of the court and the refusal without just cause on the part of the defendant to comply therewith, and not upon the agreement, if made, or other evidence forming the basis of such award or judgment. Neither the alimony, suit money, nor attorney's fees awarded, is a "debt" in the sense in which that word is ordinarily understood, or as is intended by its use in section 20, art. I of the Constitution. These awards were but means of enforcing the performance of a legal duty owing by the husband to the wife, in which the public has an interest. The power both to enter and to enforce such orders is inherent in the court.

All questions involved herein are so aptly covered in *Cain v. Miller, supra,* as to render further discussion useless.

The assigned error is not well taken. The judgment of the trial court is, therefore,

AFFIRMED.

E. MEYER, APPELLANT, V. ROSENBLATT & SON, APPELLEE.

FILED MARCH 21, 1930. No. 27015.

1. Trial: DIRECTION OF VERDICT. In an action for merchandise sold and delivered, wherein defendant counterclaimed, presenting the issue of plaintiff's oral agreement to repay overpayments, an instruction to find for defendant on proof that defendant made payments relying on plaintiff's agreement to repay any overpayments, *held* erroneous as assuming the existence

of such agreement, this being controverted and presenting an issue for the jury under the evidence.

2. ———: REFUSAL OF INSTRUCTIONS. Where, in an action for merchandise sold and delivered, defendant counterclaimed relying on plaintiff's agreement to repay overpayments, it was error to fail to instruct with reference to issues of account stated, and accord and satisfaction, tendered by plaintiff in his reply, and which were supported by competent evidence, since a party is entitled to instructions on his theory of the case, presented by the pleadings and supported by the evidence.

3. **Voluntary Payment.** Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity.

4. ———: INSTRUCTIONS. Where plaintiff, suing for merchandise sold and delivered, pleaded in his reply to defendant's counterclaim, based on an alleged agreement to repay overpayments, that the payments were voluntarily made, an instruction that defendant could not recover back money paid under threat of lawsuit, but to find for defendant if he proved that he paid money relying on plaintiff's agreement to repay overpayments and to protect credit, *held* wholly insufficient to present the law as to voluntary payments.

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

Monsky, Katleman & Grodinsky, for appellant.

Brogan, Ellick & Raymond, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

Plaintiff below, appellant here, brought this action against defendant, appellee here, for merchandise sold and delivered. Defendant admitted the account sued on in full, but counterclaimed, presenting the issue of oral agreements of plaintiff to refund an aggregate amount of payments, represented by counterclaim, to defendant in event plaintiff did not produce receipts for the merchandise represented by such items, which defendant asserted was not delivered.

Plaintiff in his reply and answer denied the issue pre

sented in the counterclaim, alleged an account stated, accord and satisfaction, and voluntary payments. Verdict was returned for defendant for the difference between the admitted account and counterclaim, judgment entered, and upon overruling of motion for new trial plaintiff appeals.

Instruction No. 4 given by the court on its own motion is as follows: "You are instructed that under the law defendant cannot recover back money, simply because it was paid under threat of a lawsuit; but if you find that defendant has proved by a preponderance of the evidence that the goods in the disputed items were not delivered to defendant by plaintiff, and that defendant paid the money to plaintiff relying upon *the agreement of plaintiff to repay defendant for any payments made by defendant to plaintiff for goods undelivered,* and that such payments by defendant to plaintiff were made to protect defendant's credit and relying upon *plaintiff's agreement to repay defendant for any overpayment,* then you should return a verdict for defendant in such sum as you may find defendant has proved under the above rule." (The italics are ours.)

The pleadings and evidence present an issue on the agreement to repay defendant for any payments made by defendant to plaintiff for goods undelivered. The existence of the agreement was controverted. Under this record the question of the existence of the agreement was a primary issue for the jury to determine from the evidence.

Instruction No. 4 assumes the existence of the controverted agreement. It fails to submit this disputed issue of fact to the jury for determination. Under the rule that an instruction is erroneous which assumes a fact as established, which is material to the case, and as to the existence of which the evidence is conflicting, we must hold that the giving of instruction No. 4 was error. *Chicago, B. & Q. R. Co. v. Anderson,* 38 Neb. 112; *Pratt v. Western Bridge & Construction Co.,* 116 Neb. 553.

The trial court did not instruct the jury with reference to the issues of account stated and accord and satisfaction, which plaintiff tendered in his reply, and which are sup-

ported by competent evidence. This is contrary to the well-settled rule in this state that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence. *Boice v. Palmer*, 55 Neb. 389; *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334; *Allen v. Rushforth*, 77 Neb. 840.

The issue of voluntary payments was presented by the plaintiff in his reply. There was competent evidence introduced to show that the payments, which were the basis of the counterclaim, were made voluntarily by the defendant to the plaintiff, with knowledge of the facts. Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity. *Renfrew v. Willis*, 33 Neb. 98; *Weber v. Kirkendall*, 44 Neb. 766. Instruction No. 4, *supra*, is the sole instruction given by the trial court which attempts to reflect plaintiff's issue of voluntary payments. It is quite evident that it does not clearly and adequately present the law as to voluntary payments.

Under the circumstances and proof, as shown by the record, the giving of instruction No. 4, failure to instruct on account stated, accord and satisfaction, and inadequately instructing on voluntary payments, constituted error which was prejudicial to the plaintiff.

We do not deem it necessary to discuss other assignments of error.

For the reasons given, the judgment of the district court is reversed and cause remanded for further proceedings according to law.

REVERSED.

GEORGE KEIM ET AL., APPELLANTS, V. VILLAGE OF BLOOMINGTON, APPELLEE.

FILED MARCH 21, 1930. No. 26916.

1. **Municipal Corporations**: DETACHMENT OF LAND. A decree of the district court finding that justice and equity do not require

detachment of farm land from the boundaries of a municipal corporation will not be set aside unless it is clearly shown that the trial court made "an important mistake of fact, or made an erroneous inference of fact or of law."

2. ———: ———. "This rule applies with peculiar force where the trial judge inspected the premises before rendering judgment." *Chapin v. Village of College View*, 88 Neb. 229.
3. **Judgment**: RES JUDICATA. In a proceeding *in rem*, a final judgment on the merits is an absolute bar to a subsequent proceeding founded upon the same state of facts. Such judgment binds successors in title as well as the original parties.
4. **Evidence** examined, and *held* that since former adjudication no new facts entitling plaintiff to relief are presented.

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

J. G. Thompson, for appellants.
George Losey, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This action is brought under section 4263, Comp. St. 1922, to detach farm land of the plaintiff from the Village of Bloomington. By detachment, the record shows, plaintiff would save about $18 a year, the amount of village tax he is now required to pay. A similar action was brought by a former owner of the land during 1919, which action terminated on March 25, 1920, by a decree in favor of the village. On the trial of the present case the court found that the action brought by the former owner is an adjudication of the present action; that no new facts entitling plaintiff to a decree were presented; and therefore denied the request of plaintiff.

Examination of the pleadings and findings in the two suits shows the facts to be substantially identical, with the exception, however, that in the present action the defendant pleads, additionally, the former adjudication, and the plaintiff replies that conditions have changed in that, first, the county seat has since been moved from Bloomington to

Franklin (October 26, 1920); and, second, that land adjacent to and north of the plaintiff's land and nearer the village and other land has been detached; so in our inquiry we should concern ourselves *only* with whether in the *proof* these latter facts constitute sufficient ground that justice and equity require detachment.

However, such facts alone *without other evidence* are not enough to warrant a finding that such a material change has been proved as to make the former adjudication ineffective.

The details of how the removal of the county seat has affected the community, if at all, are entirely lacking in evidence. Perhaps two stores less exist in the village at present than in 1920; but the comparative size of those remaining is not shown. The decrease in population, if any, the decrease in number of occupied houses, and the decrease in, and diversion of, trade generally, would all be persuasive matters of inquiry were they present. On that score, therefore, it must be assumed that no change, other than those normally to be expected since the period of depression and common to all towns, has taken place. Certainly it cannot be assumed *without some proof* that the land asked to be detached may not be used for village purposes.

What effect, if any, the detachment of the property immediately adjacent to and north of the plaintiff's property or the detachment of other land could have on the right of the plaintiff to have also his land detached is not clearly shown, except that, it is inferentially argued, the continuity of village control is broken; that property must be contiguous in order to enable the village to lawfully entertain jurisdiction over it. *Bisenius v. City of Randolph*, 82 Neb. 520; *City of Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751; *Vestal v. City of Little Rock*, 54 Ark. 321, 11 L. R. A. 778; *State v. Village of Gilbert*, 107 Minn. 364. The record is not entirely clear whether land immediately adjacent to the plaintiff's land on the east and north thereof is village property. However, the record seems to indicate that the

trial judge, by consent of both parties, inspected the property and, it must be presumed, found it to be contiguous to other village property. The trial judge found that since the former adjudication conditions had not changed; and it is entirely probable that his inspection disclosed facts not in the record and upon which he may have largely based his conclusions. *Chapin v. Village of College View*, 88 Neb. 229.

The evidence shows that a sidewalk runs from the village to the depot past and near to the plaintiff's land; that though the plaintiff's land is located almost a mile from the heart of the village, and about one-fourth mile from the main body of platted property, it receives some village benefit. At least the plaintiff uses the village electricity for lighting purposes. In respect to these considerations no change since 1920 has taken place.

One of the defenses claimed in the action in 1920, and again pleaded in the present action, which the defendant says would make it inequitable to detach the plaintiff's land, is that the right-of-way of the Burlington railroad adjoins and crosses part of the present tract; that on such right-of-way are a depot, elevators, stock yards, coal bins and oil tanks, all on property within the village and subject to taxation and from which the village realizes revenue. It was and is evidently feared that by the detachment of the plaintiff's land the railroad would benefit and the village might lose the revenue derived from taxing the railroad property. On this score the record does not show that conditions have changed since the former adjudication.

The evidence establishes that the land is practically all used for agricultural purposes and that the benefits to the plaintiff by union with the village are but slight. It may seem that on these and other general considerations existing today, as in 1920, the plaintiff should have been entitled to have his land detached. These general merits, however, were adversely adjudicated in the hearing in 1920, and by that adjudication the plaintiff is as much bound as his predecessors in title. *Sorensen v. Sorensen*, 68 Neb. 490; *State v. Broatch*, 68 Neb. 687; *Herpolsheimer v. Acme*

Harvester Co., 83 Neb. 53; *Triska v. Miller*, 86 Neb. 503; 15 R. C. L. 1008, 1028.

In any event, we have held that to entitle the plaintiff to a reversal, in a case of this character, the record must show that the trial court made an important mistake of law or fact. *Michaelson v. Village of Tilden*, 72 Neb. 744; *Gregory v. Village of Franklin*, 77 Neb. 62; *Bisenius v. City of Randolph*, 82 Neb. 520; *Chapin v. Village of College View*, 88 Neb. 229; *MacGowan v. Village of Gibbon*, 94 Neb. 772. The record does not show that such a mistake has been made.

This decision should not, however, deter the village board from consenting to detachment when it becomes apparent that in equity and good conscience conditions require such consent.

In view of the foregoing, the judgment of the district court is

AFFIRMED.

MYRTLE CURNYN, APPELLANT, V. JOHN J. KINNEY: WILLIAM VICTOR ET AL., APPELLEES.

FILED MARCH 28, 1930. No. 26823.

1. **Appeal**: DISMISSAL. The failure to file in the district court a motion for a new trial within three days is not of itself a sufficient reason for dismissing an appeal to the supreme court.
2. ———: TRANSCRIPT. The transcript of the proceedings in the district court imports verity upon appeal and is binding upon the supreme court in determining the date of the final order and the date on which the motion for a new trial was filed.
3. ———: ———. Where the transcript of the proceedings of the district court contains a motion for a new trial without showing that it was not filed within three days, the supreme court will presume upon appeal that it was filed within the time required by law.
4. ———: TIME. The statutory period of three months for the taking of an appeal from the district court begins to run from the date on which the judgment is entered on the court journal.
5. **Municipal Corporations**: POLICE OFFICERS: BONDS. For the faithful performance of official duties a police officer of Omaha is required by law to give a bond to the city as obligee.

6. ———: ———: ———. The statute, providing that "All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds," is, by construction, a part of the official bond of a police officer, though the city is the only obligee named. Comp. St. 1922, sec. 5048.
7. **Parties.** Under a Nebraska statute, a civil action is maintainable in the name of the real party in interest. Comp. St. 1922, sec. 8525.
8. **Municipal Corporations:** POLICE OFFICERS: ACTION ON BOND. The right of recovery on the bond of a policeman, conditioned upon the faithful performance of his official duties, extends to negligent acts committed by him in the exercise of municipal authority and resulting in personal injury without any fault of the person injured, and the latter may maintain an action on the bond, though it runs to the city as obligee.
9. ———: ———: BONDS: LIABILITY. A policeman in uniform, while operating a police motorcycle on public streets in transporting himself from a place of duty, where he had been directing traffic, to another place of duty at a police substation, during his working hours, is acting officially and is liable on his bond for negligence resulting in a collision with a pedestrian who is thus personally injured without fault on his part.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed.*

A. M. Morrissey, James H. Hanley and *C. J. Endres,* for appellant.

Crofoot, Fraser, Connolly & Stryker, James T. English and *B. J. Boyle, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $5,527 for personal injuries. Plaintiff was struck by a motorcycle and injured in Omaha May 4, 1927, while attempting to cross Leavenworth street where it intersects Park avenue. John J. Kinney and William Victor, Omaha policemen, and the surety on their official bonds, the Eagle Indemnity

Company, were sued as defendants. Each bond was payable to the city in the penal sum of $1,000 and conditioned upon the faithful performance of the duties of the policeman. At the time of the collision Kinney was driving the motorcycle and Victor was occupying the seat in a sidecar attachment. Due care on the part of plaintiff and negligence in the operation of the motorcycle were pleaded and copies of the bonds were attached to the petition. The principals and the surety were charged with liability for damages resulting from the alleged negligence.

Kinney and Victor admitted that they were police officers and that plaintiff sustained some accidental injuries at the time and place mentioned in her petition. Otherwise each answer was a general denial.

The surety admitted the execution of the official bonds of Kinney and Victor as policemen and also the collision and resulting injuries to plaintiff, but denied the negligence charged, and pleaded that her own negligence was the cause of the accident; that Kinney and Victor were not at the time acting in any official capacity; that Victor did not have any control over the motorcycle and was not negligent in any particular; that the bonds did not cover liability for negligence resulting in the collision, and that neither principal violated his bond.

At the close of plaintiff's evidence the trial court sustained a motion to direct a verdict in favor of the surety, but the verdict directed was never rendered by the jury and a dismissal as to the surety was not then entered. After Kinney and Victor adduced their evidence on the controverted issues between them and plaintiff, the jury returned a verdict in her favor and against Kinney alone for $1,030.25. There was no finding or judgment against Victor. Kinney did not appeal. From a judgment dismissing the action as to the surety plaintiff appealed.

The surety submitted a motion to the supreme court to dismiss the appeal, one ground being that plaintiff did not file her motion for a new trial within three days. The point is not well taken. Failure to file a motion for a new

trial within three days is not of itself a sufficient reason for dismissing an appeal. The filing of a transcript in the supreme court may confer jurisdiction and present rulings below for review in absence of a motion for a new trial. The transcript imports verity. It is binding on the appellate court and it fails to show that plaintiff did not file her motion for a new trial within three days. In the transcript the first entry relating to the dismissal as to the surety is found in an instruction to the jury April 21, 1928. The motion for a new trial was filed April 24, 1928, or within three days.

Failure to file the transcript in the supreme court within three months from the date of the trial court's dismissal as to the surety is also urged as a ground for the dismissal of the appeal. This position is also untenable. During the trial in the court below, April 20, 1928, the surety made a motion to direct a verdict in its favor. The presiding judge announced from the bench the sustaining of the motion but, as already stated, the jury never rendered the verdict directed. The judgment dismissing the action as to the surety was not entered on the court journal until November 14, 1928. This was the controlling date for the purpose of taking the appeal from the dismissal. Plaintiff filed her transcript in the supreme court November 22, 1928, which was the time required by law. The motion to dismiss the appeal is therefore overruled.

On the merits of the case, plaintiff argues that the dismissal of the action as to the surety was erroneous for the reason that the official bond of Kinney created a liability for damages resulting from his negligence while in the performance of his duties as policeman. On the other hand, the surety contends that a liability of that kind was not within the terms of the bond. On the face of the written instrument itself the city of Omaha is the only obligee. There is no specific provision in the bond itself for the protection of third persons or private individuals. The bond contains a recital that Kinney is a police officer. He obligated himself as such to "faithfully and impartially

perform all his duties as such member of the police department."

There is a line of cases holding that, in absence of statutory authority, a private individual cannot maintain an action on an official bond to a municipality or county as obligee. *Carr v. City of Knoxville,* 144 Tenn. 483, and cases collected in 19 A. L. R. 74, including *Cushing v. Lickert,* 79 Neb. 384. There are also contrary decisions to the effect that such a bond inures to the benefit of a private individual unlawfully injured by a policeman while acting in an official capacity. *City of Cairo v. Sheehan,* 173 Ill. App. 464; *People v. Morgan,* 188 Ill. App. 250; *Scott v. Feilschmidt,* 191 Ia. 347; *Hollister v. Hubbard,* 11 S. Dak. 461; *Town of Lester v. Trail,* 85 W. Va. 386; *State v. United States Fidelity & Guaranty Co.,* 85 W. Va. 720.

In the present instance, however, it is not necessary to follow either of these diverging lines of decisions in determining plaintiff's right to maintain her action against the surety, since there is a statutory grant of that privilege, if Kinney, at the time of the collision, was acting in an official capacity while negligently driving the motorcycle and breaching a condition of his bond. The city of Omaha had power to appoint police officers and require bonds, payable to the city, for the faithful performance of their duties. Comp. St. 1922, secs. 3682, 3489, 5040. Pursuant to an exercise of that power in connection with statutory requirements the bonds in suit were executed. A statute applicable to the bonds of police officers provides:

"All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds." Comp. St. 1922, sec. 5048.

While the city is the only obligee named in the bonds, the benefits thereof are extended by statute to "any persons injured by a breach of the condition of such bonds." The statutory provision quoted is, by construction, a part of the bond itself, and is binding upon both principal and surety.

Cutler v. Roberts, 7 Neb. 4; *Holt County v. Scott,* 53 Neb. 176; *United States Fidelity & Guaranty Co. v. McLaughlin,* 76 Neb. 307. In a recent case the court said:

"Official bonds are conditioned upon the faithful performance of their duties by public officers, and are given and intended for the benefit of the public, and any person, who is injured by the failure of such officer to comply with the conditions of his bond, may sue thereon in the name of the obligee named therein. By executing such a bond the obligor makes the obligee a trustee for any and all persons who are injuriously affected by the breach of its conditions." *Town of Lester v. Trail,* 85 W. Va. 386.

In Nebraska an action is maintainable in the name of the real party in interest. Comp St. 1922, sec. 8525. The right of recovery on the bond of a policeman, conditioned upon the faithful performance of his official duties, extends to negligent acts committed by him in the exercise of municipal authority and resulting in personal injury without any fault of the person injured. *Fidelity & Casualty Co. v. Boehnlein,* 202 Ky. 601; *American Guaranty Co. v. McNiece,* 111 Ohio St. 532, and cases collected in 39 A. L. R. 1306. On authority and reason, the bond in the case at bar covers the negligent act pleaded in the petition.

Was Kinney at the time of the collision performing duty as a police officer? The evidence tends to prove, and the jury found, that, while operating a motorcycle, he negligently collided with plaintiff in a public street and thus injured her. The surety takes the position that he was then acting in a private capacity while transporting himself from one place of duty to another and that consequently the nonofficial act of negligence, if committed, was not a breach of his official bond. The record contains evidence tending to prove the following facts:

The accident occurred about 6 o'clock in the evening, May 4, 1927. Kinney's regular hours of active service as police officer on that day were from 2 o'clock in the afternoon until 10 o'clock at night. At 4:45 he started on the motorcycle for the intersection at Twentieth street and St.

Mary's avenue. After arriving there he performed traffic duty until 6 o'clock, when he left on the motorcycle for the police substation at Thirty-second street and Woolworth avenue, where further official duties were regularly required of him pursuant to order of the chief of police. The collision occurred on the way to the police substation. Kinney was then in the uniform of a policeman during his regular hours of active service. The motorcycle on which he rode was public property in the police service of Omaha.

Proofs of the facts outlined justify the inference that Kinney was acting in an official capacity while transporting himself between the two places where public duty called him at different hours. The motorcycle was not his property. It belonged to the city. While operating it he was engaged in municipal business. It could only be in legal use at the time for police service. Its use by a police officer for a private purpose during his working hours would have been unauthorized. The public at large, observing a uniformed policeman rushing recklessly along a busy street at a high rate of speed on a motorcycle belonging to the city, would not likely infer he was acting in a private or personal capacity. In a recent case the court of appeals of Kentucky said:

"By all the authorities, an official bond for the faithful performance of official duties covers misfeasance, malfeasance, and nonfeasance, as counsel for appellant concede, but their argument assumes negligence in the operation of a motorcycle by a policeman is none of these. Such an assumption has neither authority nor reason to support it. * * * The whole question here then is, was Hamilton's act in negligently driving the motorcycle against plaintiff done by virtue of his office? Admittedly he was patrolling his beat in the manner and with the means provided by the city to enable him to do so. In driving the motorcycle he was doing precisely what his duties required him to do and what he had no right to do except in the discharge of his official duty. He had neither the right to patrol the beat nor drive the motorcycle except as a policeman and there

is no intimation in either the pleadings or the proof that anything he did (except his negligence) was not done in the discharge of his official duty. He was therefore driving the motorcycle by authority of his office, and it was only because of his negligent performance of his official duty that he struck and injured plaintiff. It necessarily follows that the surety upon his official bond is liable for such negligence upon its covenant that he would well and faithfully discharge his duties as a policeman." *Fidelity & Casualty Co. v. Boehnlein,* 202 Ky. 601; followed in *United States Fidelity & Guaranty Co. v. Samuels,* 116 Ohio St. 586, 53 A. L. R. 36.

The better view seems to be that the evidence was sufficient to prove that Kinney, at the time of the collision, was driving the city's motorcycle by virtue of his office as policeman, and that the trial court erred in the ruling to the contrary. It follows that the dismissal of the action as to the surety is reversed and the cause remanded for a new trial of the issues between plaintiff and the surety on Kinney's bond.

REVERSED.

SAMUEL M. HICKMAN, APPELLEE, V. CHARLES JONES, APPELLANT.

FILED MARCH 28, 1930. No. 26931.

1. **Public Lands:** DESCRIPTION. Where the United States government has caused to be made two or more surveys of its public lands, it may, in disposing of any of them, describe the lands according to any of such surveys.
2. **Evidence:** SURVEYS: MONUMENTS. Public reputation and declarations of early settlers, and even of deceased persons, may be competent to establish the fact that a monument is one marking a corner of a section of land by United States government survey, but may be insufficient to establish that such monument is the southeast corner, rather than the southwest corner, of a particular section.
3. **Judgment as Bar.** A judgment in a prior action between the same parties will not be a bar to a subsequent action, unless it is shown by the record, or by clear and satisfactory evidence, that

the same issue presented in the subsequent action was involved in the prior action.

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

T. F. Neighbors and *Paul H. Eaton,* for appellant.

Mitchell & Gantz, contra.

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

GOOD, J.

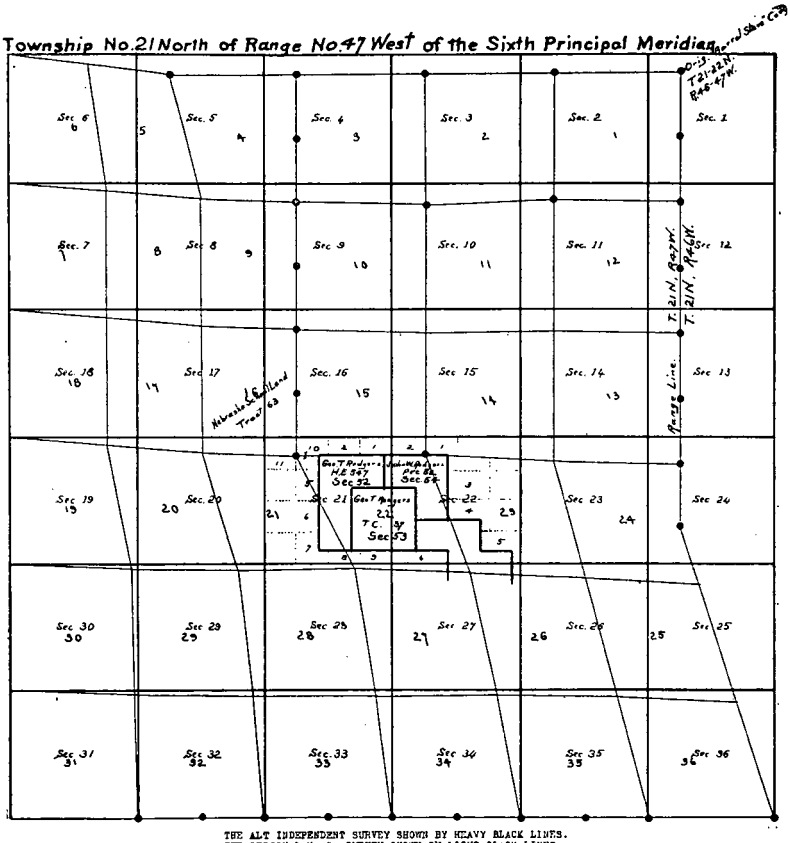
This is an action to quiet title to certain lands in Morrill county, in which plaintiff had decree as prayed, and defendant has appealed.

From the record in this case it appears that plaintiff holds record title in fee simple to the northeast quarter, the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the north half of the southeast quarter of section 21, and the west half of the northwest quarter of section 22, all in township 21 north, range 47 west, according to the original United States government survey. Plaintiff also holds lease from the state of Nebraska to section 16, in said township and range. Defendant holds title by patents from the United States government to the west half of section 15, lots 1 and 2 in section 21, and lots 1 and 2 in section 22, all in township 21 north, range 47 west, according to "the official plat of the survey of the said land, returned to the general land office by the surveyor-general." Plaintiff contends that the lands to which he holds title by deed and lease embrace much of the land claimed by defendant, notwithstanding the latter holds patents from the United States government for the lands to which he asserts title.

The controversy between the parties arises in part from the fact that there were two government surveys of said township which differed materially, and also as to whether a certain monument was the southeast corner of section 16, in said township, according to the original government sur-

vey. The original survey by the United States government was made in about 1879. The plat of that survey was filed in the general land office at Washington, D. C., and a copy thereof filed in the United States land office at Alliance, Nebraska. This plat indicates that said township was rectangular in form and was approximately six miles square. It later developed that said township was not, in fact, six miles square but was irregular in shape, being but five and one-fourth miles from east to west on the north boundary line and six miles from east to west on the south boundary line. The survey was imperfect, and many of the original section corners and quarter-section corners were either not properly marked by monuments or, if so, such monuments had become obliterated. This situation no doubt induced an act of congress in 1899, authorizing and directing a new survey of the township to be made. This survey was made about 1900 by one Alt and was not a retracement of the original but was an independent survey. A plat of this survey was also filed in the general land office and a copy thereof in the United States land office at Alliance. This differed very materially from the original survey. Several years subsequent to the Alt survey the United States government caused to be made a resurvey or retracing of the original government survey, and a plat thereof was filed in the general land office at Washington and a copy thereof in the United States land office at Alliance. On this plat all of the original section corners and quarter-section corners that could be found are indicated. The plat is a true representation of the original survey according to the monuments thereof and indicates the true boundaries of the township, as well as the interior section outlines, at least to all that part of the township where the original government corners were found. We have prepared a plat which shows the original government survey, as retraced, and the Alt survey, one superimposed upon the other. Thereon the original government survey, as retraced, is indicated by light lines, and the Alt survey by heavy lines. The section corners and quarter-section corners of the original survey,

so far as could be found, are indicated upon this plat by the mark "o." Such plat is here reproduced.



THE ALT INDEPENDENT SURVEY SHOWN BY HEAVY BLACK LINES.
THE ORIGINAL U. S. SURVEY SHOWN BY LIGHT BLACK LINES.
ORIGINAL CORNERS INDICATED THUS: ●

The act of congress authorizing the resurvey contained a proviso as follows: "That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands so occupied to the amount of land to which, under the law, he is entitled; and provided further, that said resurvey shall in no manner affect the rights of *bona fide* occupants of any of said lands to the land so occupied to the amount which said occupants are entitled to receive from the government."

The general land office issued to Alt special instructions for the execution of the survey and called attention to this provision of the act of congress. The instructions contained, among other things, the following:

"This office understands the 'actual occupant of any of said lands,' to refer to the *present owners* of claims, whether they now occupy and reside on their claims or elsewhere, and that the entire quoted phrase applies to and embraces lands acquired under the timber culture laws or by preemption or homestead entry, and to claims purchased from other parties who may have acquired their title to the lands by any proper legal process. * * *

"*Duties and Authority of Surveyors.* You will properly survey all claims within the townships covered by your contract, in accordance with its provisions and these special instructions. * * * All claims, having boundaries defined by existing corners at their ends, which for the sake of brevity are here designated 'marked boundaries,' will remain unchanged; they will be surveyed as they are marked on the ground, and at least one corner of each claim will be connected by course and distance with the nearest corner of the public surveys, township, section, or quarter-section corner, as the case may be.

"All claim boundaries not marked by natural or artificial corners will be established on true *north and south* or *east and west* lines, in order to simplify cases and limit complications.

"The corners formed by intersection of fences on the boundaries of a claim will be considered corners in the sense the term is herein employed. * * *

"*Claims marked by one corner only.* * * * Survey the boundaries of the claim for area, that is to say, make the boundaries * * * to inclose in rectangular form, the patented area."

There are other elaborate detailed instructions which it is unnecessary to here quote.

When Alt came to make his survey he found one Wagoner, plaintiff's grantor, in possession of certain lands which he claimed by mesne conveyances from the original patent-

ees. The land claimed by Wagoner was the same that plaintiff now claims as being in sections 21 and 22, but did not correspond with the Alt survey. Thereupon, as directed, Alt made a "claim survey" of the lands claimed by Wagoner, and designated the claim survey as sections 52, 53, and 54 upon the plat of the township, as surveyed by him. The original patents for the lands so claimed by Wagoner called for 440 acres. Sections 52, 53, and 54, as surveyed by Alt, likewise embrace 440 acres, so that plaintiff's grantor was, by the Alt survey, accorded the exact number of acres which he claimed, although he was claiming the land under the same designation in sections 21 and 22 as does the plaintiff in this action.

It will be observed, by reference to the foregoing plat, that the north line of sections 52 and 54 is south of the north line of sections 21 and 22, according to the Alt survey. The evidence indicates the distance to be 48 rods. The United States patents, under which defendant claims title to the lands, described as lots 1 and 2 in section 21 and lots 1 and 2 in section 22, adjoin on the north sections 52 and 54, and must have been issued by the United States government with reference to the Alt survey, since there are no lots 1 and 2 in either of said sections, according to the original survey. Where the United States government has caused to be made two or more surveys of its public lands, in disposing of any of them it may describe the lands according to any of such surveys.

In June, 1917, plaintiff acquired from Wagoner title by deed to the lands to which he asserts title in this action. In that deed this land is described in the same manner as asserted by plaintiff in his petition, and contains this further dual description: "But which according to the Alt survey, and embracing the same territory claim-lined by him in A. D. 1900, under contract with the commissioner of the general land office pursuant to an act of congress authorizing the same, and since held by such claim lines and which is designated on the official plat of his survey of said township 21 N. of range 47, as sections * * * 52, 53, and 54," etc. This plainly indicates that plaintiff and his grant-

or both considered the two descriptions identical. It also appears from the record that plaintiff has since placed several mortgages upon the land in which he has given the same dual description of the land; thus showing that he considers sections 52, 53, and 54, according to the Alt survey, as being the identical lands which he claims under descriptions as subdivisions of sections 21 and 22, according to the original government survey. Moreover, plaintiff and his grantor have inclosed the lands, known as sections 52, 53, and 54, on the east, south and west boundaries thereof and a large part of the north boundary. Plaintiff and his grantor have held and possessed these lands in this manner since 1897, and the possession and title have been recognized both by the government and by plaintiff and his grantor as containing 440 acres of land, and it has been recognized that such land is identical with that known and described in the Alt survey as sections 52, 53, and 54. Plaintiff does not assert ownership in fee to more than 440 acres, but he contends that his deeded lands are bordered on the north by section 16 of the original government survey, and that there cannot exist any such lands as represented on the plat of the Alt survey as lots 1 and 2 in section 21 and lots 1 and 2 in section 22. From the evidence it is clear that the north boundary of the land owned by plaintiff in fee simple is the north boundary of sections 52 and 54 of the Alt survey.

A number of witnesses have testified that the point shown on the plat as the southeast corner of section 15 of the original government survey was known and recognized as being the southeast corner of section 16 of that survey. That this monument was a section corner of the original survey is amply proved. That the original entrymen on the lands now embraced in sections 52 and 54 in good faith believed that monument to be the southeast corner of section 16 is made clear from the fact that it was from this corner that they located their lands immediately to the south. They believed the line extending west and east from this monument to be the north line of sections 21 and 22, respectively. They made entry on these lands and described

them as being in sections 21 and 22, and later proved up and received from the United States government patents for lands described as being in those sections. The evidence further shows that this monument is but two miles from the east boundary of the township and that, reckoning a section as being a mile, it is four miles east of the west boundary of the township. It is demonstrated that the monument was, in fact, the southeast corner of section 15, instead of the southeast corner of section 16.

Plaintiff advances the proposition that it is "competent to prove the location of a corner of a public survey by reputation, by the location of land of old settlers, by declaration of deceased persons as to corners and boundaries, by evidence of common repute of the location of public boundary lines and by hearsay testimony." For the sake of argument, the proposition of law may be admitted as sound. But plaintiff argues therefrom that the monument in question must be regarded as the southeast corner of section 16. We think this does not follow. The rule is that such evidence is competent to prove that such a monument is a corner of a public survey, and, while some of the authorities cited may tend to support the contention of plaintiff, the point involved in those cases was whether a certain monument was a corner established by a government survey, and not whether such a monument was the corner of one section or another section. In any event, general reputation among early residents and settlers that a certain monument was a corner of a particular section must give way when it is clearly shown that they were mistaken as to the particular section of which it was a corner.

The evidence in the instant case, that the monument in question was the southeast corner of section 16, was based very largely upon the fact that the original entrymen to the deeded land, now owned by plaintiff, found the monument and reported it to be the southeast corner of section 16, and from that it obtained the reputation of being the southeast corner of section 16. The evidence clearly shows that these entrymen were mistaken, and that the corner in question

was and is the southeast corner of section 15 of the original government survey.

It follows that the deeded land of plaintiff does not embrace any of the land claimed by the defendant, and that defendant is not claiming title or right of possession to any of the land embraced in sections 52, 53, and 54. It is also clear that plaintiff's leasehold interest in section 16 is located one mile west of the corner which he believed was the southeast corner of section 16, and that it does not embrace any of the land for which defendant holds patents. Section 16, as will be observed from the plat contained in this opinion, is designated by the Alt survey as tract 63, and none of the land to which defendant asserts title is included in that section or tract. It is conceded that, in the enabling act for the admission of Nebraska into the Union as a state, the government granted to the state sections 16 and 36 in each township, if such sections had not been otherwise disposed of prior to the admission of the state. The state's title to section 16 rests upon the original government survey. Any subsequent survey by the United States government could not affect or change the title to or boundaries of the land originally granted to the state. It follows that plaintiff was not entitled to a decree quieting title in himself as against the defendant.

Plaintiff has pleaded in his reply that the entire subject-matter has been heretofore adjudicated, and relies on *res judicata* of the controversy herein. In his reply he sets out a copy of the opinion by this court in the case of *Hickman v. Jones*, 106 Neb. 466. The opinion, itself, shows that that was an action in replevin to determine the right of possession to a quantity of hay. The title to lands was not involved nor litigated in that action, notwithstanding reference may have been made thereto in the opinion. Since title to land was not and could not have been litigated in the replevin action, the judgment in that case could not have related to the title to the lands. In fact, the judgment entered in that action is not pleaded, nor does it appear in the evidence.

A judgment in a prior suit between the same parties will not be a bar to a subsequent action unless it is shown by the record, or by clear and satisfactory evidence, that the same issue presented in the subsequent action was involved in the prior suit. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 72 Neb. 81. The plea of *res judicata* is not well taken.

From what has been said, it follows that plaintiff was not entitled to a decree quieting his title as against the defendant. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

J. W. DILLER, ADMINISTRATOR, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 28, 1930. No. 27013.

1. **Courts.** The decisions of the supreme court of the United States, when applicable, should and must control in determining the issue of negligence where the federal employers' liability act governs. Therefore, its interpretation of the federal employers' liability act must prevail over any state law or rule of interpretation of a state court.
2. **Master and Servant: ACTION FOR DEATH: NEGLIGENCE: PLEADING AND PROOF.** As thus interpreted, it is required in an action against an employer under the federal employers' liability act, for "injury or death resulting in whole or in part from the negligence," or "by reason of any defect or insufficiency," due to the employer's negligence, or for which liability is imposed, some specific neglect, or act of negligence, on the part of the employer, which was a proximate cause of the injury or death complained of, must be alleged and proved.
3. **Evidence** examined, and *held* insufficient to establish negligence on part of the defendant which was a proximate cause of the injury complained of.

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

Bartos & Placek, for appellant.

Byron Clark, Jesse L. Root, Robert R. Hastings and *J. W. Weingarten, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, DISTRICT JUDGE.

EBERLY, J.

This is an action to recover damages under the terms of the federal employers' liability act providing: "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 U. S. St. at Large, ch. 149, sec. 1, p. 65. At the conclusion of the evidence in the trial court and after both parties had rested, upon motion of the defendant, the jury were instructed to return a verdict for the defendant, and the action was thereupon dismissed. The plaintiff appealed.

The plaintiff's action was necessarily based upon the alleged negligence of the defendant, and as to which the averments of his petition were substantially that the plaintiff's intestate, Samuel Diller, at and prior to the time of contracting the disease causing his death, was the station agent for the defendant, and as such was in charge of the defendant's depot and business at Wilbur, Nebraska; and, with his employer, was engaged in interstate commerce at that point; that the defendant negligently failed to keep and maintain this depot as a reasonably safe place to work, but permitted the same to become in such condition that, due to the flooding thereof, the defective plumbing therein, and the lack of screens at the doors and windows thereof, it was rendered dangerous and exposed the plaintiff's in-

testate, while working, to infection due to the collection and propagation therein of germs causing typhoid fever. These allegations were denied by the defendant, and the evidence on the trial was conflicting on practically all of the issues of fact tendered by plaintiff.

However, in view of the action of the trial court, we are required to accept, for the purposes of this case, the evidence in the record supporting the plaintiff's case as true; and the action of the trial court in this case may be sustained only if the evidence in the record is not sufficient to sustain a verdict for the plaintiff. *Ogden v. Sovereign Camp, W. O. W.*, 84 Neb. 666; *Waxham v. Fink*, 86 Neb. 180; *Meek Co. v. Rohlff*, 91 Neb. 298. Also, in reviewing this cause we are required to assume the existence of every material fact which the evidence on behalf of the plaintiff establishes or tends to prove and give him the benefit of all proper inferences from such facts. *Central Nat. Bank v. Ericson*, 92 Neb. 396.

It is also true that for the sake of uniformity the decisions of the supreme court of the United States should and must control in determining the issue of negligence where the employers' liability act governs. *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51. And in this court: "The federal court interpretation of the federal employers' liability act must prevail over any state law or rule of interpretation of a state court." *Preble v. Union Stock Yards Co.*, 110 Neb. 383. It seems that the federal courts have so construed this act that there is no liability thereunder without proof of the negligence of the defendant which was the proximate cause of the injury complained of. *Nanfito v. Chicago, B. & Q. R. Co.*, 103 Neb. 577. It was incumbent on plaintiff before such recovery could be had to allege and prove, not only the cause which operated to produce the death, but also that said cause had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable. *Missouri, K. & T. R. Co. v. Foreman*, 174 Fed. 377; *Seabord Air Line Railway v. Horton*, 233 U. S. 492; *Toledo, St. L. & W. R. Co. v.*

Allen, 276 U. S. 165; *New York Central R. Co. v. Ambrose*, 50 Sup. Ct. Rep. 198.

For the purposes of this review, it stands as though admitted that plaintiff's intestate had been in the employ of the defendant railroad company for some 40 years at the time of his death; that he came to Wilbur as the station agent of the defendant at that place in 1907, and thereafter continued in that employment, and, while he owned his own home, he continually worked at the depot. The depot was a frame structure, one large room, the north room, on solid ground, with tile floor, the south room, on solid foundation and brick floor; the office, baggage room, or express room, was in the center and rested on brick piers with a hollow space underneath the floor; there was a meter pit under the office beneath the ladies' toilet; that the premises gave evidence of the fact that they were infested with rats. In a corner of the office was located the ladies' toilet and a toilet for men, which were built back to back, and toilet connections for both went into the corner of the meter pit and from thence out under the track and across the right of way to the city sewer system. The toilets had a lead connection between the toilets proper and a cast-iron soil pipe. The soil pipe to which connection was thus made ran out under the depot and conveyed the sewage to, and through, a clay tile pipe to the city sewer system. From 1925 to July 24, 1927, these toilets leaked into the meter pit. The contents of the toilets leaked out of the lead connections, and consisted of water, urine and feces. During this time there was considerable trouble with water coming back under the water pipe, which never could be traced to a water leak. This water varied from a clear to stinking water and a slimy mush, which came from a broken sewer pipe on the west side of the depot and smelled like urine and sewage and sometimes was a foot deep. This meter pit was about four by six feet. Its sides were made of brick with mortar joints. There were cracks in the east and southeast corner of the pit wall. This was located directly under the office and varied from a minute crack to about

an inch in width; it was widest about the center and extended the whole length of the wall. The water and refuse, after reaching this pit from the toilets and the sewer, oozed through that crack and went under the office. There always were stenches under the office, smelling like sewage and stagnant water. The plaintiff also alleges that the drainage of Third street and the alley between Third and Fourth streets, during seasons of extraordinary rains, followed the street to the vicinity opposite the depot, and from thence over the curb, across the tracks, over against the west side of the depot, through the rat holes there located, and found its way under the depot; and it was also alleged by plaintiff that these floods carried, with other refuse, typhoid fever germs; that there were several old privies in the alley referred to which were not covered up, and that big crowds attended a dance hall at the head of the alley, and that these people used the privies for stool and urine purposes; that this fecal matter was infected with typhoid germs and was thus carried by the floods to and under the depot in question; that commencing in 1925 and continuing thereafter the deceased had his lunch in the depot; and it is said in the evidence that the deceased never visited around but spent his time in the depot and his home, and the source from which his food was obtained is attempted to be shown.

The deceased began showing symptoms of sickness as early as the first of July, 1927. It clearly appears from the plaintiff's evidence that after that date and continuing to the 24th of July, 1927, he was scarcely able to go back and forth from his work. He experienced loss of appetite, backache, headache, got weaker, had nose bleed, and was troubled with diarrhea. On July 24 he felt compelled to relinquish his work and was placed in bed. In the opinion of all his doctors he was then suffering from a well-developed case of typhoid fever. He was thereafter removed from his home to the hospital at Grand Island, and after some time returned to his home, where he died on the 10th day of August, 1928, having never recovered from the illness which commenced on or about the 1st day of July, 1927.

It is well said in plaintiff's brief that this is purely and simply a question of fact. From the very nature of the case it is necessary that the proof must be circumstantial and that direct and positive evidence is not available. Typhoid fever is communicated only by taking the germs into the human system. Plaintiff's intestate was stricken with this disease about July 1, 1927, and his illness lasted for over a year. But we are unable to accept plaintiff's conclusion that the facts shown in his evidence establish a right of recovery against the defendant. We find nothing in the evidence supporting any inference further than that the plaintiff's intestate contracted the disease during the time he was employed by the defendant in its depot at Wilbur. Whether the infection occurred upon the street as he was passing to and from the place of employment to his home, or in the depot, or whether it occurred as the result of a possible contact with a typhoid carrier during the course of his business for his principal, we have nothing upon which any positive inference can be based. He had been employed at the same place for more than 20 years. No case of typhoid fever had occurred in Wilbur or vicinity since 1913. So far as the record discloses none of the patrons of the depot, and none of his neighbors, ever developed this disease. That the conditions disclosed by the evidence of plaintiff were unsanitary is true, but if we are to accept plaintiff's theory there were also other unsanitary conditions to be found in the nearby open privies and the use to which the alley referred to was devoted; not only were these unsanitary, but according to plaintiff's allegations were actually infested with typhoid fever germs. There is nothing in the evidence which even, as a matter of probability, discloses when, where, or how the actual contact between plaintiff's intestate and the germs of the disease from which he died actually took place. It is to be remembered that unsanitary conditions promote the spread of, but cannot originate, typhoid fever. The germs must be introduced by man and are so introduced. The man who first brings infection to a community may have the fever and not know

what is the matter. He may be recovering from it and still not know, or he may have had it and recovered long before but be a carrier and continue excreting bacilli for years. No typhoid fever existed at Wilbur or was developed among the patrons of this depot either before, during, or after the commencement of the decedent's illness. Indeed, his appears to be the only case of this disease that can be developed in, or was in manner traceable to, this structure. No investigation was made of the depot and surroundings until about the first day of August, 1927. On that date samples of water were taken at the house, depot, and elsewhere. These were all shown to be negative. On August 14 samples of water and mud were taken from the meter pit and from under the depot and delivered for analysis. About two months later additional samples were taken from the meter pit. Still later further samples were taken and on or about the 18th of March, 1928, certain witnesses who testified went to the premises in company with each other and procured samples. It is true that all of these specimens taken on and after August 14, according to these witnesses, disclosed the presence of typhoid fever germs. But in this connection it is to be remembered that from and after the first days of July to July 24, 1927, the evidence in the record fairly reflects the fact that the deceased, though continuing his regular employment in the depot, was a sick man and suffering from the effects of typhoid fever. The natural method of dissemination of this disease is practically agreed to by the experts of both parties to this litigation. From the record before us it is a fair inference that during this period between the first of July, 1927, and the 24th day of July, in the same year, Diller was excreting typhoid fever germs. During that time he suffered from attacks of diarrhea. The use of the toilets in the office, under such circumstances, by him was inevitable. If plaintiff's witnesses are correct as to their leaky condition and defective plumbing, and plaintiff's theory of the distribution of disease germs from toilets to meter pit and from thence over the ground under the depot is to be accepted, it is fair-

ly inferable that this sick man, thus excreting typhoid bacilli in feces and urine, contributed to the filth that found its way into the meter pit and from thence through the crack in the meter pit wall to the ground under the office, and from thence by rats, mice, flies, and other vermin to various parts of the premises, the results of plaintiff's discoveries made after August 1, 1927, are fully accounted for. At least this source of infection, thus clearly established, precludes an affirmative inference that the infected condition existed at and prior to the time plaintiff's intestate contracted the disease that caused his death.

The result thus reached is in strict accord with the facts testified to by plaintiff's witnesses and is not at variance with what may be termed common knowledge of this disease.

Thus, the findings of the Reed board, which was composed of the medical officers of the army, who at the close of the Spanish American War of 1898 made an extended study of the causes of a typhoid epidemic which the troops of that war suffered and which was published to the nation at large, thus becoming common property, determined as a matter of fact that a man (in a military camp) infected with typhoid fever might have scattered the infection in every latrene in the regiment to which he belonged before the disease was recognized in himself.

And again in 1908 an epidemic of 410 cases of typhoid fever occurred in the suburbs of Boston. The infection was traced to a milk dealer who continued his work for a period of two weeks after the onset of typhoid fever of which he later died. These are not cited as determinative precedents, but only illustrative of the deductions made from the testimony actually appearing in this record.

The conclusion is that, as to the depot occupied by Diller engaged in his employment during the three weeks or more while he was a sick man suffering from typhoid fever, the mere existence of typhoid fever germs in any part of the premises so occupied and used and under the depot to which such germs might have been carried by way of the meter

pit affords no evidence that this infected condition obtained prior to Diller's sickness, or that Diller's sickness was in any manner caused thereby.

The plaintiff in this case relied wholly upon circumstantial evidence to sustain his case. To justify recovery under the federal rule, it is required that the evidence introduced establish as a fact that the negligence of the defendant was the proximate cause of the injury complained of. Wherein circumstantial evidence alone is relied upon to furnish the necessary proof, the federal rule appears to be: "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. * * * 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' * * * The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. * * * A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." *United States v. Ross,* 92 U. S. 281. See *Manning v. Insurance Company,* 100 U. S. 693, 698; *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U. S. 472, 477; *New York Central R. Co. v. Ambrose,* 50 Sup. Ct. Rep. 198.

It follows therefore that the action of the trial court in directing a verdict against the plaintiff is sustained by the record; and the judgment is

AFFIRMED.

EARL J. KEIL, APPELLEE, V. FARMERS IRRIGATION DISTRICT, APPELLANT.

FILED MARCH 28, 1930. No. 27191.

1. **Master and Servant:** AWARD OF COMPENSATION: APPEAL: SUMMONS: AMENDMENT. Where a mistake is made in the date of the return and answer days of a summons issued on appeal from the award of the compensation commissioner, the same may be amended by the district court, even after objections to the jurisdiction of the court are pending based upon that particular defect.
2. ———: ———: ———: SERVICE OF COPY OF PETITION. The provision of section 3062, Comp. St. 1922, requiring the service of "a copy of the petition," is directory merely, and not mandatory in the sense of being essential to jurisdiction of the district court.

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

Raymond & Fitzgerald, for appellant.

Mothersead & York and *Yale H. Cavett, contra.*

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

EBERLY, J.

This action was originally an appeal to the district court from the award of the compensation commissioner. Special appearance of the plaintiff (employee) was made and sustained in that court, and the defendant's (employer's) appeal to the district court was dismissed by that court without a hearing on the merits. From the order of dismissal the defendant appeals to this court.

It appears from the record that the hearing in this case before the compensation commissioner was determined on the 27th day of March, 1929; that notice of appeal from this award was duly given and the petition in due form was filed in the district court for Scotts Bluff county on the 3d day of April, 1929. On the same day summons was issued by the clerk of the district court, which fixed the 14th day of April, 1929, as the return day and the 9th day

of May, 1929, as the answer day for the employee, and that the sheriff of said county received the writ on the 4th day of April, 1929, and served it on the 12th day of April, 1929; that thereafter on the 8th day of May, 1929, there was filed in said cause a special appearance objecting to the jurisdiction of the district court therein for the following reasons, to wit:

"(1) No proper service of summons hath been had upon this plaintiff on said appeal, in that the purported summons issued in said case on the 3d day of April, 1929, makes the return day therein on the 15th day of April, 1929, instead of the 7th day of April as required by law, and makes the answer day therein on the 9th day of May, 1929, instead of April 14, 1929. (2) No copy of the petition of the defendant, Farmers Irrigation District, on said appeal was served with said summons as by law required."

On the 20th day of June, 1929, the employer, Farmers Irrigation District, by written motion, moved the court to permit and direct the amendment of the summons issued and served herein by correcting the mistake of the clerk by the insertion of the true and correct date for the return of said summons and the insertion of the true and correct date of answer day therein, and to attach a copy of the petition to conform to statute. Thereafter on the 20th day of June the motion of the Farmers Irrigation District to amend the summons issued and served herein was overruled, and the special appearance was sustained and the appeal of the employer thereupon dismissed and alias summons denied. The employer now presents this action on the part of the trial court as error.

This action arises under the Nebraska workmen's compensation law. Under section 3062 of that act, procedure in cases of dispute, so far as pertains to the matter before us, is as follows: "In case either party refuses to accept the recommendations or awards of the compensation commissioner, either party may submit to the district court a verified petition, setting forth the names and residences of the parties and facts relating to the employment at the

time of the injury, the injury in its extent and character, the amount of wages being received at the time of the injury, the knowledge of or notice to the employer of the occurrence of said injury, and such other facts as may be necessary for the information of the court, and also stating the matter or matters in dispute and the contention of the petitioner with reference thereto. Upon the filing of such petition a summons shall issue and be served upon the adverse party, *as in civil causes*, together with a copy of the petition. Return of service shall be made within four days from the issuance of the summons. Within seven days after the return day of such summons the party upon whom the same is served shall file an answer to said petition," etc., and thereupon after compliance with this statute such cause shall be for trial in the district court.

It is also to be noted that the statutory designation of this proceeding in the district court is "an appeal," it being provided by section 3080, Comp. St. 1922, that the award made by the compensation commissioner shall be final, "unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition of the order or award: Provided, that the order and award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties."

With reference to the filing of the statutory notice of appeal with the compensation commissioner, which is not questioned in the instant case, Flansburg, J., in *Mucha v. Morris & Co.*, 105 Neb. 180, says: "The provision for the filing of notice with the compensation commissioner was for the purpose of giving the adverse party knowledge of the appeal. Upon the filing of such notice, no further duty devolved upon the compensation commissioner. The filing of such notice did not affect the award; on the other hand, the award continues to be binding until the appeal is perfected and service had. It is apparent that such notice is for the benefit of the opposing party, and in such cases it is

generally held that the party for whose benefit the provision is made may waive the giving of the formal notice, and that this may be done by a voluntary appearance in the court where the appeal is lodged. * * * It is our opinion that the district court had jurisdiction of the subject of the action, given by statute by the timely filing of the petition for review, and that the voluntary appearance filed in the case conferred upon the court jurisdiction of the person of the defendant." In *Mauck v. Brown*, 59 Neb. 382, 396, quoting section 98, ch. 26, Comp. St. 1899: "The party against whom judgment is rendered in cases tried in the county and district court may appeal to the district or supreme court"—the court held that "appeal" was used in its distinctive and technical sense, and not in a general sense, and the reasoning of that case seems in point in the present case. We cannot therefore accept the contention of the appellee that the proceeding before us is other than an appeal in the distinctive sense of that term, as it comports not only with the terms of the statute considered with reference to their context, but also when considered with reference to the actual proceedings had in the superior courts to which such appeal lies. On this basis the question presented is: Was the action of the district court in refusing permission to make the amendments applied for and dismissing the appeal error?

It must be conceded that the proceedings before us evidence a *bona fide* attempt on part of the litigant to exercise the constitutional right "to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise." The simple mandate of the Constitution is that this right "shall not be denied." So far as the party appealing is concerned, the compensation act under consideration contains but two requirements as to appeals: First, the giving of notice of appeal; and, second, the filing of a prescribed petition within a prescribed time. It seems admitted in the record that these requirements were substantially performed. The terms of this act under consideration impose on the clerk of the district court upon the filing

of such petition, as an official duty, to issue summons in terms as prescribed in the act, which shall be served "as in civil causes, together with a copy of the petition." It must be conceded that the clerk of the district court in the performance of this official duty is not in any manner under the direction or control of the litigant. In the instant case this official erred and failed to comply with the statutory directions relative to the summons he issued, and because thereof the court dismissed the action, and thus in fact denied the right of appeal. Is this act justifiable?

This court is committed to the doctrine that the right of appeal is a substantial one to be sustained if possible, and equitable relief in the form of a new trial will be granted where a suitor without fault or laches on his part is deprived of some essential to review. *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118.

Under the provisions of sections 1, 2, and 5, ch. 47, Laws 1881, entitled "An act providing for an appeal from the decision of the county court in certain matters," prescribing that the county judge shall transmit to the district court a transcript of his proceedings within ten days after an appeal from an order in probate is perfected, it was held that, where a party has within due time done all that is legally required to perfect the appeal, the district court does not lose jurisdiction of the appeal by reason of its being filed six days late. *Drexel v. Reed*, 69 Neb. 468, 65 Neb. 231; *Cheney v. Buckmaster*, 29 Neb. 420. It would seem that to deny the right of appeal in the instant case wholly because of an official error of the clerk of the court when the appellant "has, within due time, done all that is legally required to perfect an appeal" is hardly consistent with the basic principle which the case last above cited proclaims. However, the record in the case presents other matters for our consideration.

The language of the statute involved (Comp. St. 1922, sec. 3062) is already quoted. By its terms, "upon the filing of such petition a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy

of the petition." The reference to the Civil Code is manifest. So far as applicable to the transaction, and not inconsistent with the workmen's compensation act, by the language quoted the terms of this Civil Code must be considered as part of the statute. The word "as" when used in this connection is defined: "Similar to;" "of the same kind;" "in the same manner;" and "in like manner." 5 C. J. 597. The following phrases similar in import to these controlling statutory words have received judicial interpretation. In *Brownfield v. Weicht,* 9 Ind. 394, 396, where in construing a statute providing that a copy of the order of sale and judgment shall be issued, etc., to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and cost, *as upon execution,* the court said: "It seems to us that the phrase, 'as upon execution,' plainly shows a legislative intention that the law regulating sales on execution should apply to, and in all respects govern, sales under a decree of foreclosure." Also the phrase, "as in other civil actions," was before the supreme court of Indiana in *Cravens v. Chambers,* 55 Ind. 5, and they held that 1 Rev. St. 1876, pp. 142, 147, sec. 20, providing that in voluntary assignment no party aggrieved shall be deprived from having an appeal as in other civil actions, does not give the appeal of itself, but merely provides that nothing in the act contained shall prevent the appeal "as in other civil actions," and therefore whether the appeal lies depends on whether in civil actions the appeal lies in the case.

It is thought that the statutory language under consideration, "as in civil causes," forming a part of section 3062, Comp. St. 1922, is synonymous with and the exact legal equivalent of "as in other civil actions." It is to be remembered that our Civil Code has abolished distinctions between actions at law and suits in equity and in lieu thereof has ordained that there shall be but one form of action which shall be designated "a civil action." Comp. St. 1922, sec. 8503. A civil action is commenced by filing in the of-

fice of the clerk of the proper court a proper petition and causing a summons to issue thereon. Comp. St. 1922, sec. 8567. "An action shall be deemed commenced, * * * as to the defendant, at the date of the summons which is served upon him." Comp. St. 1922, sec. 8523. The requisites of a summons in civil actions is provided for in section 8569, Comp. St. 1922. "Whenever the time for bringing parties into court is not fixed by statute," the time, and the issuance, service, and return of summons, is regulated by sections 8571, 8582. In connection with the Civil Code provisions relative to the issuance and service of summons, and by this court construed as applicable thereto, and indeed as a real part thereof, is section 8656, Comp. St. 1922, a part of the Code of Civil Procedure, providing: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any * * * process, or proceeding, 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. * * * And whenever any proceeding taken by the party fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." Section 8657, Comp. St. 1922, provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." It seems but logical to state as the conclusion that the words "as in civil causes," as employed in the compensation act, plainly evidence a legislative intent that the provisions of the Code of Civil Procedure relating to summons shall, except when inconsistent with the specific provisions therein, apply to and in all respects govern procedure under the compensation act.

The analysis of the objections sustained by the district court in the present case discloses that they are essentially two; first, that the summons issued and served was defective in that there was a misstatement as to the return and

answer day as fixed by the workmen's compensation act; and, second, that no copy of the petition was served therewith. In view of the statutory provisions quoted, it is considered that the same rule of amendments applicable to actions under the Civil Code is applicable to the present situation. The matter of erroneous answer and return days was before this court in *Barker Co. v. Central West Investment Co.*, 75 Neb. 43, and the rule announced was: "Where a mistake is made in the date of the return and answer days of a summons, the same may be amended by the district court, even after objections to the jurisdiction of the court are pending based upon that particular defect." The reasoning of Letton, C., author of the opinion, is applicable and controlling in this case. It follows therefore that the errors contained in the summons issued and served under the terms of section 3062, Comp. St. 1922, were subject to amendment, and in so far as the errors appearing in such summons are concerned the action of the trial court in denying the application to amend was erroneous.

Was the failure to serve a copy of the petition jurisdictional? The language of section 3080, Comp. St. 1922, does not in express terms so declare. Indeed, by express reference, as we have seen, the compensation act incorporates within itself the provisions of the Civil Code relating to the issuance and service of summons, and thereby adopts these provisions as applicable to, and in all respects governing, its procedure. Under the Civil Code jurisdiction attaches on service and return of summons. There is no other jurisdictional requirement. By reference these Code provisions are embodied in the compensation act and are controlling, unless the added words, "together with a copy of the petition," are inconsistent with the language of the Civil Code. But such is not the case, for they may be construed together and harmonized. The words last quoted then become "directory" in character, at least not mandatory in the sense of jurisdictional. This construction, it seems, would be necessitated by the fact that the entire proceeding, as we have already seen, is appellate in its char-

acter. And it relating to one of the necessary steps to the exercise of a substantial right conferred by the Constitution itself, judicial discretion should be exercised to promote rather than to defeat this end. It would seem therefore that the district court, in sustaining the special appearance and in denying the application to amend, committed reversible error. The judgment is therefore reversed and the cause remanded, with dirctions to permit the amendments applied for.

REVERSED.

IN RE GUARDIANSHIP OF EBBA PETERSON. JOHN A. LINDBLAD, APPELLEE, V. JACOB PETERSON, APPELLANT.

FILED MARCH 28, 1930. No. 27121.

1. **Guardian and Ward:** MINORS: APPOINTMENT OF GUARDIAN: JURISDICTION. Where a mother having restricted custody of her minor child, by virtue of a divorce decree, removes from the county wherein said decree was rendered and where the father of the child continues to reside, the county court of the county of the mother's domicile does not, upon the death of the mother, acquire jurisdiction to appoint a guardian of the person and the estate of the minor under section 1577, Comp. St. 1922, providing for appointment of guardians for minors being residents or inhabitants of the same county, if the father, upon the death of the mother, seeks to exercise his natural right to the custody of his child and challenges the jurisdiction of the court.
2. **Divorce:** CUSTODY OF CHILD. A decree of divorce, which awards the custody of a minor child to the mother with the privilege of visitation reserved to the father, against whom there is no finding of unfitness, does not deprive the father of the natural right to the custody of his child except as against the mother. Upon her death, his right ceases to be affected by said decree, and he is then entitled to the custody of said child against the claim of any person.
3. **Parent and Child:** CUSTODY OF CHILD. A parent who has not voluntarily surrendered the custody and control of his child, or wilfully abandoned the same, cannot be deprived of his child in a contest with a stranger, unless unfitness is affirmatively alleged and proved.

4. Guardian and Ward: RESIDENCE OF MINOR. The habitation or residence of a minor child, as contemplated by section 1577, Comp. St. 1922, is by operation of law determined and fixed by that of the parent legally entitled to the custody and control of said child, unless said parent has voluntarily surrendered such right.

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

John J. Ledwith and *Cordeal, Colfer & Russell,* for appellant.

Latham & Schroeder, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

DAY, J.

This is an appeal from the judgment of the district court for Frontier county approving and confirming an order of the county court of said county appointing John A. Lindblad guardian of the estate of Ebba Peterson, a minor.

John A. Lindblad filed a petition, July 13, 1928, in the county court of Frontier county praying for his appointment as guardian of the person and estate of Ebba Peterson, his stepdaughter, a minor, aged 15 years. His petition alleged that both he and the minor were residents and inhabitants of said county; that he had married Hanna Peterson, the mother of Ebba, in April, 1926, from which date until the death of the mother, July 5, 1928, she and her minor child Ebba had resided with him in his home in Frontier county; that his wife, the mother of the minor child herein involved, died intestate leaving an estate of which her minor child inherited three-fourths; that the residence of Jacob Peterson, the father of said minor child, is in Lancaster county, Nebraska, but that the father is not a suitable and competent person to be appointed the guardian of the person and the estate of the minor child.

Ebba Peterson, the minor involved herein, filed a duly acknowledged written nomination of Lindblad, her stepfather, and requested his appointment as her guardian.

To all of which the father objected, as follows: "That your objector, Jacob Peterson, is now, and for many years last past has been, a resident of Lancaster county, Nebraska, and that he is the father of said Ebba Peterson, and further that the domicile of the said Ebba Peterson, since the date of the death of her mother, is Lancaster county, Nebraska, and that because of this fact the county court of Frontier county, Nebraska, is without jurisdiction to hear this application or to appoint a guardian for the said Ebba Peterson, a minor."

Upon hearing, the county court overruled the objection to the jurisdiction, made a finding that the minor was a resident and inhabitant of Frontier county, and entered an order appointing appellee as her guardian. Thereafter, the district court, upon appeal, after a hearing upon the same issues, approved and confirmed the order of the county court by a decree as follows:

"Now on this 25th day of May, 1929, the court being duly advised in the premises, finds that the minor child, Ebba Peterson, has been a *bona fide* resident of Frontier county for more than two years, having been removed to that county by her mother, in whose custody she was, about the month of April, 1926, and resided with her mother in that county until the death of her mother in the month of July, 1928, and has since resided in said county; that she is the owner of an interest in real and personal estate; that she has nominated John A. Lindblad, as guardian; that it appears to the court from the evidence that John A. Lindblad is a suitable and competent person to have the guardianship of the person and estate of said minor. It further appears from the record that the only question raised by the objections of Jacob Peterson is a question of jurisdiction. The court finds that the county court of Frontier county had jurisdiction over said minor and of these proceedings. No other or further objection being made by said Jacob Peterson, it is therefore ordered by the court that the proceedings of the county judge of Frontier county, Nebraska, be and they are hereby confirmed and approved."

The sole question of law presented in this court, as in the county and district courts, is whether the Frontier county court had jurisdiction to appoint a guardian of the person and the estate of Ebba Peterson, a minor, 15 years of age. In 1918, Jacob and Hanna Peterson, the parents of Ebba, were divorced in the district court for Lancaster county, where both resided at that time. The decree of divorce provided for the custody of Ebba as follows: "That the education, care, custody and nurture of the minor daughter Ebba is hereby awarded to the plaintiff subject to the right of the defendant to visit said child at all proper times, and subject to the further right of the father to take said child to his own home to visit him and his other children at suitable times and in such manner as shall not interfere with the education and control of said child; and it is further ordered that said child shall be and remain at all times within the jurisdiction of this court."

In April, 1926, Ebba's mother married John A. Lindblad, appellee, and, accompanied by her child Ebba, moved to her husband's home in Frontier county, where on July 5, 1928, she died, intestate, leaving surviving as her sole heirs, appellee, her husband, and Ebba, her minor daughter. Ebba lived with her mother and step-father continuously from June, 1926, until the mother's death, and since that time has remained at her step-father's home in Frontier county. Ebba's father, Jacob Peterson, was a resident of Lancaster county, Nebraska, at the time of the divorce in 1918; at the time of the death of her mother; at the time Lindblad filed his petition in the county court of Frontier county praying for his appointment as Ebba's guardian; and now is a resident of Lancaster county.

The guardianship proceedings in this case were apparently prosecuted under section 1577, Comp. St. 1922, which provides: "The county court in each county, when it shall appear necessary or convenient, may appoint guardians to minors and others, being inhabitants or residents in the same county." The appellant, the father of Ebba Peterson, contends that the county court of Frontier county did not

have jurisdiction to appoint a guardian, for that the domicile of the minor, Elba Peterson, was in Lancaster county, Nebraska, at the time of the divorcement of her parents in 1918. There, also, she was a resident and inhabitant. What effect did the decree of divorce have upon her? In said decree, her custody was given to her mother. As shown by the decree quoted, *supra,* the custody of the mother was a restricted one. It was restricted by, and subject to, the right of the father to visit said child at all proper times; by the right of the father to take the child to visit him and his other children at suitable times. In order that the father might have the benefit of the privileges reserved to him, it was also ordered that the child should be and remain at all times within the jurisdiction of the court. There was no finding in that decree that the father was unfit to have the custody, care, and education of his child. In this state of the record, the decree of divorce merely settled the question of the custody and control of said child as between the father and mother and upon the death of the mother the father became entitled to her custody and control.

This court said in the case of *Clarke v. Lyon,* 82 Neb. 625: "Where a court granting a divorce, without finding the father unfit, temporarily awards the custody of minor children to the mother, such decree does not deprive the father of the natural right to the custody of such children against any person except the mother; and, upon her death, such right ceases to be affected by such award." In explanation thereof the court used the following language: "Her death not only removes the reason for this award of custody, but renders its execution impossible, so that the right of the father to the custody of the children is no longer affected by such decree." Applied to the case at bar, upon the death of Mrs. Lindblad, the father's right to the custody of Ebba Peterson was not affected by the decree of divorce. Upon that occasion the father immediately became entitled to her custody as a natural right, unaffected by the former decree. The step-father and appellee, Lindblad, did not in any sense succeed to the rights or duties

relative to the minor child, which the mother acquired by virtue of said decree against the father. The father, as the surviving parent, has the natural right to the custody of the child. This is fundamental as well as statutory. Comp. St. 1922, sec. 1581. The welfare of the child is paramount, but every presumption is in favor of the competency and suitability of the parents. There is no conflict between the welfare of the child and the right of the parent, but the custody of a minor is to be determined from the facts in each case with a due regard to both. Courts should not, and do not, deprive parents of the custody of their child without good cause. In a contest between a stranger and a parent, the latter is not to be deprived of the custody of the child, unless unfitness is affirmatively alleged and proved. This court has so held in *Norval v. Zinsmaster*, 57 Neb. 158; *Terry v. Johnson*, 73 Neb. 653; *Voboril v. Voboril*, 115 Neb. 615; *Bailey v. Randall*, 16 Neb. 328.

Since the county court of each county has jurisdiction to appoint a guardian to a minor who is an inhabitant or resident in the same county, the gist of this whole case is whether Ebba Peterson was a resident or inhabitant of Frontier county, as contemplated by section 1577, Comp. St. 1922. If she was, the court had jurisdiction, to make appointment complained of herein; if she was neither a resident nor an inhabitant of said county, then the court was without jurisdiction.

The question of residence, within the meaning of the statute, is generally one of intention to be determined from the facts and circumstances of each particular case. The test of residence is: Did one remove from his former residence with an intention to abandon the same, and an intention of acquiring a new residence? Did Ebba Peterson acquire a new residence when she was taken by her mother from Lancaster to Frontier county? It is the general rule that the residence of a minor child is that of its parents. Under section 1581, Comp. St. 1922, the parents are equally entitled to the custody, services, and earnings, and to direct her education. But upon the entry of a divorce de-

cree between the parents, obviously both cannot exercise all the prerogatives belonging to them as parents, and then the court must make some equitable order, having in mind the best interest and welfare of the child. The order made relative thereto is a temporary order (Comp. St. 1922, sec. 1527), and the child and parents in so far as the custody of the minor child is concerned, are subject to the future orders of the district court relative thereto. We are not passing upon the question as to whether or not the divorced mother of a child, having the unrestricted custody, could, by changing her residence, change that of the child. That is not the case here, since the custody of the mother was restricted by the decree of divorce requiring the child to be kept within the jurisdiction of the court and making the custody of said child as between the parents subject to further orders of the court relative thereto. It follows, therefore, that, since the minor was not capable of changing her residence and the mother was deprived the right by the restrictions in the very decree which gave her custody, the residence of Ebba Peterson was not changed from Lancaster county to Frontier county. It then becomes apparent that the jurisdiction of the Frontier county court fails unless Ebba Peterson was an inhabitant of said county. Before her mother's death, the matter of her habitation and residence was a matter within the exclusive jurisdiction of the district court for Lancaster county. The rights and duties of the mother and father were determined by the decree. They were matters subject to further orders of that court. But when the mother, Hanna Peterson Lindblad, died, the decree of divorce between the parties, in so far as it regulated the rights of the custody of the minor child, became a nullity. Immediately thereupon the father became entitled to the custody of his child. By operation of law, her residence and habitation became that of her father. It became his duty as well as his privilege to select a home for her. From the death of the mother on the 5th of July, 1928, the father was entitled to her custody and control, and from said date he was entitled to choose

her place of residence and habitation, by operation of law. He immediately undertook to exercise his parental right, but was thwarted, and the said right was contested by the step-father, by the commencement of this proceeding on July 13, 1928. The court was without jurisdiction in this case, first, because the mother was without authority to change the residence or habitation of the minor, since her custody was restricted by the provisions in the divorce decree relative to visitation of the father and requiring said minor to be kept within the jurisdiction of the court; and secondly, because, on and after the death of the mother the father of said minor had the exclusive right to determine the place of residence and habitation of said minor child, and by affirmative act he has fixed it in Lancaster county.

While the appellee has not assisted us with briefs, we are not unmindful of certain school cases decided by this court wherein these questions are discussed. *Wirsig v. Scott,* 79 Neb. 322; *Mizner v. School District,* 2 Neb. (Unof.) 238; *McNish v. State,* 74 Neb. 261. In each of these cases, the child was living apart from the parents with their consent. The interest of the state in the education of the children was the controlling factor in these cases. Not one of them involved the question of depriving a parent of the custody of his child. In fact, this court in the case of *Wirsig v. Scott, supra,* distinguished them in the following language: "This contention is put upon the ground that the parents are the natural guardians, and that, while living, a guardian cannot be appointed unless the unsuitableness of the parents is adjudicated, and numerous authorities are cited in support of that contention. That rule is applicable where the appointment of a guardian is resisted by the parents, but we know of no rule of law which will prevent the parents from voluntarily surrendering the custody and control of their children to a suitable guardian, if they choose to do so." Under the holdings of this court, we have no doubt but that her residence in Frontier county was sufficient, if with the father's consent, to entitle her to attend the public schools there.

However, we conclude that the Frontier county court did not have jurisdiction to appoint a guardian over the minor in this case, when the jurisdiction of the court was challenged by the father, who was entitled to her custody some time prior to the commencement of these proceedings. In conformance to the foregoing opinion, the objections of the appellant are sustained, the order appointing the appellee guardian of Ebba Peterson is vacated, the judgment of the district court is reversed and the cause remanded to the district court, with directions to certify the same to the county court.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. STATE BANK OF PAPILLION: R. O. BROWNELL, RECEIVER APPELLANT: ALBERT HALPIN, INTERVENER, APPELLEE.

FILED MARCH 28, 1930. No. 26813.

Banks and Banking: INSOLVENCY: NOTICE: ALLOWANCE OF CLAIMS. Section 21, ch. 191, Laws 1923, does not bar the allowance of the claim of a creditor who did not receive the notice to file claims mailed under the provisions of such section and who had no knowledge of the insolvency of the bank until more than six months after the date for filing claims as fixed by the court's order, and the trial court does not abuse its discretion in allowing such a claim, notwithstanding its prior order, any time before final distribution of proceeds.

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

Crossman, Munger & Barton, for appellant.

Nickerson & Nickerson, contra.

Heard before GOSS, C. J., DEAN, EBERLY and DAY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

TEWELL, District Judge.

This cause comes to this court upon appeal by the receiver of the State Bank of Papillion, Nebraska, from an order of the district court allowing the claim of the inter-

vener, Albert Halpin, against the insolvent bank as a deposit, and directing its payment by order upon the bank guaranty fund. The facts are established either by admissions in the pleadings or by the stipulation of facts that is incorporated in the bill of exceptions.

The record discloses that on September 4, 1926, R. O. Brownell was by the district court for Sarpy county, Nebraska, duly appointed receiver of the State Bank of Papillion, hereinafter designated as the bank. On September 15, 1926, the receiver filed in the district court for Sarpy county, Nebraska, that being the county in which the bank was located, a petition designated as "Mailing List of Creditors of State Bank of Papillion." It appears that in this petition the intervener, Albert Halpin, was designated as a creditor, but that his address was not given, the entry therein being "Halpin, Albert, address unknown." On September 16, 1926, an order of the district court for Sarpy county was made and entered of record limiting the time for filing of claims against the bank to November 15, 1926, and fixing the date for a hearing on such claims as December 15, 1926. On September 20, 1926, the receiver furnished the newspaper designated by order of court a notice to creditors, and the same was by it published once each week for two weeks. This notice to creditors was posted on the door of the bank on September 16, 1926. The address of Albert Halpin was not known to the receiver, and on September 22, 1926, the receiver mailed a notice of the time and place of hearing on claims with a blank form for filing of claim, addressed to "Albert Halpin, Papillion, Nebr." The envelope containing this notice and form was returned to the receiver bearing the stamp "Address unknown." The record further shows that the intervener, Halpin, deposited in the bank on September 9, 1925, the sum of $438.33, and that at the time the receiver took charge of the bank he had on deposit in a checking account the sum of $378.33. Shortly after making the deposit mentioned, the intervener left Papillion, and worked in Iowa as a farm hand. He knew nothing about the bank being in

the hands of a receiver until in September, 1927. On September 30, 1927, for the first time he filed his claim, and on October 8, 1927, with leave of court granted by an order of October 8, 1927, without notice to the receiver, he filed his petition of intervention praying for the allowance of his claim and for an order directing that it be paid by order upon the guaranty fund. The proceeds from the assets of the bank had not yet been distributed. In his claim and also in his petition of intervention Halpin pleads the fact that he did not know of the bank being in the hands of a receiver until just before filing his claim, and that no notice to creditors was received by him. The receiver pleads that the allowance of the claim is barred by the provisions of section 21, ch. 191, Laws 1923, upon the theory that such section is a special statute of limitations.

The sole question involved herein is whether or not the trial court erred in allowing Halpin's claim under the facts as above stated. Section 21, ch. 191, Laws 1923, which was in effect, not only when the receiver was appointed, but also when Halpin's claim and petition of intervention were filed, provides as follows:

"Within twenty days after taking possession of any insolvent bank, the receiver shall file in the district court of the county in which the bank is located, a petition setting forth the name and address of each of the creditors of such bank as shown by the books thereof, or known to be creditors by such receiver, and ask for an order limiting the time for filing and fixing the date for hearing on the claims of such creditors. No notice shall be necessary of the hearing on said petition and a judge of said court may hear the same at any time or place within the state at his convenience. Such time for filing claims shall be not more than sixty days nor less than thirty days from the entry of said order, and the date for hearing shall be not more than thirty days thereafter. Within seven days after said order is entered, the receiver shall mail to each known creditor of such bank, a notice of the time, and place of the hearing on claims by the court, and with such notice, shall send a

blank form for filing of claims by the creditor. Such claim shall be sworn to by the creditor or a representative thereof, and filed with the receiver or the clerk of the court. Any claim not presented at the place or within the time fixed by such notice, shall be forever barred unless the court shall by order direct payment thereof thereafter, which order may be entered upon a showing within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing claims. Such receiver shall also post notice for filing claims on the door of such bank and within three weeks from the date of the order fixing the time for hearing on claims, give notice by publication in such newspaper as the court may direct, once in each week for two weeks, requiring all persons having claims against such bank to obtain forms therefor to verify their claims and present the same to the receiver or to the clerk of the court within the time fixed in such notice."

Intervener Halpin first claims that the provisions of said section were not strictly followed, in that the notice was not mailed to him, but rather simply addressed to him at the town where the bank was located; and, second, claims that such section is contrary to section 1, art. II of the Nebraska Constitution, as being an interference by the legislative with the judicial department of the state, in that it attempts to limit the discretion of the court in its action on claims, rather than to place a bar upon the remedy of the creditor. The following observations relative to said section seem warranted:

(1) The books of the bank determine the name and address of the only persons to be listed as creditors.

(2) Notice to file claims is only mailed to each known creditor.

(3) No diligent search is required to discover unknown creditors, or whereabouts of persons known to be creditors.

(4) There is no provision that the notice in its form shall be directed to any creditor by name.

(5) The only provision for the appearance of the name or address of any creditor as shown by the books of the bank relates to such appearance on a petition to be filed in court and upon an envelope in which the notice is to be mailed.

(6) No time is fixed as to when a notice shall be posted on the door of the bank.

(7) Under the provisions of the act the time for filing claims could elapse prior to the end of the week in which the second publication of the notice was made.

(8) The act contains no provision to the effect that the act of making the deposit shall be a consent to the manner of service of notice to file claims provided by the section in case it is placed in receivership.

(9) The act does not expressly provide an absolute bar to action upon a claim not filed within the time prescribed by the court's order, even to a creditor who actually received the notice, but instead contains the words "unless the court shall by order direct payment thereof thereafter," etc. Such order directing payment "thereafter" could, by the provisions of the section, be made without any claim ever being filed.

(10) There is no provision that the "showing" mentioned therein must be made within six months from any definite time, nor that the court may not direct payment upon some other "showing."

(11) The time within which claims are to be filed is fixed by order of the court in the first instance, and not by the provisions of the section.

The necessity for some special limitation either by statute or court order upon the time within which claims should be filed against an insolvent bank is quite apparent. However, the reasons giving rise to this necessity are different than those that make necessary general statutes of limitations upon actions. The most urgent reason for filing claims within a very limited time against an insolvent bank in a receivership proceeding is that it greatly aids in a quick distribution of the proceeds from the assets, which

could not occur, at least as to the final dividend, until the total of all claims has been ascertained. If all claims against an insolvent bank are filed any time before final distribution of proceeds, the most urgent necessity for such a special limitation is met.

As an aid in determining the intent of the legislature in its passage of said section 21, it is well to state a few rules of law relating to statutes limiting the time in which actions may be brought. The legislature may by statute prescribe a reasonable limitation upon the time within which an action at law or in equity may be brought, and the statute that is in effect at the time the action is brought and applicable thereto is determinative of whether such action is barred, all subject to the restriction that such statute may not limit action on existing claims without allowing a reasonable time within which to bring action thereon. 37 C. J. 687. Such a statute, however, will not be extended by construction to include actions within the reason, but not within the words thereof. 37 C. J. 687-689; *Dringman v. Keith,* 86 Neb. 476; *Helbig v. Citizens Ins. Co.,* 234 Ill. 251. In *State v. Bank of Commerce,* 61 Neb. 22, this court held that a court may, in its discretion, permit a creditor to share in the assets of an insolvent bank, although his claim was not filed within the limit of the time that had been fixed by prior order of court for the presentation of claims. While the said section 21 was not in force at the time of the decision last mentioned, yet the time for presenting claims as fixed by court order had expired under the facts of that case, as is true in this case. See 7 C. J. 744.

With the provisions of said section 21, together with the reasons for its enactment, and also the rules of law above stated, in mind, no conclusion seems warranted in this case other than that the provisions of said section at least do not bar action upon a claim against an insolvent bank of a creditor who did not receive the notice to file claims which the section provides shall be mailed, and that the trial court did not abuse its discretion in allowing the intervener's

claim while the process of liquidation was still in progress and the proceeds from the assets not yet distributed, even though such claim was not filed within the time fixed by a prior general order of the court.

The question of whether or not said section 21 is unconstitutional on account of attempting to place a restriction upon the action of the court, rather than placing a bar upon the remedy of the creditor, as claimed by the intervener, or on account of attempting to bar the claim of the creditor without due process of law, or whether said section is not a special statute of limitations at all, but merely directory in its nature, are questions expressly not decided in this opinion.

For the reasons above stated, the decree of the trial court is affirmed and all costs in this court taxed to appellant.

AFFIRMED.

The following opinion on motion for rehearing was filed October 17, 1930. *Former opinion vacated, and judgment of affirmance adhered to.*

1. **Banks and Banking:** FILING CLAIMS: LIMITATION. Statutory special time limit for filing claims against an insolvent state bank will be applied to bar claims only when it appears that there has been a compliance with the statutory procedure and conditions.
2. **Appeal.** A judgment of the district court will not be reversed unless the record affirmatively shows that prejudicial error was committed.

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

GOOD, J.

From a judgment of the district court, allowing as preferred and payable from the depositors' guaranty fund a claim in favor of Albert Halpin against the State Bank of Papillion, insolvent, the receiver of such bank has appealed.

This cause is now before us on a motion for rehearing. The former opinion appears, *ante*, p. 519.

On September 4, 1926, a receiver for the insolvent bank was appointed, and on the 15th of the same month he filed

in the district court a petition and designated mailing list of creditors of the insolvent bank. On the day following, the district court entered an order limiting the time for filing claims by the creditors of the bank to November 15, 1926, and fixing December 15, 1926, as the date for the hearing on claims. On September 20, 1926, the receiver caused to be published in a Papillion newspaper a notice to creditors, which was published in the issues of September 30 and October 7. On September 16 a copy of the same notice to creditors was posted on the door of the bank.

At the time the receiver was appointed, Halpin, a farm-hand, who had worked in the vicinity of Papillion, had on deposit in the State Bank of Papillion the sum of $378.33. This deposit was made in 1925, and some time thereafter Halpin removed to another state, and had no knowledge or information that the bank had become insolvent, or that notice had been given to creditors, until in the month of September, 1927. On the 8th day of October, 1927, he filed his claim with the receiver and asked that it be allowed as preferred. The receiver filed objections to the allowance of the claim, on the ground that, under the provisions of section 21, ch. 191, Laws 1923, and the order of the court fixing the time for filing claims, the claim was barred and could not be allowed.

Section 21, ch. 191, Laws 1923, *inter alia,* provides: "Within twenty days after taking possession of any insolvent bank, the receiver shall file in the district court of the county in which the bank is located, a petition setting forth the name and address of each of the creditors of such bank as shown by the books thereof, or known to be creditors by such receiver, and ask for an order limiting the time for filing and fixing the date for hearing on the claims of such creditors. * * * Such time for filing claims shall be not more than sixty days nor less than thirty days from the entry of said order. * * * Within seven days after said order is entered, the receiver shall mail to each known creditor of such bank a notice of the time, and place of the hearing on claims by the court. * * * Any claim not presented at the place or within the time fixed by such

notice, shall be forever barred unless the court shall by order direct payment thereof thereafter, which order may be entered upon a showing within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing on claims. Such receiver shall also post notice for filing claims on the door of such bank and within three weeks from the date of the order fixing the time for hearing on claims, give notice by publication in such newspaper as the court may direct, once in each week for two weeks, requiring all persons having claims against such bank to obtain forms therefor to verify their claims and present the same to the receiver or to the clerk of the court within the time fixed in such notice."

The receiver insists that the claim is forever barred, since it was not filed with the receiver or with the clerk of the court until more than six months had elapsed after the time fixed in the order of the court for filing claims.

Assuming, without so deciding, that the statute is valid and should have the interpretation placed upon it by the receiver, we are required to determine whether the facts presented by the record are sufficient to require the application of the time limitation, provided by the statute, to the case in hand. The only evidence preserved in the bill of exceptions is a stipulation by the parties. On this stipulation and the matters therein referred to, the cause was submitted to and decided by the trial court, which overruled the receiver's objections and allowed the claim as preferred.

The stipulation contains the following: "That on September 15, 1926, said R. O. Brownell as such receiver filed with the clerk of the district court of Sarpy county, in which county said insolvent bank was located, a 'petition' and designated 'Mailing List of Creditors of the State Bank of Papillion,' and which is now on file in book 1 of the pleadings in above case No. 4298, and it is stipulated that said 'petition' or 'Mailing List of Creditors of the State Bank of Papillion' be considered as evidence by the court,

together with the verification thereto." The petition and mailing list of creditors, referred to in the stipulation, are not incorporated in the bill of exceptions, nor are they in the record presented to this court. Another excerpt from the stipulation is as follows: "That on September 20, 1926, said receiver furnished the Papillion Times, a legal newspaper printed at Papillion, Nebraska, with a notice to creditors, which notice was published in the issues of said newspaper of September 30 and October 7, 1926. That on September 16, 1926, a copy of said notice to creditors was posted on the door of the State Bank of Papillion. It is also stipulated that the copy of the printed notice shown in Vol. 1 of said case No. 4298 is a correct copy of the notice published and the one posted." The notice therein referred to is not in the bill of exceptions nor in the record. We are not advised by the record as to the grounds or reasons for the court's decision. It is stated in appellant's brief that the trial court did not give the reason or authority upon which the decision was based.

Do these facts, disclosed by the record, require the application of the statute of limitations provided in section 21, ch. 191, Laws 1923? For aught that appears, the trial court may have deemed the petition and mailing list, referred to in the stipulation, insufficient in form and substance to warrant making the order of the court above referred to; or the court may have deemed that the notice to creditors, posted on the door of the bank and published in the newspaper, was insufficient in form and substance to give due notice to creditors, and that it did not comply with the statute. It is apparent that the trial court had before it material evidence on which to base its decision, but which is not preserved in the bill of exceptions. This evidence may have been sufficient to justify the court's action in overruling the receiver's objections and allowing the claim.

We are unable, therefore, to determine that the trial court committed any error in the judgment from which the appeal is taken. It is a well-recognized rule that on appeal, before a cause will be reversed, error must affirma-

tively appear and will not be presumed. Applying this rule to the record before us, we are necessarily compelled to affirm the judgment of the district court.

The conclusion reached renders it unnecessary to consider any of the other questions raised and presented in the briefs and on oral argument.

The former opinion is hereby vacated, and, since no error affirmatively appears, the judgment of affirmance is adhered to.

AFFIRMED.

MAGGIE FISHER, ADMINISTRATRIX, APPELLEE, V. LEWIS H. TRESTER, APPELLANT.

FILED MARCH 28, 1930. No. 26911.

1. **Death**: DAMAGES. In an action by the personal representative of a deceased child, for the benefit of parents, to recover damages for negligently or wrongfully causing the death of such child, the life expectancy of the parents, and not of the child, is to be used as the time element in determining the amount of the damage, where the life expectancy of the child exceeds that of the parents.
2. ———: ———. The measure of damage in an action by the personal representative of a child, for the benefit of its parents, to recover for wrongfully causing the death of such child, is the present worth in money of the contributions having a general monetary value of which the parents are shown by the evidence with reasonable certainty to have been deprived by the act causing the death, and those contributions that are only probable, or conjectural, may not be included in the amount of such damage.
3. ———: ———: INSTRUCTIONS. If the consideration of the life expectancy of one is an issue in an action to recover damage for personal injuries, or wrongful death, the court should instruct the jury to take into account in such consideration, not only mortality tables, if such are in evidence, but also all other facts and circumstances as shown by the evidence and having a bearing thereon.
4. **Appeal**: REMITTITUR. If the jury are led into returning an excessive verdict by reason of erroneous instructions upon the measure of damage, and a given sum can, with certainty, be said to be as much or more than the excess, judgment may be rendered upon such verdict for its amount minus such given

sum, even when the amount of the excess is not definitely ascertainable, if the one in whose favor such verdict was returned voluntarily elects to remit such given sum, and if passion or prejudice did not exist and no error relating to the right of recovery was committed in the trial.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed on condition.*

Mockett & Finkelstein and *F. B. Baylor,* for appellant.

Chambers & Holland, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

TEWELL, District Judge.

This action was brought by the plaintiff as administratrix of the estate of her deceased son, Harry Fisher, to recover damages arising from the death of said Harry Fisher, which resulted from injuries sustained in an automobile accident. The action is maintained under the provisions of sections 1382 and 1383, Comp. St. 1922, commonly known as Lord Campbell's Act. The accident occurred on March 31, 1928, at the intersection of Thirty-first street and D street in Lincoln, Nebraska. The side of the rear portion of a Ford truck that was being driven westward on Thirty-first street by one John Ernst was struck by the radiator and left front fender of a Ford sedan that was being driven northward on D street by one Albert Wentzlaff, who was then engaged in his work as an employee of the defendant. Ernst, the driver of the truck, and the deceased, Harry Fisher, were employed by Wilson & Company, and, at the time of the accident, were delivering meats and groceries for their employer. At the time the sedan collided with the truck, Harry Fisher was riding in the rear portion of the open body of the truck and sitting upon a pail of lard. He was thrown from the truck by the force of the collision to the pavement, and a day or two later died from the injuries thereby sustained. The petition specifies certain acts of negligence as being the proximate cause of his death.

The answer denies the negligence alleged, and pleads negligence on the part of said Ernst and the deceased. Trial was had to a jury, and from a verdict and judgment for plaintiff in the sum of $7,250 the defendant, Lewis H. Trester, prosecutes this appeal. Wilson & Company was made a party defendant merely because of the subrogation existing in its favor under the employers' liability act, and does not join in the appeal.

In his brief the defendant assigns nine errors. Assignments of error Nos. 2, 3, 4 and 5 are directed respectively against instructions Nos. 12, 13, 16 and 19 given by the court, and assignments of error Nos. 6 and 7 are directed at the refusal of the court to give instructions Nos. 2, 3 and 11 requested by the defendant. These assignments, due to their nature, may be conveniently considered in a group, and for a discussion of them instructions Nos. 12, 13, 16 and 19, as given by the court, are copied herein. These four last mentioned instructions are as follows:

"12. The jury are instructed that in the bringing and prosecution of this action the plaintiff, although she is designated as the administratrix of the estate of Harry Fisher, deceased, is acting only for the next of kin of said Harry Fisher, and the recovery, if any, in her favor must represent only the present worth of the probable monetary loss or services during his lifetime which the father and mother have suffered by reason of the death of Harry Fisher. Therefore, in arriving at the amount of such recovery, if any, you are not to take into consideration the fact that the assets of the estate of said Harry Fisher may have been lessened by reason of his death, or that his father and mother may have suffered some loss of inheritance.

"13. The jury are instructed that no legal obligation rested upon Harry Fisher to make contributions in money or services to his father and mother after he reached the age of twenty-one years, so long as the father and mother are reasonably able to earn a livelihood; and whether such contributions would probably have been made must be determined by you from a preponderance of the evidence."

"16. By present worth is meant that sum which if paid at this time will represent the actual value of those contributions in money or services, if any, which you find Harry Fisher would probably have made to his father and mother had his death not occurred."

"19. If you find from the evidence under the instructions of the court that the defendant, through his agent and servant, was guilty of negligence, as charged in plaintiff's petition, which directly and proximately caused or contributed to the death of plaintiff's decedent, and that plaintiff is entitled to a verdict under the evidence and the instructions given you, then the measure of plaintiff's damages would be the pecuniary loss resulting to decedent's father and mother by reason of decedent's death."

In his assignment of error No. 2, the defendant complains of instruction No. 12, set forth above, as fixing the lifetime of the deceased, and not the lifetime of the next of kin, as the period of time to be used in computing the amount of recovery. It is at least susceptible of this meaning. This instruction is an exact copy of instruction No. 1 of those requested by the defendant, with the exception of the court's addition of the phrase "present worth of the probable" and the phrase "or services during his lifetime" at the points in the instruction where those phrases are placed. The deceased is shown to have been 20 years of age at the time of his death; his mother, Maggie Fisher, to have been 51 years of age, and his father, Emmet E. Fisher, to have been 55 years of age. According to the mortality tables introduced in evidence, the life expectancy of deceased was approximately 40 years; that of his mother approximately 19 years, and that of his father approximately 17 years. Under the inheritance laws of this state, the father and mother of the deceased are his sole next of kin, and share equally all of the avails of any recovery herein under the provisions of section 1383, Comp. St. 1922. The life expectancy of the parents, and not of the child, under the facts in this case, is the life expectancy to be used as the time element in computing the amount of damage. To the extent that instruction No. 12 made the

life expectancy of the deceased the time element in the rule for the computation of damages when the life expectancy of the deceased exceeded that of the parents, it is erroneous. 17 C. J. 1331, and cases cited in the footnotes; *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

In his said assignments of error Nos. 2 to 5 inclusive, the defendant complains of said instruction No. 12, and also of instructions Nos. 13, 16 and 19, as allowing the amount of contributions by the deceased to depend upon mere probability. In instruction No. 2 requested by the defendant, but not given by the court, the recovery, if any, is limited by the first sentence therein to the present worth of the contributions in money and services that would have been made to the father and mother during their lifetimes. The last sentence in such requested instruction is an exact copy of instruction No. 16 given by the court and set out above, with the exception that the court inserted the word "probably" in its instruction No. 16. The first sentence of instruction No. 11 requested by the defendant, but not given, is an exact copy of instruction No. 13 given by the court and set out above, with the exception that the court added the word "reasonably" and the word "probably" where the same occur in said instruction No. 13. In an action such as this, where the life expectancy of the deceased exceeded that of the next of kin, and the next of kin are the parents of the deceased, the measure of damage is the present worth in money of the contributions having a monetary value of which the preponderance of the evidence shows with reasonable certainty the next of kin have been deprived by the act of the defendant that creates the liability. That which is only probable, estimated or conjectural may not be considered in determining the pecuniary loss. *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60; *Greenwood v. King*, 82 Neb. 17; 17 C. J. 1365, and cases cited in the footnotes. Instructions Nos. 12, 13, 16 and 19, when read together, make the probable pecuniary loss, rather than the pecuniary loss shown by the evidence with reasonable certainty, the basis for determin-

ing the pecuniary loss, and to that extent, when instructions free from such interpretation were tendered by the defendant, were erroneous.

Instruction No. 3 requested by the defendant referred to the evidence relating to the age of the next of kin and the mortality tables relating to the probable duration of life of normal persons of that age and directed the jury to take into account their state of health in determining the probable duration of their lives. This instruction was refused by the court and none given upon the subject-matter thereof. The record contains evidence showing the father and mother each to be in a poor state of health. It was the duty of the jury to consider the life expectancy of the parents, not only as shown by the mortality tables, but as shown from all other facts and circumstances shown in the evidence and having a bearing thereon. Such an instruction, indeed, had a proper place in this case and should have been given, although its refusal, if other errors heretofore pointed out had not occurred, might not, perhaps, be said to constitute error. 17 C. J. 1366; *Steinbrunner v. Pittsburgh R. Co.*, 146 Pa. St. 504, 28 Am. St. Rep. 806; *Illinois Central R. Co. v. Houchins*, 121 Ky. 526, 123 Am. St. Rep. 205.

In his assignment of error No. 7, the defendant complains of the court's refusal to give that part of instruction No. 11 requested by him which directs the jury not to consider the evidence relating to the existence of brothers and sisters of the deceased, except so far as it might have a bearing upon the amount of contributions of a monetary value that the deceased would have made to his parents. There is evidence showing that a sister of the deceased, 21 years old and in poor health, lived with the plaintiff and her husband. In assignment of error No. 8, the defendant complains of the admission of evidence showing that two married brothers were living outside the home of their parents. Evidence of this nature in some jurisdictions has been held inadmissible. 17 C. J. 1361. If admitted, the trial court, at least when requested, should give an instruction upon the limited purpose for which

such evidence may be considered. If admitted and a requested instruction thereon properly limiting its purpose is not given, reversible error may be committed, where the record discloses that a part of its effect was to unduly elicit sympathy from the jury. Such does not seem to be the condition in the record in this case.

It will be noted that all of the assignments of error above noted relate to matters having a bearing upon the amount of the recovery, rather than upon the question of whether or not the defendant was liable in damages in some amount. The court submitted the issue of contributory negligence and the circumstances under which it would bar recovery, if existing, to the jury, along with the rule of diminishing the amount of recovery if contributory negligence existed but was slight and the negligence of the defendant gross in comparison therewith. No error is pointed out that relates to liability in some amount. The evidence is sufficient to sustain the plaintiff's right of recovery as distinguished from her amount of recovery.

The only other complaint of the defendant which it is necessary to consider is that which relates to the verdict being excessive. The record shows the deceased to have been attending high school, and intending to enter the state university at Lincoln upon the completion of his high school course. He was industrious, frugal and of good habits. During holidays, summer vacation, and on Saturdays he worked, and earned between $400 and $500 a year. His earnings were given to his mother, who bought the household necessities. After paying for the clothes and incidental expenses of the deceased, the mother claims she had left about one-half of these earnings. He aided his mother about the home. He helped her to do laundry work which she brought home to do for hire from a store where she worked, for doing which his mother was paid the sum of $10 a week. When employed full time while not in school, the deceased earned from $18 to $24 a week. The present worth of $1 on the date of the death of the decedent, if paid once annually for 19 years, that being the

life expectancy of the mother as shown by the mortality tables, is $12.08, when 5 per cent. is used as a basis of computation. Upon the above basis, the pecuniary loss to the parents would have to average the sum of a little more than $600 a year paid each year for the entire period of 19 years in order to be of the present worth of the amount of the verdict in this case. That any rule for the exact mathematical calculation of the pecuniary loss in a case like this exists is not meant nor even inferred by the foregoing statements. Such a rule does not exist, but nevertheless the foregoing method of calculation may permissibly be used by an appellate court as a part of its consideration of whether or not the verdict in such a case is excessive. The jury in an action of this kind are necessarily allowed a latitude in determining what pecuniary loss to the next of kin has been shown, but they must confine themselves to such pecuniary loss as is shown by the evidence with reasonable certainty, and cannot arbitrarily indulge in conjecture and speculation. Their action is reviewable within certain limits. 17 C. J. 1347. Upon the record in this case the verdict is excessive.

Although the verdict is excessive, it does not necessarily follow that it must be set aside in its entirety. There is nothing in the record to indicate that it is tainted with passion or prejudice. The errors complained of by the defendant all relate to the amount of the recovery rather than to the right of recovery in some amount. This court has many times affirmed a judgment excessive in amount, even in actions *ex delicto,* upon condition that a remittitur of an amount large enough to include all excess be filed. *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713; *Elliott v. City of University Place,* 102 Neb. 273.

Jurisdictions allowing a remittitur in that class of actions *ex delicto* in which the amount of the excess cannot be definitely ascertained seem to confine its allowance to cases in which the errors, if any present, do not relate to the right of recovery, and in which the court can say with reasonable certainty that the amount of the remittitur al-

lowed is large enough to cover all excess. 4 C. J. 1144. In this case the monetary value of the contributions to the next of kin that were being made by the deceased prior to and at the time of his death is confined as to its amount within narrow limits. Of course, such value alone does not measure the pecuniary loss. However, the court can say with reasonable certainty that the sum of $4,250 will include all of the amount by which the verdict is excessive, either by reason of the errors heretofore pointed out, or by reason of the jury having abused their discretion and going even beyond the measure of damage fixed in the instructions as given. Such amount may include more than such excess. If it includes at least all of such excess, no injury is done the defendant, even though the plaintiff elects to remit. If it includes more, neither the plaintiff nor the defendant is injured, as the plaintiff is not required to remit but may accept a new trial instead.

For the reasons above set forth, it is ordered that the judgment of the trial court be reversed and a new trial granted, unless the plaintiff within 30 days after the filing of this opinion file in this court a remittitur of all of the judgment in excess of the sum of $3,000 and interest on such sum of $3,000 accruing since the date such judgment was rendered by the trial court and the costs in the district court; but, in the event such remittitur is filed, that then the judgment of the trial court be affirmed as to the sum of $3,000 and interest thereon after the date such judgment was rendered by the trial court and the costs in the trial court. Costs in this court in any event are taxed to the plaintiff.

AFFIRMED ON CONDITION.

IN RE ESTATE OF IDA WECKER.
HUGO A. WECKER ET AL., APPELLANTS, V. ANNA ZUECHER ET AL., APPELLEES.

FILED APRIL 3, 1930. No. 27098.

Appeal: REVERSAL. The record being examined, *held* that it fails, in the particular shown in the opinion, to furnish a definite

basis to support the decree and judgment of the district court. The judgment is reversed and the cause is remanded for a new trial in accordance with the views expressed in the opinion.

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

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

M. H. Leamy, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

GOSS, C. J.

This case involves the final distribution of the personal property left by Ida Wecker, who died intestate on November 2, 1926.

The controversy arose in the county court when the estate of Ida Wecker was up for final distribution. The parties in interest are the ten children of Ida Wecker. Four of them were the parties affirmatively interested in the appeal from the final decree of distribution in the county court and they also appealed from an adverse judgment in the district court. The other six children are appellees here as they were satisfied with the decrees in the county and district courts. All of them were represented in both courts. They were and are the only persons interested in the distribution of their mother's estate. They and their mother were the only parties interested in the distribution of their father's estate.

On the trial in the district court most of the facts were stipulated. Nicholas Wecker, the father of these ten children, died June 1, 1915, a resident of Pierce county. His will was probated in that county. It devised 320 acres of land to his son Oswald and devised and bequeathed all the remainder of his property, both real and personal, to his wife for her use during her natural life, without the power to sell the real estate. It devised and bequeathed the remainder in said real and personal property to his daugh-

ters Anna Zuecher, Selma Grunwald, Clara Wecker, Ida Wagner, Lena Huwaldt, and to his son, Oscar Wecker, as tenants in common, share and share alike. Aside from the farm devised to Oswald, the only real property left by Nicholas Wecker was a quarter section of land and two lots in the town of Pierce, all in Pierce county. All debts were paid out of the personal property. The estate of Nicholas Wecker was closed by a final decree and Ida Wecker as executrix was fully discharged on July 7, 1916. She took possession of the said real property given her for her life use and of the personal property remaining. On the trial in the district court the parties stipulated that the personal property, when so taken over by her, was of the value of $18,902.40; and that at the time of her death none of the personal property described in the final decree in the estate of Nicholas Wecker "existed in specie" except a few shares in local companies, separately described in the stipulation and there stipulated as valued at a total of $1,200.

The evidence shows that the total value of the personal property left in the estate of Ida Wecker for expenses of administration and distribution was about $30,000. In the final decree the district court found the amount then on hand to be $29,678.65. Of this sum the judgment allotted $20,831.38 to the six remaindermen under a finding that such sum was the corpus of the estate derived by Ida Wecker from the estate of Nicholas Wecker and preserved by her, and the balance of $8,847.27 was allotted to all her ten heirs as the personal property of Ida Wecker at the time of her death; the decree ordered the expenses of administration to be paid out of the total in proportion to the above allotments.

No evidence has been pointed out to us, nor can we find any ourselves, which indicates the basis for discovery as to the personal property of Ida Wecker in her own right at the time of her husband's death or what she may have acquired at any time thereafter, except perhaps a few hundred dollars worth of wearing apparel and household goods.

The parties expressly stipulated in the evidence during the trial "that, by the terms of the said last will and testament, it was the intention of the said Nicholas Wecker, deceased, to give a life estate in the residue of his property therein referred to to the said Ida Wecker with the power of disposition and sale of the personal property and also the right to consume such portions of the corpus thereof as might be reasonably necessary for her support and maintenance according to her standard of living and station in life."

In effect, the decree finds and holds that Ida Wecker had no personal property at the time of her husband's death; and that she had no personal property in her own right when she died intestate, except the amount of the increase of the personal property, as heretofore stated, taken over here from her husband's estate and left by her to be distributed to all ten heirs share and share alike. As we have indicated, we find no evidence to warrant the assumption that any of the personal property left by her was derived from her husband's estate, except the stocks in the local companies valued at $1,200. The record being silent upon the subject, there was no evidential basis for the decree of the district court that found and held in effect that she had in no way depleted the corpus of the personal property derived from the estate of her husband. For aught the evidence shows, she may have had $30,000 in her own right and may have used all of the personal property derived from her husband's estate, except the stocks heretofore mentioned, in the years between the settlement of his estate and the time of her death. The parties stipulated that she might do this if reasonably necessary, but they have failed to show in evidence that element so essential to arrive at any definite amount, except the $1,200, as the remaining corpus of the personal property derived from her husband's estate. Thus, we cannot say that the $18,902.40, which the parties stipulated as the value of the personal property she took over from her husband's estate, or the $20,831.38, which the district court found and decreed was the true

amount, is the fund which should be paid over, subject to costs and expenses, by her administrator to the six appellees as remaindermen under the will of Nicholas Wecker. Because of this failure of the evidence, the case will have to be sent back to the district court.

We do not desire to embarrass the trial there, or the review here, if perchance the case should come here again. But we deem a few suggestions helpful. The estate of Nicholas Wecker was fully closed and the executrix was discharged. When this controversy arose in the estate of Ida Wecker, intestate, in the county court, there are some things to indicate that perhaps the county court appointed as administrator *de bonis non* in the estate of Nicholas Wecker the same person, A. J. Mastalir, who was the administrator of the estate of Ida Wecker. The transcript in the county court proceedings shows that the county judge and the appellees had the idea that the two estates were to be coupled, in the title and in some references elsewhere. To some extent this practice persisted in the district court. The appellants, however, filed their petition and reply in the county court as well as in the district court as in the estate of Ida Wecker, seeking to impress upon the distribution of her personal property the character of personality belonging to her alone, whereas the answers setting forth the position of appellees in the county court and in the district court more or less vaguely coupled the two estates and described the administrator as being administrator of both estates. In the circumstances we think the matter should have been considered, as we think it in fact was in effect considered, as arising in the estate of Ida Wecker alone. The source of the personal property derived by Ida Wecker from the estate of Nicholas Wecker, the amount thereof, the terms under which she took it, and like questions, were evidential facts to be discovered from facts arising in the estate of Nicholas Wecker, but that did not prevent the settlement of the controversy, between the parties here, in the proceedings in the estate of Ida Wecker. The stipulation of the parties heretofore partly quoted from the evi-

dence seems to indicate that this was the real understanding of the parties.

While A. J. Mastalir as administrator filed and verified the answers both in the county court and district court, it is apparent that on both occasions he was acting in the interests of the six remaindermen who were expressly substituted for him as parties in the trial in the district court. The same attorney who represented him in the county court and when he filed his answer in the district court continued to represent appellees in the district court after they were substituted as parties for the administrator. In these circumstances neither the appellees nor appellants were prejudiced nor will be heard to say that the issues were between different parties in the county and district courts.

The appellees cross-appealed and asked for more than they got by the decree of the district court. Their right so to do is questioned by appellants. It is not necessary to consider this matter as it goes back to the district court with the appeal.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial in accordance with the views expressed in this opinion.

REVERSED.

GOLDIE KUBICEK, APPELLANT, V. WILLIAM SLEZAK, APPELLEE.

FILED APRIL 3, 1930. No. 27080.

Evidence. In an action for damages caused by an assault with intent to commit rape, an ordinary observer who was an eye-witness to the felonious act may testify to the appearance of plaintiff at the time as indicating fear, and the exclusion of such testimony may be prejudicial error.

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

Bartos & Placek, for appellant.

Waring & Waring, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

ROSE, J.

This is an action to recover damages in the sum of $50,000 for assault with intent to commit rape. The answer to the petition was a general denial. Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment dismissing the action plaintiff appealed.

One of the assignments of error challenges a ruling that prevented the mother of plaintiff from testifying to the appearance of plaintiff immediately after the assault as the former described it on the witness-stand.

At the time of the felonious assault pleaded in the petition, plaintiff was a female child about 9 years of age and defendant was a boy of 18. The father of plaintiff and the father of defendant were neighboring farmers and were jointly interested in threshing grain. They were thus engaged on the latter's farm July 14, 1927. On the morning of that day plaintiff and her mother were at the home of defendant's parents, where the mother and other women were cooking for threshers. Defendant was at work hauling wheat and scooping it into a granary a short distance from his father's house. While at the granary defendant called to some one at the house for a broom. Plaintiff carried it to him. Shortly afterward her mother left the house, emptied some tin cans into a spring wagon used for removing garbage, and before returning to the house went to the granary. She testified on the witness-stand to what followed, saying, among other things, she heard a cry, looked through a door in the granary, saw defendant in an attempt to commit rape upon plaintiff, and called defendant's mother and told her of the offense. Later, in the direct examination of plaintiff's mother as a witness, she was asked, referring to her little daughter immediately after the assault:

"How did she appear to you as you observed her as to being scared or otherwise?"

The trial court sustained an objection to the question as calling for a conclusion; "incompetent, irrelevant, and immaterial." Plaintiff excepted and offered to prove that, at the time, plaintiff appeared to be scared. A similar objection to the offer was sustained by the trial court.

The exclusion of this testimony is properly presented for review. Error in the rulings is obvious. The appearance of plaintiff immediately after the felonious assault to which the witness testified was material to plaintiff's case. That plaintiff appeared to be seized by fear as an instantaneous result of the violence described by the witness was evidence tending to prove both assault and resulting injury. Fear may be apparent on the face of an outraged female child. If it was reflected by distorted features, that fact was part of plaintiff's case. Shock produced by a revolting crime against sex may injure both mind and body. The fear of imminent ravishment may be far-reaching in its effect. It has been known to produce permanent insanity. The evidence rejected was the best obtainable under the circumstances. Generally such testimony comes from nonprofessional and nonexpert witnesses. The mother of plaintiff was competent to testify to facial appearance as well as to outcry. If she told the truth, she saw her infant daughter, when crying, about to be violently ravished. Courts usually admit testimony like that excluded. The reasons for its admissibility have been judicially explained time and again. In *Struble v. Village of DeWitt*, 89 Neb. 726, it was held:

"Nonexpert witnesses are competent to testify as to circumstances and conditions that any person of ordinary intelligence might observe, and such witnesses may testify whether a person who has been injured, and with whom they were familiar, appeared to be suffering pain, the appearance of her injury, and similar matters observed by them tending to show the nature and extent of the injury."

In *McKennan v. Omaha & C. B. Street R. Co.*, 97 Neb. 281, 285, the court said:

"The first point urged is that the court erred in permitting nonexpert witnesses to testify to their conclusion or

opinion that McKennan was sick and hurt and suffered pain. It is said that this invaded the province of the jury. We think there is no merit in this contention. In 2 Jones, Commentaries on Law of Evidence, sec. 366, it is said, quoting from a New Hampshire case (*Hardy v. Merrill*, 56 N. H. 227): ' "But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." Admittedly difficult as the task of framing a rule on the subject is, Foster, Chief Justice, in the New Hampshire case referred to, formulated a rule, which, if properly applied, will serve as a useful instruction. Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.' See, also, 3 Wigmore, Evidence, sec. 1974; *Hewitt v. Eisenbart*, 36 Neb. 794; *Western Travelers Accident Ass'n v. Munson*, 73 Neb. 858."

"Fear" is enumerated as one of the subjects to which the rule of evidence applies. The principle generally recognized has been stated in the following language:

"When the circumstances are such that all the facts cannot be placed before the jury with such clearness as to enable them to draw a correct inference, and the province of the jury is not invaded, and the inference is not one for the drawing of which special skill, knowledge, and experience are required, an ordinary observer who has had suitable opportunity for observation may state the apparent physical condition of another person, or testify as to what are more distinctly inferences from animate bodily phenomena." 22 C. J. 618, sec. 711.

Error, therefore, is apparent on the face of the record. That the rulings reviewed were harmless is not a sufficient answer to the assignment of error considered. The circumstances disclosed by the entire record do not seem to justify a finding that the trial below did not result in a miscarriage of justice.

For the errors pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HELLEN UDE, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED APRIL 3, 1930. No. 27118.

Insurance: ACTION: DEFENSE: BURDEN OF PROOF. When a fraternal beneficiary society issues a benefit certificate to a new member and admits the insured to membership in the society and admits the acceptance by it of all dues and assessments required by the society under the terms of the benefit certificate, and pleads an affirmative defense, it devolves upon such fraternal society to establish such defense, and, where the evidence is conflicting, the question is for the jury.

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

Nelson C. Pratt and *George G. Perrin,* for appellant.

Heasty, Barnes & Rain, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY AND DAY, JJ., AND CARTER AND CHASE, District Judges.

DEAN, J.

This action was begun in the district court for Jefferson county by Hellen Ude, plaintiff, to recover $1,000 from the Modern Woodmen of America, defendant, under the terms of a fraternal beneficiary insurance certificate, dated June 15, 1927, which was issued by the defendant society to her uncle, Captain C. Parker, and wherein plaintiff was named

as the sole beneficiary. Plaintiff recovered a verdict and judgment thereon for $1,086.70, from which the defendant has appealed.

In its answer the defendant society admitted that all required assessments and dues had been paid by the insured from the date of his acceptance as a fraternal member until his death, and that due notice of his death, on February 4, 1928, was given by plaintiff to defendant. But as a part of its defense the society alleged that the insured was not in sound health when the certificate was issued, and that his death "resulted directly or indirectly from his use of intoxicating liquors."

On the part of the defendant, evidence was introduced tending to prove that certain witnesses, who were members of the society, had seen Parker when he appeared to be intoxicated, and some witnesses testified that he had some difficulty in breathing at times, and that from his general appearance they did not think that he was a strong man. Other members of the order testified that, while they believed that he drank, they made no objection to his admission into the brotherhood on this ground. But some testified that they had seen him in the performance of heavy physical labor, such as cutting ice and the like, not very long before his death.

Shortly before his death, Parker went to a physician to have his throat X-rayed. This physician testified that Parker was in more or less distress just before he died, but that he appeared to be a "fairly well-nourished man." Other witnesses testified for plaintiff that they had long known Parker and that he was a strong man and appeared to be in good health and that they had never seen him intoxicated. This evidence was introduced as tending to show that Parker's health and strength and his physique were in a normal condition until he was overtaken by his final illness.

The examining physician for the defendant society testified that he examined Parker three or four days before his death and that the patient then had an attack of flu and

was suffering from some throat trouble. The immediate cause of Parker's death, he testified, was probably bronchial pneumonia. This witness also testified that he never knew of Parker calling any doctor to attend him before his last illness came upon him. This witness was by marriage related to Parker, but, of course, it does not follow that his evidence should be held for naught.

The record discloses that it was the duty of the general secretary of the society to pass upon the applications for membership; that he did not necessarily know the applicants personally but relied upon the statements of the examining physicians in respect of physical condition and the like. It appears, too, from the evidence that the secretary relied on Parker's statements in respect of health and of abstention from the use of intoxicants, just as he did in that of other applicants. And it may be noted that Parker had previously been a member of the lodge but had allowed his membership to lapse, but he was subsequently reinstated; so that he passed within the portals of the society two times. The secretary, it may be observed, pointed out that the procedure for readmittance is the same as for admittance to membership under the original application.

The evidence before us conflicts in respect of the physical condition of the injured, but there is, nevertheless, competent evidence which tends to prove that Parker was not a weakling at any time material to this controversy. Some witnesses testified that they had seen him perform strenuous manual labor shortly before his death, as noted above, and some testified that he had the appetite of an average healthy man and appeared to be fairly strong. The examining physician apparently considered him a good risk, for he so reported him to the general secretary of the defendant society. And the jury, as triers of fact, found in favor of the plaintiff on the material issues which are involved here and against the defendant society, under instructions that appear to state the law applicable to the facts.

It appears to us that when a fraternal beneficiary society issues a benefit certificate to a new member and admits the

insured to membership in the society and admits the acceptance by it of all dues and assessments required by the society under the terms of the benefit certificate, and pleads an affirmative defense, it devolves upon such fraternal society to establish such defense, and, where the evidence is conflicting, the question is for the jury. Clearly the agents of the defendant society knew of the condition of which complaint is now made long before the death of the insured, but there is not a syllable of evidence which goes to show that any of the members in any manner remonstrated with the insured in respect of his alleged fondness for intoxicating liquors. *Modern Woodmen of America v. Colman,* 68 Neb. 660; *Modern Woodmen of America v. Berry,* 100 Neb. 820; *Warren v. Grand Lodge, A. O. U. W.,* 104 Neb. 810, and cases there cited.

The jury in the present case and the trial judge alike saw and heard and observed the demeanor of the witnesses when they testified and are therefore more capable of judging of the weight of the evidence than a reviewing court which is confined to the printed page for its conclusions as to the merits of the subject-matter. This rule is so well established in this jurisdiction that it has become a fundamental in Nebraska practice. In view of the facts before us, and the law applicable thereto, we conclude that the judgment of the district court must be and it hereby is

AFFIRMED.

ELMER J. NEVILLE, APPELLEE, V. CITY OF OMAHA, APPELLANT.
JOSEPHINE PLATNER, APPELLEE, V. CITY OF OMAHA, APPELLANT.
GEORGE T. MORTON, APPELLEE, V. CITY OF OMAHA, APPELLANT.
N. P. DODGE COMPANY, APPELLEE, V. CITY OF OMAHA, APPELLANT.
ALFRED D. FOSTER ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.
ELMER J. NEVILLE ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.
MYRON L. LEARNED ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED APRIL 3, 1930. NOS. 27283, 27284, 27285, 27286, 27287, 27288, 27289.

1. **Municipal Corporations**: PUBLIC IMPROVEMENTS: SPECIAL ASSESSMENTS. Special assessments upon real estate for a public improvement cannot exceed in amount the special benefit conferred upon the property by such improvement.
2. **Record** examined, and *held* to sustain the findings and decrees of the trial court.

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

John F. Moriarty, T. J. O'Brien and *B. J. Boyle*, for appellant.

Rose, Wells, Martin & Lane, Crofoot, Fraser, Connolly & Stryker, William Baird & Sons, Kennedy, Loomis & Offutt, W. H. Herdman, and *Johnson, Moorhead & Rine, contra.*

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

GOOD, J.

In each of the above entitled causes there is involved the question as to whether certain special assessments, made by the proper authorities of the city of Omaha for a public

improvement, exceed the special benefits conferred upon the properties of plaintiffs by reason of such improvement.

The city of Omaha caused Twentieth street, between Dodge street, on the north, and Leavenworth street, on the south, to be widened, and the cost of such improvement was nearly $800,000. Assessments for special benefits conferred were levied against the properties of plaintiffs and others either abutting upon or in close proximity to the widened part of the street. From the assessments so made the plaintiffs appealed to the district court, where the cases were tried together upon one record. In cases numbered 27283, 27284, 27286, 27287, 27288, and 27289, the trial court found that the special assessments exceeded the special benefits conferred, and canceled the assessments to the extent that they were found to be excessive. In case No. 27285, which involves several different parcels of land, the trial court found that, as to some of them, the special benefits equaled the amount of the special assessments, and, as to these parcels, the assessments were upheld. As to two tracts, the court found that no special benefits were conferred by the improvement, and, as to these, the special assessments were canceled in their entirety. As to the other tracts or parcels in that case, the trial court found that the assessments levied exceeded the special benefits conferred by the improvement, and canceled the assessments to the extent that they were found to be excessive. From the decree entered in each of the cases, the city of Omaha has appealed to this court, and the causes were here argued and submitted together.

Counsel for defendant city contend that the assessment in each case made by the city was not in excess of the special benefits conferred on the plaintiffs' properties by reason of the public improvement, and that the findings and judgment of the trial court are not sustained by the evidence.

Both parties concede the rule of law to be that special assessments on real estate for a public improvement cannot exceed the special benefits conferred by the improvement.

The questions for determination are, therefore, merely questions of fact. The evidence is in irreconcilable conflict as to the special benefits conferred by the improvement in each instance. That on behalf of the city, standing alone, tends to support the city's contention that the benefits conferred by the improvement are equal to or in excess of the amount of the assessment in each instance made; while the evidence on behalf of each plaintiff tends very strongly to show that in some instances no special benefit whatever was conferred by the improvement, and that in all other cases the special assessments were very greatly in excess of any special benefits accruing by reason of the public improvement.

The improvement consisted in taking a strip of land, 20 feet wide, on one side of the street for a number of blocks and a strip, 40 feet wide, on the other side for several blocks, and, as above noted, the total cost of the improvement was nearly $800,000. The amount assessed back against the real estate in the vicinity of the improvement, for special benefits, exceeded $700,000. Each of the parties called expert witnesses to testify as to the value of the respective properties of the plaintiffs before and after the improvement and as to the amount of benefits which were conferred on the respective tracts by reason of the public improvement. Each witness gave his reasons for his opinion. In addition, there was evidence by the plaintiffs tending to show that after the construction of the improvement rental values of the properties of the plaintiffs, which either abutted upon or were in close proximity to Twentieth street, had not increased, but in most instances had decreased. It was also shown that there had been a number of sales of real estate which had been assessed for special benefits, and that the actual sales were for less amounts than the conceded values before the improvement. It should be stated that the trial in the district court was about two and one-half years after the public improvement was determined upon and some time after it had been completely finished.

The record is voluminous. We have examined it with

considerable care, and we might apply, and rest the decision in this case upon, the rule often announced by this court, that in a trial *de novo* of a suit in equity on appeal this court, in reaching an independent conclusion, without reference to the conclusion reached by the district court, as required by the statute, is not precluded from giving some weight to the findings of the trial court when the evidence is conflicting and in serious doubt. We do not find it necessary, however, to invoke this rule, to aid the court in disposing of these appeals.

From an examination of the record, including the exhibits and the oral testimony, we are convinced that each finding of the trial court is fully and amply sustained by the evidence. We are satisfied that no special benefits accrued to the properties where the special assessments were entirely canceled, and we are fully satisfied that the special benefits, accruing to the properties by reason of the public improvement, in none of the cases exceed, if, indeed, they equal, the amounts to which the assessments were approved by the trial court. We are convinced that the evidence required the cancelation of the special assessments to the extent that it was done by the decrees in the several appeals.

No error prejudicial to the appellant is disclosed in any of the appeals. The judgment of the district court in each of the above cases is, therefore,

AFFIRMED.

OMER W. VOGES, APPELLEE, V. MECHANICS INSURANCE COMPANY, APPELLANT.

FILED APRIL 3, 1930. No. 27042.

1. Insurance: POLICY: CONSTRUCTION. Policy of insurance in suit construed and the following provisions, viz., "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," *held,*

(a) To be a valid stipulation and determinative of the rights and liabilities of the insurer and insured and applicable to losses not within the scope of the Nebraska valued policy act;
(b) That, when applicable, "the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused;" and
(c) That the provision, "the loss or damage * * * shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," constitutes merely a limitation upon the amount of the recovery, and is not a substantive measure of damages which the insured can invoke.

2. ———: ———: ———. As applied to the facts in the present case, the provisions of this policy contemplate that the "actual cash value" of the building as it stood on the ground prior to the fire shall be compared with the "actual cash value" of the same building at the conclusion of the fire, and that the difference shall be taken as the measure of damages, subject, however, to the limitations expressed in the terms of the policy.

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

C. C. Flansburg, for appellant.

Andrew P. Moran, R. H. Hagelin and *Fields, Ricketts & Ricketts, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

EBERLY, J.

This is an action on a fire insurance policy to recover damages for partial loss occasioned by fire, in the building insured, on the 7th day of November, 1927. There was a trial to a jury and verdict returned in favor of appellees for the sum of $5,432.66. Motion for new trial on behalf of the insurance company was overruled and judgment for this amount entered. The insurance company appeals.

The controlling question presented by the record is as to the correctness of the measure of damages as defined by the instructions and applied to the evidence then before the trial court. In fact, the substantial dispute between the parties is even more restricted. It may be said to be limited

to the question of damages to the rear or south wall of the building insured. The appellee sought to establish the damages to this portion of the building, as elsewhere, by proof of the work to be done and material needed to repair the building, and his evidence appears to be limited to these topics. Assuming this evidence of appellee to be true, it establishes only the cost of replacement of the damaged structure which is reflected in the verdict returned as the damages suffered and recoverable under the policy. In pursuance of this theory the district court instructed the jury:

"If you find from the evidence that the walls of the building are cracked or otherwise damaged by fire or water, or both, to such an extent that they would need be torn down and rebuilt, or repairs made to the walls, or any part thereof, which such damage and the cost of repairing said walls would be damages for which the plaintiff would be entitled to recover;" and also, "That the defendant, the insurance company, must accept the building in the condition in which it was at the time the insurance policy was written and cannot be heard to complain that the building may not have been a solid structure or that there may have been some defects in the walls prior to the date of insurance, but such defects can only be taken into consideration by you for the purpose of determining that, if there were such defects if the fire and water would have caused more damage than if the walls had been of solid structure, and, if so, that defendant would be liable therefor."

In this connection it appears that this building at the time of the fire occasioning the damage incurred had been constructed for 55 years. The brick used were soft sand brick, and the mortar, lime mortar. The rear wall was cracked and had been defective for more than 30 years prior to the date of the fire, and the evidence is to the effect that "the building had not been kept in repair." The effect of the litigation thus far is to require the insurance company to replace the wall which was defective and damaged prior to the fire by a wall substantially perfect in construction

and material irrespective of the relative value of each. Thus, in truth and in fact, the trial court establishes as a sole substantive measure of damages invokable as such by the insured that replacement, under the facts in this case, was the measure of recovery.

There is no substantial dispute between the parties on the fact that the loss comprising the cause of action in the present case is partial, and that therefore the policy in this case is an open one as contradistinguished from a "valued policy." It also fairly appears that the policy in dispute is "on a form prescribed by the department of trade and commerce as nearly as practicable in the form known as the New York standard" form. Comp. St. 1922, sec. 7836. The terms of this policy provide: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. * * * It shall be optional, however, with this company * * * to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do." There is no question under the facts appearing in the record that the insurance company has not sought to avail itself of the option last quoted.

With reference to substantially identical policy provisions it has been said: "Now, unless it can be shown that they had not the right so to contract, or have used terms possessing some other than their ordinary meaning and import, this basis for estimating the loss thus established must control and govern. It is the law of the contract established by the parties themselves. Nothing has or can be shown, we think, to countervail their right so to contract in regard to the subject-matter mentioned, or which controls the ordinary meaning of the terms used by them. This has not

and cannot be done. The contract is so plain that interpretation is not needed to arrive at what was meant. The parties meant only what they have plainly said." *Commonwealth Ins. Co. v. Sennett, Barr & Co.*, 37 Pa. St. 205. The language employed in the policy in suit applies to partial destruction of property and prescribes that in such cases "the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused." And solely as a limitation of the liability thus expressed appear the words: "And shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." In support of this conclusion it is to be noted that the quoted language is from the "New York standard form," and due to this fact decisions from the appellate courts of that state on this subject have a special importance. In consideration of the point suggested, the language quoted from the policy in suit was before the appellate court of New York in the case of *McAnarney v. Newark Fire Ins. Co.*, 247 N. Y. 176, in which it was determined that the provisions to the effect that the liability shall not exceed the cost of repair or of replacement is by its terms merely a limitation on the insurer's liability, and is not a substantive measure of damages which the insured can invoke. See, also, *McCready v. Hartford Fire Ins. Co.*, 61 App. Div. (N. Y.) 583.

In the case of *Citizens Savings Bank & Trust Co. v. Fitchburg Mutual Fire Ins. Co.*, 86 Vt. 267, the supreme court of that state in construing the identical provision here presented stated as its conclusion: "The policy makes the cash value of the building destroyed the basis of ascertainment, taking into account its previous depreciation from all causes; and makes the cost of present construction a mere limitation upon the extent of the recovery. The cost of a new building may limit the recovery, but cannot be made a controlling factor in the conduct of the inquiry. The cash value of the building destroyed is the fundamental fact to be established, and any evidence which has a legitimate

tendency to prove that fact is admissible." And it further declared: "The apparent purpose of the provision is to protect the insurer from appreciations of real estate values which are not caused by and do not depend upon the cost of construction. The policy does not make the cost of replacement the invariable test of actual cash value, but limits the recovery in cases where an ascertainment according to actual cash value would exceed that amount. The defendant may guard against a possible finding in excess of the cost of replacement by introducing evidence of what the cost would be. But it cannot confine the plaintiff to proof of that character by making the cost of construction the basis of ascertainment."

In the case of *Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 53 Neb. 123, in a case where the character of the property as to whether real or personal was in question, the rule was announced that the insured "may show the value as it was just before the fire, and its value just after, as affording data for the assessment of his damages, without attempting to classify the property as real or personal."

We therefore conclude that the controlling language heretofore quoted from the policy in suit applies to both partial and total losses, and, except as governed by our valued policy enactment, to real as well as personal property. As applied to a partial destruction of real estate the language: "The loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused"—contemplates that the "actual cash value" of the building as it stood on the ground shall be compared with the "actual cash value" of the same building after the conclusion of the fire, and that the difference shall be taken as the measure of recovery, subject however to the limitation expressed in the terms of this policy. It would seem that when the owner of a building, damaged through the hazard of fire, has received compensation for his loss which, together with the then actual cash value of the damaged structure after the conflagration, con-

stitutes the equivalent of the actual cash value of the building immediately prior thereto, he, as assured, has been fully indemnified as contemplated by the terms of his contract. More than this he cannot exact. In the present case it would seem obvious that if the plaintiff be sustained in his claim for repairs, including the replacement of the rear wall, his building will then possess an actual cash value in excess of what it had prior to the time of the fire. It is evident therefore that the real error committed by the trial court was to regard the limitation stated in the terms of the policy, "and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," as a substantive measure of damages instead of a limitation upon what might be otherwise recovered under the terms of the contract.

It follows, therefore, that the cause must be, and is, reversed and remanded for further proceedings consistent with this opinion.

REVERSED.

BENJAMIN L. ALLENDER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1930. No. 27078.

1. **Evidence** examined, discussed in the opinion, and *held* sufficient to sustain the verdict of the jury.
2. **Trial**: PEREMPTORY INSTRUCTION. Where there is evidence on a controverted issue of fact sufficient to support a verdict in favor of plaintiff, it would be erroneous to give a peremptory instruction in favor of defendant.
3. **Evidence**: ADMISSIBILITY: MARKET VALUE. Where the question was as to the market value of live stock at the place said live stock was to be marketed, the testimony of a witness in the live stock business at that place that he had been buying and selling cattle daily for years, that his firm held auction sales every Saturday and that he was the auctioneer when these sales were held, that he received the market reports daily over the radio, that he was a subscriber to the Daily Journal and the Stockmen's Journal and consulted them as to the prices prevailing on the day the cattle in question were sold, that it was his custom to see what happened to the market every day, that he

saw the cattle in question and personally auctioned them, is competent, and such testimony was admissible for the purposes for which it was offered.

4. ———: COMPETENCY OF EXPERT: MARKET VALUE. Likewise, a witness testifying that he had years of experience in the cattle business and in shipping cattle, had seen the cattle in question on different days immediately prior to the time they arrived at the place of unloading, was familiar with the market value of cattle at various live stock markets, of which the place of unloading the cattle in question was one, and knew what cattle were selling for at the time on these various markets, is a competent witness as to the market values of cattle at the place of unloading or where the cattle were to be marketed.

5. ———: ———: WEIGHTS OF CATTLE. Testimony of witnesses experienced in purchasing and handling cattle, buying and selling them on their judgment and who had seen the cattle in question at the loading point at or about the time they were loaded, some of whom had seen the cattle loaded, knew the kinds and sizes of said cattle, had found by experience that by inspection they could estimate the weights of such animals with accuracy, is competent to show the average weight of the animals at the loading point.

6. Appeal: NEW TRIAL: DISCRETION OF COURT. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court and, on appeal, the ruling thereon will not be disturbed, unless a clear abuse of discretion is shown.

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

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

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

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

Plaintiff shipped four carloads of cattle over defendant railroad from Oral, South Dakota, to Fremont, Nebraska, and instituted this action in the district court for Holt county to recover damages to said cattle on account of negligence, rough handling, and also for the loss of three head

and the loss by death of one, and unreasonable delay in transit.

Defendant denied negligence on its part, and alleged that if financial loss accrued to plaintiff said loss was due to plaintiff's negligence.

Plaintiff replied to defendant's answer by a general denial.

After the admission of all of the evidence, the district court took from the jury all consideration of the question of unreasonable delay in transit on the part of defendant.

The jury returned a verdict for plaintiff in the sum of $1,059.69, upon which judgment was entered, and from which judgment defendant appeals.

Defendant contends that the verdict is not sustained by sufficient evidence, and that the court erred in refusing to direct a verdict for defendant. These two assignments may be considered together.

In determining the sufficiency of the evidence all of the evidence must be taken into consideration.

Plaintiff, in support of his contention as to the rough handling of the cattle by, and the negligence of, defendant, related what occurred on the trip, that the movement of the train was unusually rough, intimated that he was thrown from his seat in the caboose on account of the rough handling of the train *en route,* and also stated that he got out several times to examine the cattle, and that in practically every instance there were some cattle down in the cars and that he was obliged to get them up with a prod pole. He also introduced the testimony of witnesses, who were experienced in the cattle business, who saw the cattle and had examined them before they were shipped, and also introduced the testimony of other experienced cattlemen to show the condition of the same cattle at the time they arrived at Fremont, where they were to be marketed, and that at that time the cattle were bruised, gaunt, lame, and the hair had been scraped off certain of the animals, that some were bleeding from their heads, the hoofs of others were bleeding, and other general statements as to their appearance and condition.

Contra to this evidence defendant introduced evidence to show that nothing unusual happened on the trip, that it was necessary and incident to the shipping of cattle that they be prodded up and made to stand, and produced train records as to the handling of the train and the location of the cars containing the cattle in the train.

Defendant cites the case of *Quinby v. Union P. R. Co.*, 83 Neb. 777, to the effect that the carrier is not liable for injuries to live stock due to their propensities to injure each other from fright or other causes. The case cited is distinctively different from the case at bar. The stock in question in that case was left on the tracks of defendant company for about three hours. There is a distinction where stock is detained in a car standing still for three hours and where stock is transported over tracks a distance of approximately 500 miles and consuming 35½ hours on the trip. We have no quarrel with the law as stated in the case cited, but we cannot agree with counsel for defendant that the case at bar is governed by the same rules as in the case cited. We are inclined to accept the decision of this court in case of *Herold v. United States Express Co.*, 98 Neb. 217, in which this court held: "While a common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, yet, where animals are shipped, it is its duty to exercise such care as the circumstances indicate is reasonably necessary in order to safely transport them, and if, on account of a failure to exercise such care, the animals are injured, are lost, or die, the carrier may be liable for damages."

From the evidence it appears that there was a controverted issue of fact upon the proposition of negligence of defendant company and the rough handling charged to it. This being true, the court was in duty bound to submit the issue of negligence and rough handling to the jury, and, as this court has said, where there is a controverted issue of fact, it would be erroneous for the trial court to give a peremptory instruction. The trial court was correct in refusing to direct a verdict for the defendant.

Defendant assigns as error the receiving of the testimony of plaintiff and his witnesses, Moore and Borders, as to the market value of the cattle at Fremont, said testimony being without foundation, contrary to law, hearsay, and incompetent.

Plaintiff's witness, Colonel Borders, testified that he was an experienced cattle dealer and in the cattle business at the place of unloading the cattle, that he auctioned cattle once each week, that he personally auctioned these cattle, that he received the quotations on the cattle market over the radio each day, that he read the Stockmen's Journal and the newspapers, that he was acquainted with the prices of cattle at the place of unloading on the day they arrived there, and gave his opinion as to the market value of the cattle at Fremont.

Plaintiff, an experienced cattle dealer, testified as to the condition of the cattle, their kinds and classes, their average weights at the place of loading, and their appearance and condition at the place of unloading.

Witness Moore, an experienced cattleman, saw these cattle on different days at the place of loading, knew their sizes and kinds, had bought and sold cattle, and was acquainted with the market values of the cattle at the place where they were unloaded and to be marketed.

Such testimony is competent and admissible to show the market values of cattle at the place where they are to be marketed. *Westphalen v. Atlantic N. & S. R. Co.*, 152 Ia. 232; *Hudson & Co. v. Northern P. R. Co.*, 92 Ia. 231.

In the *Westphalen* case, *supra*, the trial court admitted the testimony of men who were experienced in the purchase and handling of cattle, and who had been in the habit of buying and selling cattle on their judgment, and who had found by experience that they could by inspection estimate the weights of such animals with accuracy, and the appellate court held the testimony of such witnesses competent from observation of the cattle at their destination as to their average weight at the place where loaded for transportation.

In the *Hudson* case, *supra,* the court held that a witness is competent to speak as to the market value of live stock, if he bases his opinion upon the market reports and quotations.

Defendant objected to the competency of this testimony for the reason that there were no sales' records of any other cattle shown as of January 14, 1928, the date that most of these cattle were auctioned, and that stock journals, which are competent evidence, were not received in evidence to show the state of the market on that date, that no record of other sales was shown except the sale of one bull calf, which was not sold by the pound, and, further, that the witness Moore was not in Fremont on the date the cattle arrived there or were sold.

Defendant cites the case of *Trennt v. Chicago, B. & Q. R. Co.,* 107 Neb. 406, wherein this court held that market reports in journals, properly authenticated, are competent evidence of the state of the market. Defendant contends that in the case at bar no such market reports and journals were received in evidence.

In the case of *Chicago, B. & Q. R. Co. v. Todd,* 74 Neb. 712, it was held that market reports and journals, such as the commercial world relies upon, are competent evidence of the state of the market.

In the *Trennt* case, *supra,* the testimony of a witness was held to be incompetent who testified that he did not know the market at or near the time in question, nor remember the number, kind, or class of property under consideration, or any other similar transaction, and whose sole statement bearing on such question was what he recollected three years later. In that case it was held that, while market reports, properly authenticated, are competent evidence of the state of the market, it does not follow that they are the only competent evidence thereof. This is true. However, weighed against the evidence of plaintiff and his witnesses in the case at bar, as hereinbefore set out, we believe plaintiff and his witnesses competent, under the circumstances of this case, to testify to the market values of the stock at the place of unloading.

Defendant further complains of and cites as error the admission of evidence introduced on behalf of plaintiff as to the market values of the cattle at the place of loading.

Plaintiff's evidence shows in this respect that the witnesses saw the cattle at the place of loading, knew the kinds and sizes of the cattle at that point, were experienced cattlemen, bought and sold cattle on their judgments, and could tell the weights of cattle by inspection with accuracy. The authorities in support of the admissibility of this evidence have heretofore been cited.

Defendant criticizes the admissibility of this evidence on the theory that the witnesses were not testifying from written memoranda made at the time, and that the memorandum from which plaintiff testified was made during the progress of the trial, and that without it such evidence, after a lapse of eleven months, was wholly incompetent. Persons of experience in the cattle business, knowing the kinds and sizes of the cattle purchased and having estimated at one time their weights and values, may recall the particular cattle in question when the subject-matter is called to their attention.

Counsel for defendant contend in this action that the subject of estimated weights and shrinkages is not a proper basis for recovery for rough handling in transit, as long as the issue of unreasonable delay had been withdrawn from the jury's consideration. While most of the cases upon which recovery is based for estimated weights and shrinkage in transit have been instituted and the recovery based upon unreasonable delay in transit, it seems apparent that on a long trip, even when the question of unreasonable delay has been withdrawn from the jury's consideration, negligence and rough handling on the part of defendant company could cause shrinkage in the animals, and that plaintiff is not bound to base his action strictly on the question of unreasonable delay, if the evidence warranted the findings of negligence and rough handling on the part of the defendant over a long trip such as the one in this case.

All of the instructions of the court have been examined

and considered together and properly reflect the law of the case and contain the substance of the instructions tendered by defendant.

Defendant's next assignment of error is that the court refused to grant a new trial on the ground of newly discovered evidence. In support of its motion defendant introduced an affidavit of one Jay Harrington who stated that he had purchased 17 head of mixed cattle from plaintiff on the 13th of January, 1928, the day before the cattle were auctioned at Fremont by Colonel Borders. The testimony was that Colonel Borders, who handled the cattle for plaintiff, was not clear as to the number of cattle that were sold to the said Harrington at private sale, but recalls that it might have been as high as 18 or 20 head. Plaintiff placed the number sold to Harrington at 16 head. Defendant contends that, inasmuch as the case went to the jury on the question of the loss of three head of cattle, and it was shown by the affidavit of Harrington that he had purchased 17 head, defendant accounted for one of the extra head alleged to have been lost and a new trial should have been granted.

Further supporting its contention, defendant states that exhibits A and 2 offered and received in evidence show a change by erasure and a change in the figures, so that the original and copy are not consistent with each other, with the intimation that a forgery was evident, and that this case was conceived upon these alleged changes as indicated by defendant in referring to these exhibits. We are inclined to the view that the exhibits, having been offered and received in evidence with the changes as they existed, were taken advantage of by defendant and that matter argued to the jury.

Defendant contends that 19 head of cattle were sold to Jay Harrington. Plaintiff's testimony was to the effect that 16 head had been sold to Mr. Harrington. This evidence appears in the record and was probably argued and stressed by defendant to the jury. The fact remains that from the record it appears that 143 head of cattle were loaded at Oral for shipment to Fremont. At Fremont, by

count, one calf was dead and three head of cattle were missing. The jury had a right to weigh the evidence, as hereinbefore set forth, for the reason that there is a direct conflict in the evidence as to the number of cattle alleged to have been lost. We feel that all the evidence was before the court and that the jury had the full benefit of it.

The trial judge overruled the motion for a new trial. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court, and, on appeal, the ruling thereon will not be disturbed, unless a clear abuse of discretion is shown. *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694; *Peterson v. Kouty*, 103 Neb. 321.

We conclude that the judgment of the lower court must be, and is hereby,

AFFIRMED.

HENRY HAWKINS, APPELLANT, V. W. E. MULLEN ET AL., APPELLEES.

FILED APRIL 11, 1930. No. 27308.

Vendor and Purchaser: FORECLOSURE: ORDER OF SALE: STAY. When, on the merits of a suit in equity on a contract to purchase land which a vendor refused or was unable to convey, the vendee treats the contract as a mortgage and accepts a decree of foreclosure granting him a lien for the money paid by him as fully as if it were a mortgage, the vendor is entitled to a stay of the order of sale under the decree upon filing his written request in compliance with section 8988, Comp. St. 1922.

APPEAL from the district court for Stanton county: CHARLES H. STEWART, JUDGE. *Reversed.*

A. E. Wenke and *Zacek & Nicholson*, for appellant.

S. L. Winters, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and CARTER, District Judge.

GOSS, C. J.

The only question involved is whether the appellant, Haw-

kins, was entitled to a stay of nine months as if upon a decree for the sale of mortgaged premises.

The decree was entered pursuant to a mandate in *Hawkins v. Mullen,* 118 Neb. 129. The nature of the case must be stated to understand the issue involved here. Hawkins brought suit to quiet title against various parties. He obtained a favorable decree against all of them in the district court. Two of them appealed. One was Farmers Union Cooperative Association. It had a mechanic's lien arising by reason of repairs and improvements upon the premises, made partly under the direct authority of Hawkins and ratified by him as to the rest. The other appellant was Fleming. His interest arose by reason of the fact that his mother's rights in the premises had been assigned to him by quitclaim deed. The mother had paid Hawkins $9,500 as part payment on the land under an oral contract. He had declared the contract forfeited, and had refused to accept the balance of the purchase price or to refund the money paid. As shown in the opinion on the merits, Fleming claimed that the quitclaim deed "was in fact an equitable mortgage representing the amount of money advanced toward the purchase price of the property." This court reversed the judgment and remanded the case, with directions to the district court to ascertain the amount due on the mechanic's lien, to decree it to be a first lien on the premises and award foreclosure thereof; to award Fleming $9,500 with interest at 7 per cent. per annum "from the date of the forfeiture of said contract by appellee, as a condition for the cancelation of the quitclaim deed, and that, in default of such payment by appellee, the said deed stand as a second lien on said lands for the payment of said amount, and that appellant have foreclosure thereof." The decree was entered July 2, 1929, the request for stay was filed July 8, 1929, and the order, striking the request from the record and directing the issuance of an order of sale as provided in the decree, was made September 7, 1929.

Section 8988, Comp. St. 1922, is as follows: "The order of sale on all decrees for the sale of mortgaged premises

shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same: Provided, if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof."

There are, naturally, few cases construing this statute. We have held that the word "defendant" applies to the mortgagor or to persons in privity with him, and not to a cross-petitioner seeking to enforce a judgment lien upon the premises. *Clark v. Pahl,* 75 Neb. 161. That it does not apply to strict foreclosures. *Harrington v. Birdsall,* 38 Neb. 176. And, where a land contract was treated as a mortgage, a stay of execution upon request of defendants will be upheld as in the case of a mortgage. *Spencer v. Moyer,* 29 Neb. 305.

It is apparent that there is not involved here the enforcement of any lien for a judgment secured in a law action, nor was there any issue resulting in a decree for strict foreclosure. Hawkins contended, when the case was before us on the merits, as recited in the opinion there, "that, even though the appellant might be entitled to a return of the purchase money paid, it cannot be recovered in this action, but that he is relegated to his remedy at law, and this was the holding of the trial court." Fleming, however, prevailed on this point. It is thus clear that throughout the case, when in this court before and in the final decree in favor of Fleming's lien in the district court, his lien was treated as a mortgage lien.

In *Spencer v. Moyer, supra,* it was said: "The instrument sued on is not a technical mortgage, yet it was declared on in the petition substantially as a mortgage, was claimed to be a mortgage by the defendants in the answer, and the form of the decree is the same as it would have been had it been a mortgage in the most technical sense of the word."

The case last cited has not been criticized or overruled.

It is sought to be distinguished as not applicable because the request for stay there upheld was made by the vendee, whereas here the request was made by Hawkins, the vendor. We can see no force in the argument when considered in the light of the statute and its intent. The statute gives a "defendant" a right to a stay. Strictly speaking, Hawkins was not a defendant. He forestalled the defendants by bringing his suit in equity against them. They set up their equitable rights in his lands and secured no more and no less than if they had been plaintiffs and he the defendant. He did defend their claims and so as a matter of equity he was the defendant in Fleming's counterclaim asking for the allowance of an equitable lien and its foreclosure on the land of Hawkins to secure the repayment of the money paid for a title that Hawkins failed to transfer. We think that, within the meaning and intent of the statute, the request for stay was made by a "defendant."

The rule, as applicable to the instant case, may be put in this form: When, on the merits of a suit in equity on a contract to purchase land which a vendor refused or was unable to convey, the vendee treats the contract as a mortgage and accepts a decree of foreclosure granting him a lien for the money paid by him as fully as if it were a mortgage, the vendor is entitled to a stay of the order of sale under the decree upon filing his written request in compliance with section 8988, Comp. St. 1922.

For the reasons stated, the appellant was entitled to the stay of the order of sale for nine months from the date of the decree. The court erred in striking the request from the record. The judgment of the district court is therefore reversed at the costs of the appellee on this appeal in this court.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK: E. J. DEMPSTER, RECEIVER, APPELLANT: HENRY G. SEYFER ET AL., INTERVENERS, APPELLEES.

FILED APRIL 11, 1930. No. 26978.

Appeal: MOOT QUESTIONS. An appeal presenting nothing but moot questions may be dismissed upon the appellate court's own motion.

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

C. M. Skiles, I. D. Beynon and *Albert S. Johnston,* for appellant.

Paul Jessen, Pitzer & Tyler and *D. W. Livingston, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and LANDIS, District Judge.

ROSE, J.

This is a controversy between creditors of an insolvent state bank and the receiver over the allowance of a claim.

In a proceeding by the state of Nebraska to wind up the affairs of the Dunbar State Bank, Henry G. Seyfer, James Murray, Earl Seyfer and H. S. Westbrook intervened, filed a claim for $5,000 and pleaded a preference requiring payment out of funds in the hands of the receiver, if sufficient, but, if insufficient, demanding payment of the remainder out of the bank guaranty fund. The receiver contested the claim. Upon a trial of the issues raised by the pleadings, the district court ordered the receiver to pay interveners $1,100 out of bank assets or funds in his hands and allowed the remainder, or $3,900, as a claim against the bank guaranty fund. The receiver appealed to the supreme court, where the judgment of the district court was affirmed. *State v. Dunbar State Bank,* 230 N. W. 99.*

* Note—Opinion withdrawn, and judgment of affirmance adhered to in opinion reported in *State v. Dunbar State Bank,* 120 Neb. ——.

Before the transcript of the proceedings below was filed in the supreme court, however, interveners presented to the district court in the same case a motion for the immediate payment of the $1,100, as allowed, on the grounds that the receiver failed to supersede the original judgment within the time required by law and that he had not obtained permission to appeal. This motion was sustained by the district court and, from the order requiring such payment, the receiver perfected a second appeal, which is the only one now under consideration, the original judgment having been affirmed as stated.

In the supreme court interveners presented a motion to dismiss the second or present appeal on the grounds that permission to take it had not been granted by the trial court and that the original judgment had not been superseded. This latter motion was overruled by the supreme court with a view to a subsequent inquiry into the merits of the second appeal. Prior to the affirmance of the original judgment on the first appeal, the questions raised on the merits of the second appeal were argued and submitted but not determined.

The record now shows that the affirmance and the opinion upon the first appeal will prevent the receiver from obtaining any relief upon the second or present appeal. Nothing but moot questions remain undetermined. The controlling principle on the record as it now stands has been stated as follows:

"Courts properly decline to express an opinion on a mere abstraction, and may act on their own motion in dismissing an appeal involving only an inquiry of that nature." *McCarter v. Lavery*, 101 Neb. 748.

See, also, *Ververka v. Fullmers*, 83 Neb. 6; *Heesch v. Snyder*, 85 Neb. 778; *Brown v. Buckley*, 86 Neb. 572; *Deines v. Schwind*, 89 Neb. 122; *State v. Trainor*, 91 Neb. 848; *State v. Armstrong*, 94 Neb. 592; *Schlanbusch v. Schlanbusch*, 103 Neb. 588.

The questions argued in the supreme court upon the motion in the second appeal and upon the merits thereof, hav-

ing become moot questions, will not now be determined. The former order overruling that motion is therefore vacated and the second or present appeal dismissed at the costs of the receiver.

APPEAL DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK: E. J. DEMPSTER, RECEIVER, APPELLANT: HENRY G. SEYFER ET AL., INTERVENERS, APPELLEES.

FILED APRIL 11, 1930. No. 26979.

Banks and Banking: APPEAL: AFFIRMANCE. Judgment allowing claims against the receiver of an insolvent state bank and an order requiring immediate payment of a dividend out of funds in his hands affirmed as being free from error.

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

C. M. Skiles, I. D. Beynon and *Albert S. Johnston,* for appellant.

Paul Jessen, Pitzer & Tyler and *D. W. Livingston, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and LANDIS, District Judge.

ROSE, J.

This is a controversy between creditors of an insolvent state bank and the receiver over the allowance of claims.

In a proceeding by the state of Nebraska to wind up the affairs of the Dunbar State Bank, Henry G. Seyfer, Earl Seyfer, H. S. Westbrook and James Murray filed two claims each for $2,000, or $4,000 in all, and pleaded a preference requiring payment out of funds in the hands of the receiver, if sufficient, but, if insufficient, calling for payment of the remainder out of the bank guaranty fund. The receiver contested the claims. Upon a trial of the issues raised by the pleadings, the district court ordered the receiver to pay

interveners forthwith $784.70 out of bank assets or funds in his hands and allowed the remainder, or $3,295.30, as a claim against the bank guaranty fund. Afterward interveners applied to the district court for a peremptory order on the receiver requiring immediate payment of the $784.70 as allowed. From an order granting the application the receiver appealed.

In the supreme court interveners submitted a preliminary motion to dismiss the appeal. This was temporarily overruled. The case was subsequently argued and submitted on its merits.

Does the record disclose error? The judgment allowing the claims is based on two valid, unpaid certificates of deposit issued by the Dunbar State Bank for money received in the regular course of business while the bank was in actual operation as a commercial enterprise. Interveners are the claimants and the holders of the certificates of deposit. The deposits evidenced by the certificates were never withdrawn. The receiver retained in his hands funds equivalent to 22 per cent. of the claims, or $784.70, to pay an authorized dividend for that sum, in the event of their allowance, in common with other claims of the same rank. The pleadings and the proofs so show. The judgment allowing the claims and the peremptory order to pay the dividend are therefore free from error.

In view of the conclusion reached on the merits of the appeal, the preliminary ruling on the motion to dismiss is withdrawn.

AFFIRMED.

ROBERT E. JONES ET AL., APPELLANTS, V. JABE B. GIBSON ET AL., APPELLEES.

FILED APRIL 11, 1930. No. 27185.

Taxation: TAX SALE CERTIFICATE: FORECLOSURE: UNKNOWN OWNER: JURISDICTION. Where a deed to real estate has not been recorded by the purchaser thereof until after the institution of proceedings to foreclose a tax sale certificate thereon, under section 6092, Comp. St. 1922, and the plaintiff in such case filed

with his petition the required affidavit that the owner of the land is unknown, and cannot be found, and that he therefore made the land a party to the foreclosure action, the court thereby acquires jurisdiction thereof to proceed in the premises under the above act.

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

E. D. Crites and *F. A. Crites,* for appellants.

Shurtleff & Spillman, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

DEAN, J.

This is an injunction suit begun by Robert E. Jones and Jennie E. Jones, his wife, as plaintiffs, in the district court for Dawes county, wherein they sought to enjoin the defendants, Jabe B. Gibson, as owner of a tax sale certificate, and Vet Canfield, sheriff of Dawes county, from proceeding with the sale of 1,200 acres of land owned by plaintiffs pursuant to the provisions of a tax sale certificate under which the tax foreclosure suit was begun. From an order dismissing their petition the plaintiffs have appealed.

Plaintiffs obtained a mortgage deed to the 1,200-acre tract of land, which was made, executed, and delivered to them October 14, 1920, by the then owners of the land, namely, Benjamin A. Thornton and Elsie M. Thornton, his wife. And it is alleged that the mortgage deed was given to secure the payment of a certain promissory note in the principal sum of $9,000, executed by Thornton and his wife, and that the mortgage was foreclosed by the mortgagees as against the Thorntons, September 24, 1924, and, on May 5, 1926, the sale of the land was confirmed by the court. Subsequently, on appeal, the above judgment, November 29, 1927, was affirmed.

Gibson purchased the above tax sale certificate November 6, 1922, and began a foreclosure proceeding thereon October 10, 1927. In his petition he alleged that "the own-

er of the said real estate described in this cause of action is unknown and cannot be found and for that reason said real estate is made a party defendant to said action."

On the merits, Jones and wife, as plaintiffs, contend that the affidavit of defendant Gibson, to which reference is hereinafter made, is false and untrue, and they allege that they, as owners of the real estate in suit, appeared of record, and that the summons which was served on the Thorntons, then residing on the premises, had no force and effect as against the plaintiffs, and that the court was therefore without jurisdiction to proceed against the land. It may here be noted, however, that the record discloses that the plaintiffs did not appear of record as owners of the land until the filing of a sheriff's deed February 9, 1928, and that, as above noted, the defendant Gibson began the tax foreclosure proceeding October 10, 1927, which was about four months before the sheriff's deed was filed of record.

Defendant Gibson, in his brief, argues that, although the district court confirmed the sale of the land on application of the plaintiffs, pursuant to their mortgage foreclosure suit, the appeal of the mortgage foreclosure proceedings was then pending and undetermined in this court at or about the time defendant began the above proceeding, and that the owner of the land was therefore "unknown." It appears that the plaintiffs' deed was not recorded until February 20, 1928, and the tax foreclosure proceeding, as noted above, was begun October 10, 1927, and therein this averment appears, namely: "That the owner of the real estate above described and named as party defendant in said action, and each particular tract thereof, is unknown and cannot be found." Section 6092, Comp. St. 1922, provides:

"The plaintiff may also at his option make any or all of the parcels of land described in his petition a defendant, and, in case the owner of any such parcel of land shall be unknown and cannot be found, may proceed against the land itself, but in such case the service must be as in the case of a nonresident defendant."

In *Leigh v. Green*, 64 Neb. 533, we said: "When the owner of the land is not known to the holder of a tax certificate and cannot be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings; and in such case allegations in the petition and an affidavit for service by publication on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack."

And in a later case, namely, *Gwin v. Freese*, 90 Neb. 15, we held: "In an action to foreclose a lien for taxes, when the action is against the land itself, and the petition, duly verified, contains the allegation that the owner of the land is unknown, the court will not be without jurisdiction for want of such allegation in the affidavit for service by publication."

In the present case, of course, the affidavit of defendant did allege that the owner of the land was unknown. And where a deed to real estate has not been recorded by the purchaser thereof until after the institution of proceedings to foreclose a tax sale certificate thereon, under section 6092, Comp. St. 1922, and the plaintiff in such case filed with his petition the required affidavit that the owner of the land is unknown and cannot be found, and that he therefore made the land a party to the foreclosure action, the court thereby acquires jurisdiction thereof to proceed in the premises under the above act.

Plaintiffs allege that defendant's cause of action in the tax foreclosure suit is barred by the statute of limitations and that it was not brought within the statutory period named in section 6097, Comp. St. 1922, which provides:

"If the owner of any tax sale certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold."

As noted herein, defendant's tax sale certificate is dated

November 6, 1922, and he began foreclosure proceedings October 10, 1927, which was clearly within the time that would prevent the application of the statute of limitations from barring the beginning of an action to foreclose the tax lien against the land in suit. The five-year period allowed by the statute would not have expired for almost thirty days after the action was begun.

From an examination of the record and the law applicable thereto, we conclude that the judgment of the district court is right and must be and it hereby is in all things

AFFIRMED.

L. L. FOSTER, APPELLEE, V. J. C. HARTMAN, APPELLANT.

FILED APRIL 11, 1930. No. 26973.

1. **Evidence** examined and *held* insufficient to support the verdict.
2. **Guardian and Ward**: CUSTODY OF WARD. Unless licensed so to do by the state department of public welfare, a guardian is without authority to place out or give the care and custody of his minor ward to any person, other than temporarily.
3. ———: ———: PUBLIC POLICY. A contract by the terms of which a guardian attempts to give the custody and control of his 12 year old ward to another person until the minor shall have attained the age of 21 years, and by the terms of which contract the minor is to be sent to school, boarded and clothed until he shall have completed the high school course, and is thereafter to work and labor for the person with whom he has been placed until he shall have attained the age of 21 years, is contrary to public policy and void.
4. **Damages** are not recoverable for the breach of a void contract.

APPEAL from the district court for Franklin county: J. W. JAMES, JUDGE. *Reversed and dismissed.*

Bernard McNeny and *Thomas Robertson*, for appellant.

Byrum & Thompson, contra.

HEARD before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

GOOD, J.

This action arose in the county court wherein plaintiff

filed a claim against the estate of Harold O. Pettite, a minor, for the sum of $1,061, for board, clothing and other items alleged to have been furnished to such minor. To this claim objections were filed by Hartman, the guardian. On hearing, the county court disallowed the claim. Plaintiff appealed to the district court and therein filed a petition in which he alleged, for his cause of action, that he had entered into an oral agreement with the guardian of the minor, by the terms of which plaintiff was to clothe and board the minor and send him to school until he had finished the high school course, and for his compensation the minor was to work for plaintiff until the minor had attained his majority. Plaintiff further alleged that after the minor had attained the age of 17 years and had finished the high school course he had, at the instance of his guardian, left plaintiff's home and employment and refused to carry out the contract.

That the cause of action set out in the petition in the district court is materially different from the claim filed in the county court is clearly apparent. The claim filed in the county court was one upon account. The petition in the district court is for damages for breach of contract. So far as the record discloses, that question was not brought to the attention of the district court. Issue was joined upon the petition, trial had, and verdict rendered in favor of plaintiff for $1,061, on which judgment was entered. The guardian brings the cause to this court to review the judgment.

That the verdict is not sustained by sufficient evidence and that the judgment is contrary to law are the only errors assigned that need be considered.

From the record it appears that plaintiff and the guardian entered into a written contract whereby plaintiff, for a stipulated sum, was to board and clothe the minor until he had attained the age of 12 years. This contract was carried out and the agreed compensation paid. Plaintiff's evidence tends to show that shortly after the minor became 12 years of age a further oral agreement was entered into between

plaintiff and the guardian, by the terms of which the minor was to remain in the home of the plaintiff, who was to clothe and send the minor to school until he had completed the high school course, and that for his compensation plaintiff was to retain the control and custody of the minor and have the benefit of his services until he had attained the age of 21 years. The guardian denies that he made any such oral agreement.

Conceding that such an agreement was made, let us examine the evidence to see if it is sufficient to support the verdict. The only evidence offered by plaintiff as to the amount that he should recover for the breach of the alleged contract is what he claims was the value of the board, clothing and other items which he furnished to the minor during the time that he was attending high school. If such a contract was made and if it is valid, the measure of plaintiff's recovery would be the value of the minor's services from the time he left the plaintiff's home until he attained his majority, less the reasonable cost of the minor's board and clothing. There is no evidence as to the value of such services or the cost or expenses of the minor's board and clothing during such period. The evidence is wholly insufficient to support any recovery.

A more serious question is presented, namely: Did the guardian have any power to make the alleged oral contract? Section 8265, Comp. St. 1922, so far as applicable, provides: "No person, other than a parent, shall place out, or give the care and custody of, any child, to any person or association, other than temporarily, unless such person shall be duly licensed by the department of public welfare under such rules and regulations as said department shall prescribe."

The contract would require the minor to perform, for a period of four years, services for the plaintiff without any designation as to the character of the labor to be performed, and would create a condition quite analogous to that known as peonage, which is denounced by the law of the nation. It would require four years of servitude to pay for the minor's board, lodging and clothing that had been previous-

ly furnished while he was attending high school. Whether such a contract would, strictly speaking, create a condition of peonage, it is unnecessary to determine. In any event, we are convinced that such a contract is not only forbidden by statute but is contrary to sound public policy, and is therefore void. Damages may not be recovered for the breach of a void contract.

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

REVERSED AND DISMISSED.

ELIZABETH B. CLARKE, APPELLANT, V. FRED P. MARCONNIT ET AL., APPELLEES.

FILED APRIL 11, 1930. No. 27126.

1. Trusts: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* insufficient to establish a trust in lands conveyed to defendant by plaintiff's father.
2. Deeds: ALTERATION. A grantor cannot, by any act subsequent to the delivery of a deed, invalidate, alter or affect the instrument. 18 C. J. 217.

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

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

Benjamin S. Baker, Ralph Wilson and *Lee Kelligar, contra.*

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

GOOD, J.

This is a suit in equity in which plaintiff seeks to have certain deeds of conveyance, absolute on their face, decreed to have conveyed to the grantee the title to the lands therein described in trust for specified purposes. From an adverse decree, plaintiff appeals.

From the record the following pertinent facts appear: George Fred Marconnit and his wife, Mary, residents of Omaha, were the parents of two children, Elizabeth B. Clarke, plaintiff, and Fred P. Marconnit, defendant. In 1909 George Fred Marconnit executed a will, by the terms of which he bequeathed to his wife all of his personalty absolutely and to her devised the possession, rents, income and profits from all of his real estate during the term of her natural life. He devised to the plaintiff, subject to the life use of his wife, the homestead in Omaha, and to his son he devised the residue of his real estate, which consisted of about 835 acres of land, situate in Nemaha and Otoe counties. The latter devise required the son to pay to his sister the sum of $12,000, which was made a charge upon the real estate devised to defendant. In January, 1919, he added a codicil to his will which did not change the terms thereof, except change in the persons nominated to be executors of the will. Six months later he conveyed to his son, by warranty deed, the lands in Otoe and Nemaha counties. In 1924 he departed this life. His will was admitted to probate. The $12,000, mentioned in the will, was not paid by the son to his sister. Some years later Mary Marconnit, the widow, departed this life. This action was instituted by Mrs. Clarke, claiming that the deeds were intended to convey the title to the farms in trust to her brother for the following purposes: To constitute the grantee a trustee to assist in the management of the farms; to avoid payment of inheritance tax, and to divide the lands, after death of Mary Marconnit, between the grantee and plaintiff.

The evidence discloses without dispute that immediately after the deeds were executed, in July, 1919, they were delivered to the grantee, and that he has retained possession of them since that date. It also discloses that at the time of their execution the father stated that within a few days they would go to the farms, inform the tenants thereon of the change in ownership, and arrange with them for the transfer of their relations, as tenants, from the father to the

son. It also appears that within a short time after the deeds were executed the father and son went to Otoe and Nemaha counties, and there interviewed the tenants; that the father informed the tenants that he had transferred the lands to his son and that they should thereafter deal with him respecting the farms. The evidence discloses that from that time on the tenants dealt exclusively with the son and turned over to him the rents and income from the farms. It also appears that about two years after the deeds were executed Fred P. Marconnit opened a joint account in an Omaha bank in the name of himself and father; that at least a part of the rents and income from the farms and other items were deposited in this account; that both father and son were privileged to, and did, check against this account; the father for his individual support and use, and the son for the purpose of making investments by way of mortgage loans. It appears that when the father died there was in this account a sum in excess of $3,000; that the son, who was one of the executors of his father's will, listed the balance in this account as a part of the assets of his father's estate. It also appears that some time subsequent to his father's death Fred P. Marconnit informed plaintiff that he desired to carry out the provisions of his father's will, and that he was ready and willing to pay over to her the $12,000 therein provided, but for some reason the amount was not paid, perhaps because Mrs. Clarke was not satisfied at that time with the disposition that her father had made of his property, and perhaps in the belief that she was entitled to a share in the real estate which had been conveyed to her brother.

With respect to the allegation that the real estate was conveyed for the purpose of defeating an inheritance tax, it may be said that the proposition finds little support in the evidence. The only evidence which would lend any color to the contention is the fact that at the time of the conveyance the grantor was 65 years of age, and that at one time subsequent to the conveyances, in a conversation with a witness, he made a statement that his estate would

not be subject to an inheritance tax, as he had disposed of most of his property. There was no intimation that the disposition had been made for the purpose of evading payment of an inheritance tax. At that time he had an expectancy of approximately 10 or 11 years, and was apparently in fairly good health. There is nothing to indicate that he contemplated an early demise, or that the conveyances were made in anticipation of death. Under the rule announced in *In re Estate of Bronzynski*, 116 Neb. 196, the evidence was wholly insufficient to show that the conveyances were made in contemplation of death. We do not wish to be understood as here deciding that the property may not, in a proper proceeding, be subject to an inheritance tax, but only that the evidence in this case wholly fails to show that it was conveyed for the purpose of creating a trust to evade the provisions of the inheritance tax law.

Plaintiff further contends that the conveyances were made to enable the grantor to rid himself of the burdens of managing the farms. The contention is unsupported either by reason or by fact. The father could have placed the management of the farms in the care of the son without conveying title, and there is no substantial evidence indicating that such was the purpose of the grantor in making the conveyances.

The only evidence to support the charge that the conveyances were given with the intent of making the grantee a trustee to hold title until the death of his mother, and then to make an equal division of the lands between himself and the plaintiff, may be summarized as follows: First, the circumstance that the value of the property conveyed represented the major portion of the grantor's property; second, that the proportion of the property given to the grantee was greatly in excess of that which was given to grantor's daughter by his will; third, the act of the grantee in creating a joint bank account, on which both the grantor and grantee were permitted to draw; fourth, that grantor left unchanged the provision in his will for

a lien, in favor of plaintiff, on the lands devised to the son; and, fifth, a statement made by the grantor some two years after the date of the conveyances wherein he stated, in substance, that he did not desire the Clarkes (meaning his daughter's relatives by marriage) to have any part of his property, and that he could not help his daughter without helping her husband's relatives; that she would receive from $12,000 to $15,000, and no more, from his estate, and that she should receive only the income from this sum until she had reached the age of 45 years. At the time he made this statement grantor retained no property of any consequence, save and except the homestead which was devised to the daughter, subject to the life use by his widow, and perhaps a small amount of personal property which was also bequeathed to his wife. This statement, however, was not made in the presence of the grantee; nor is there any evidence of an agreement between the father and son that the latter should pay the $12,000 charge upon the real estate to the grantor's daughter. The statement does indicate that, in the mind of the grantor, the $12,000 should be paid by his son to his daughter. It is perfectly clear that if the son had taken title to the real estate under the will he would have taken it burdened with the charge therein provided; but it is equally clear that he did not take title under the provisions of the will, but under deeds, absolute in form, which contained no provision requiring him to make payment of any sum to his sister. It is a familiar rule that a grantor cannot, by any act subsequent to the delivery of a deed, invalidate, alter or affect the instrument. 18 C. J. 217. The statement made by the grantor, to the effect that his daughter would receive from $12,000 to $15,000 out of his estate, cannot affect the title to the real estate which he had previously conveyed. It seems reasonably apparent that he believed that the provisions in his will would operate to require his son to pay to his daughter the sum of $12,000. This was a mistaken conception of the law. If, as seems

apparent, it was the belief of the grantor that the daughter would receive from the son the sum of $12,000, it is unfortunate that he did not insert a provision therefor in the deeds and thereby make it a charge upon the land. Notwithstanding this may have been his belief and his intention, this court is powerless to change the effect of the deeds and to read into them something that the grantor did not take the precaution to insert. If the $12,000 is received by plaintiff, as, probably, intended by her father, it will be because the grantee, now knowing that it was the purpose and intent that he should do so, sees fit to carry out the wishes of his father, although he is not legally obligated so to do.

It is argued by plaintiff that, because defendant caused a joint account of defendant and his father to be opened in a bank, into which account defendant paid a part of the rents and income from the farms, this fact shows that the lands were conveyed in trust. This contention cannot be sustained. The money placed in this account was the property of the defendant. It was his to do with as he saw fit. He could have given it to his father absolutely, or to any one else, and he could have placed it in any bank he desired and permitted his father, or any one else, to draw upon it if he so chose. It is probable that, realizing that his father had been generous and liberal with him, he felt it proper to be generous and liberal with his father.

The trial court found, among other things, that while the deeds took effect from the time of their delivery there was an agreement or understanding between the grantor and the grantee that the bequest of $12,000 to the plaintiff, made in the will of the grantor, should be carried out and paid by the grantee, but that, notwithstanding such understanding, the trial court was without jurisdiction to award such bequest or to decree any charge or lien on the land by reason thereof. This particular finding we think is not warranted by the evidence; nor do we agree to the proposition of law that the court was without jurisdiction,

The judgment of the district court denying relief is right, notwithstanding the particular finding and conclusion of law, and it is, therefore,

AFFIRMED.

DEAN, J., dissenting.

I do not agree with the conclusions expressed in the main opinion. It appears to me that the terms of the will of the senior Marconnit provided that the plaintiff shall inherit the homestead, which was of the approximate value of $4,000, and that when plaintiff reached the age of 45 years she should receive the sum of $12,000 from the estate. When the suit was tried plaintiff was past the age of 45 years, but she had never received any part of the $12,000 bequest. The will provides that the son shall inherit certain real estate, but that it shall be subject to the payment to plaintiff of the $12,000, which was bequeathed to her by her father and which was made a specific charge against the real estate. The following provision is in the will. "For the purpose of carrying out the terms of this bequest I hereby give, bequeath and devise unto my said executors hereinafter named (the testator's widow and his son Fred) the said sum of twelve thousand ($12,000) dollars upon the terms and conditions stated in this item of my will. * * * My said executors hereinafter named shall hold said twelve thousand ($12,000) dollars and invest the same as above provided until my said daughter Lizzie Clarke reaches the age of forty-five (45) years."

Some time in July, 1919, the senior Marconnit purported to convey certain farms located in Nemaha and Otoe counties to the defendant. This was six years before his death. The will was written in 1909, and was ratified and confirmed in a codicil which was executed ten years thereafter, namely, in 1919, that being the same year in which the deeds were executed. The defendant, however, testified that he did not have the above named deeds recorded until the year after the death of his father, namely, in 1925, nor did he tell his sister about the deeds until several weeks

after his father had passed away. Clearly the defendant appears to have recognized his sister's rights. I submit that the real estate should be held subject to the $12,000 bequest and that it was the intention of the senior Marconnit that the defendant should inherit such real estate subject to the payment of $12,000 to his sister, the plaintiff herein.

CORNELIA NORTON V. STATE OF NEBRASKA.

FILED APRIL 11, 1930. NO. 27297.

1. **Receiving Stolen Goods.** The receiving or concealing of stolen hogs, knowing them to have been stolen, with intent to defraud the owner, is by section 9611, Comp. St. 1922, made a substantive crime, and a conviction therefor may be had without regard to the person who stole the hogs, or the person from whom they were received.
2. ———: "CONCEALS:" INTENT. The word "conceals," as it appears in that part of section 9611, Comp. St. 1922, reading as follows, "or conceals any sow, barrow, boar or pig, knowing the same to have been stolen," covers and includes the words "with intent * * * to defraud the owner."
3. **Criminal Law:** EVIDENCE: WEIGHT: QUESTION FOR JURY. Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury.
4. ———: VERDICT. It is not necessary that the name of defendant in a criminal case appear in the body of the verdict, other than as defendant, where in the caption thereof he is designated by his proper name with the word "defendant" immediately following it.
5. ———: INSTRUCTIONS. "Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed by the appellate court merely because a single instruction, when considered separately, is incomplete." *Samuels v. State*, 101 Neb. 383.
6. **Record** examined, and found without error prejudicial to defendant.

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

M. O. Bates and *Neil France,* for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and L. S. HASTINGS, District Judges.

THOMPSON, J.

The plaintiff in error, hereinafter called defendant, was informed against and convicted of receiving and concealing stolen hogs, of some value, knowing the same to have been stolen, with intent to defraud the owner, under section 9611, Comp. St. 1922. Such section provides: "Whoever steals any sow, barrow, boar or pig of any value, or receives or buys any sow, barrow, boar, stag or pig that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or buying to defraud the owner, or conceals any such thief, knowing him to be such, or conceals any sow, barrow, boar or pig, knowing the same to have been stolen, shall be imprisoned in the penitentiary not more than five nor less than one year and shall pay the costs of prosecution."

For reversal numerous claimed errors are presented, which will receive consideration as reached.

At the outset we might state that the receiving or concealing of stolen hogs, knowing them to have been stolen, with intent to defraud the owner, is by the aforesaid section 9611 made a substantive crime, and a conviction therefor may be had without regard to the person who stole the hogs, or the person from whom they were received. *Levi v. State,* 14 Neb. 1; *Ream v. State,* 52 Neb. 727; *In re Loomis,* 84 Neb. 493; Maxwell, Criminal Procedure (2d ed.) pp. 383 to 387, and authorities therein cited.

Further, the word "conceals," as it appears in that part of section 9611, Comp. St. 1922, reading as follows, "or conceals any sow, barrow, boar or pig, knowing the same to have been stolen," should be given the same meaning as if

followed by the words "with intent * * * to defraud the owner." In *Bailey v. State,* 115 Neb. 77, in construing this same word as it appears in a similar clause of section 9612, Comp. St. 1922, relating to poultry stealing, we concluded that the word "conceal," as there used, covered and included the words "with intent * * * to defraud the owner." This is a logical conclusion, as in law the word "conceal" ordinarily implies design or purpose.

An error stressed in the briefs, and at oral argument, is that the judgment is without supporting evidence. The bill of exceptions, consisting of some 249 pages, has been carefully read and considered. The evidence is, in many material portions thereof, acutely conflicting, and in other parts uncontradicted or admitted, from a consideration of all of which different minds may reasonably arrive at different conclusions. In such a case, we are controlled by *Dore v. Omaha & C. B. Street R. Co.,* 97 Neb. 250, wherein it is held: "The jury are the judges of the credibility of witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested." Under this record, we cannot say, and do not find, that the verdict of the jury is without support in the evidence, nor that the same is clearly wrong.

It is submitted that the verdict is contrary to law, owing to its uncertainty as to the person found guilty. The verdict recites:

"In the District Court of Dawson County, Nebraska. State of Nebraska, Plaintiff, v. Cornelia Norton, Defendant. State of Nebraska, County of Dawson, ss. Verdict of Jury. We, the jury duly impaneled and sworn in the above entitled cause, do find the defendant guilty in the manner and form as charged in the information. That at the time of receiving or concealing of said hogs by the defendant they were worth $125.00. (Signed) Oswald A. Kutz, Foreman."

It will be noticed that in the caption of such verdict the words "Cornelia Norton" are followed by the word "De-

fendant," and the verdict finds the "defendant" guilty. We may further note that she was so designated in the information referred to in this verdict, also in numerous of the instructions given by the court, as well as in the title of the instructions, which were submitted by the court, carried to the jury room, and before the jury at the time of their deliberations and finding. These facts, considered in connection with the verdict, bring it clearly within the rule of construction announced in *Keeler v. State*, 73 Neb. 441, as follows: "Verdicts in criminal cases should be certain and import a definite meaning free from ambiguity. If the meaning of the verdict in the light of the whole record is clear, beyond any reasonable doubt, it is sufficient." In the course of the opinion in the *Keeler* case, *Williams v. State*, 6 Neb. 334, relied upon by defendant, is considered and distinguished, and, as we conclude, properly so.

Other claimed errors of law, both as to instructions and those occurring at the trial, are also urged as grounds for reversal. These have had our consideration. Some of the challenged instructions, if viewed independently, may be incomplete, but when considered in connection with the others given, which we must do under this record, they fairly submit to the jury the issues involved. *Samuels v. State*, 101 Neb. 383; *Williams v. State*, 115 Neb. 277.

The defendant has had a fair trial, and no substantial miscarriage of justice has actually occurred; hence, the provisions of section 10186, Comp. St. 1922, are controlling herein.

No error prejudicial to the rights of the defendant appearing in the record, the judgment of the district court is

AFFIRMED.

CLIFFORD D. MARSHALL, APPELLANT, V. EDWARD W. ROWE ET AL., APPELLEES.

FILED APRIL 18, 1930. No. 27159.

Judgment: SATISFACTION: PETITION TO SET ASIDE: SUFFICIENCY. In an action by a judgment creditor to set aside a satisfaction

of judgment made for less than the amount due on the judgment but alleged to have been procured by the judgment debtor by fraudulent misrepresentations of fact as to his property, and where all the necessary elements of fact are pleaded by the creditor and demurred to by the debtor, the demurrer should be overruled.

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

Walton B. Roberts, Marcus L. Poteet and *Prince & Prince,* for appellant.

John J. Ledwith and *Horth, Cleary & Suhr, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

GOSS, C. J.

Plaintiff appeals from the judgment of the district court sustaining separate demurrers of the defendants.

To make clear the situation, it is necessary to state plaintiff's pleading rather fully. The pleading to which the defendants demur was a motion filed in the original case in which the judgment was entered in the district court for Lancaster county and was entitled "Motion to set aside satisfaction of judgment." The motion consisted of twelve paragraphs and was duly verified. It had all the forms of a petition. In the final order herein, on plaintiff's refusing to plead further and "electing to stand upon his petition, the court accordingly orders that plaintiff's petition and cause of action be and hereby is dismissed." The motion was filed September 24, 1928. It alleged that on or about April 28, 1915, plaintiff obtained in this action a judgment for $2,000 and costs against the defendants and that the judgment was affirmed on or about April 2, 1917, in the supreme court; that execution was issued on April 26, 1917, out of the district court for Lancaster county and on May 4, 1917, returned unsatisfied, for want of property of either defendant on which to levy; that on April 27, 1917, a transcript of the judgment was duly filed in the

office of the clerk of the district court for Hall county, Nebraska, execution was issued thereon, and on May 7, 1917, it was duly returned as unsatisfied, for want of any property on which to levy; that about 1915, while the action was pending in the district court for Lancaster county, the defendant McGrath purchased a described quarter section of land in Hall county, Nebraska, and received a warranty deed therefor, but the grantee's name was given in said deed as Susan E. McGrath, wife of the said defendant; that he had caused the deed to be put in his wife's name for the purpose of hindering, delaying, preventing and defrauding the plaintiff in the enforcement and satisfaction of his judgment, but that the said wife took title without consideration and held it in trust only for her said husband; that on or about May 8, 1917, plaintiff commenced an action in equity against the defendant McGrath and his wife to subject said real estate to the payment of said judgment; that the defendants therein filed an answer, which answer was not verified, denying each and every allegation contained in plaintiff's petition; that the plaintiff by his attorney filed a motion to strike the answer for the reason that it was not verified, the motion was sustained, and thereupon the defendant Benjamin R. McGrath filed a duly verified answer, denying each and every allegation contained in plaintiff's petition, and plaintiff alleges that said sworn statement was false and was known at the time by said defendant to be false and that said defendant knew at the time that he was the owner of the real estate and that it was held in trust by his wife solely as trustee for said defendant; that plaintiff was unable to disprove said statement, relied upon it and believed it to be true, and therefore accepted the sum of $1,500 in settlement of said judgment, which was then approximately $3,000, principal, interest and costs; that the settlement was obtained solely and only by the fraudulent statements heretofore referred to and that the release of said judgment was totally without consideration and void; that plaintiff did not know and had no means of discovering that said statements were

false, until about the 31st day of August, 1926, the said defendant McGrath having filed a petition in the district court for Hall county in which he sought to hold the said Susan E. McGrath as trustee of said real estate, and on a hearing thereof on the 20th day of August, 1926, the said McGrath testified that his wife had been at all times since 1914 the owner of record of said real estate, holding the legal title solely in trust for him. Plaintiff alleges that he did not know of the fraud until November 25, 1926, and that immediately upon the discovery of said facts he commenced an action in the district court for Hall county, Nebraska, and filed a motion in this case to revive the judgment. The plaintiff prayed, among other things, that the satisfaction be set aside and that defendants have credit for the amount paid as and when paid. The exact words of the satisfaction are not pleaded, but plaintiff alleged that the satisfaction shows on its face that the sum of money which plaintiff recovered was less than the amount due upon the judgment and that the release of the balance remaining unpaid was without consideration and void. There was no motion by defendants to make this pleading more specific.

Defendants separately demurred to this pleading on the grounds (1) that the court had no jurisdiction of the person of the defendant or subject-matter, (2) that there is another action pending between the same parties for the same cause, (3) that there is a defect of the parties defendant, and (4) that the motion does not state facts sufficient to constitute a cause of action or entitle the plaintiff to the relief prayed for.

The above four grounds of demurrer are among the six grounds provided in our Code. Comp. St. 1922, sec. 8610. But this section provides that none of these grounds are permitted to be set up by demurrer except when they appear on the face of the petition.

The court had jurisdiction of the person of each of the defendants because each defendant demurred and thereby appeared generally; it had jurisdiction of the subject-mat-

ter—to pass on the validity of a satisfaction of judgment alleged to have been procured by fraud—at least as between these, the same parties as in the original action, and where no intervening rights of innocent third parties are affected. Nor does it appear from the petition that there is another action pending between the same parties for the same cause. The "cause" here is to set aside the satisfaction of judgment. This disposes of the first two grounds of the demurrers. The record does not indicate the reasons of the district court for sustaining the demurrers, but it is evident they could not have been based on the grounds already mentioned.

On the question of procedure both parties cite *Fox v. State*, 63 Neb. 185; the appellant citing it as authority for the proposition that a motion filed in the original case is a proper procedure to cancel a satisfaction procured by fraud; the appellee citing it on the proposition that, where there is a conflict in the evidence, parties seeking relief should be left to an independent action. The opinion in that case was written by Pound, C., and approved by the court. It provides, citing authorities, that, generally, where a satisfaction of judgment has been procured by fraud or mistake, the proper course is to apply to the court in which is the record of the judgment by motion to set aside such satisfaction. But if rights of others, not parties to the original action, have supervened or would be unduly affected, or if the evidence is conflicting on material questions of fact arising upon the motion, the party seeking relief should be left to an independent action. *Knaak v. Brown*, 115 Neb. 260, 267, citing numerous authorities, is to the same general effect. It so happens in the present state of the instant case that the demurrers admit that there is no conflict of fact between the parties. It also appears, as before indicated, that the suit involves only the same original parties, and, while the pleading of the appellant is styled a motion, it is in form and substance an independent petition. In the order of dismissal the district court aptly called it a petition. The appellees might have

attacked it by motion to make its allegations of fact more specific or in any way an ordinary petition might be attacked, or they might have set up their defenses by answer. They chose to demur, and so we must consider that, for the present purposes, the suit was properly brought.

The appellees presented an able oral argument and submitted a strong brief in support of the judgment sustaining the demurrers; but on examination of the record we find they have taken facts for granted as appearing in the record before us which may appear in the previous history of the case or cases but which we cannot find in the record here. Unless these matters appear in the record they do not aid the demurrers. We believe we have faithfully stated the contents of the motion and of the record. Among the instances where the appellees state as facts upon which they ground their argument for affirmance but which we cannot take as facts in our review, because we cannot find them in the record, are the following: First, a rather complete history of a creditor's bill filed against the McGraths in Hall county in 1917, and a statement that it was dismissed with prejudice by Marshall; second, likewise a rather complete synopsis of another suit brought by Marshall for the same cause in the district court for Hall county on December 9, 1926, resulting, it is claimed, in a final judgment on demurrer in favor of McGrath on March 21, 1928; third, that the satisfaction of judgment involved here was "under seal, having been acknowledged by judgment creditor before a notary public and placed of record;" and, fourth, that the defendants are doctors, that the original judgment was obtained against them on a charge of negligence in a certain nose operation and that they were joint tortfeasors.

Under section 8512, Comp. St. 1922, a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud. Such an action must be commenced within four years after discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence upon an inquiry which

if pursued would lead to such discovery. *Parker v. Kuhn,* 21 Neb. 413; *Coad v. Dorsey,* 96 Neb. 612; *Hanna v. Bergquist,* 102 Neb. 658. Taking as true the allegations of the petition, this suit was begun in time.

The real crux of the case is whether the representations inducing the satisfaction of the judgment for a consideration less than the amount due was fraudulent or might as a matter of fact be found or considered fraudulent in the circumstances. We have to take as true the fact in substance that the Hall county land in Mrs. McGrath's name belonged to her husband and that in his answer to Marshall's petition to uncover the title McGrath denied that fact. The general denial is not to be considered in this phase of the question so much from its technical aspect as a pleading but rather as to what it imported in the way of truth in the light of a consequent settlement between the parties without a legal contest of the issues presented by the general denial. Whether or not a general denial need be verified in such a case or whether it strengthened the representation when the general denial was verified and filed we do not decide. What difference does it make whether he made the representation orally or in a letter or in a pleading? But it can readily be understood, if McGrath had admitted the fact, as he now admits it by demurrer, that he was indeed the real owner of the land, it is likely that Marshall would not have accepted so inadequate a sum in satisfaction of a judicially liquidated debt. The inference might follow that Marshall was induced to accept the representation and act upon it. So when Marshall alleged as a fact in these proceedings that he relied on this representation so made and the defendants admit by demurrer that he so relied, that becomes the admission of a pleaded fact.

Lastly, it is claimed in the argument by appellees that there is no ground alleged to justify Marshall in having the satisfaction set aside as to Rowe; that therefore the judgment will remain satisfied as to Rowe, if Marshall get what he asks for, and reinstated as to McGrath; that Mc-

Grath was always entitled to contribution from Rowe, and, if Marshall succeeded, McGrath will be deprived of this substantial right of contribution. Reference to the petition shows that Marshall "accepted the sum of $1,500 in settlement of said judgment," but we are unable to find therein any statement of the fact that McGrath alone paid it. Where they were jointly liable we cannot assume that both did not contribute to the amount paid. It may be that the form of the satisfaction, or some other receipt, or the facts that might be produced on complete issues of fact and a trial thereon, would indicate who actually paid the amount or how the parties contributed, if at all. On the record we do know that the judgment was satisfied with much less than full payment of the amount due. The representations of McGrath as to his property appear to have been the inducement to the judgment creditor to accept less than full payment. It seems to be the rule that payment of a judgment by one of two joint debtors operates as a satisfaction and extinguishment of the judgment as to both. 34 C. J. 689, sec. 1062. But there was no payment in full of the judgment here. "Whatever mode of procedure is pursued to cancel the record of the satisfaction of a judgment, the remedy sought is governed by equitable rules, the ultimate question being whether it is inequitable for the person relying thereon to avail himself of the entry of satisfaction." 15 R. C. L. 831, sec. 302. In the circumstances and as the record stands, Rowe cannot claim the advantage arising out of the representations of McGrath.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SECURITY STATE BANK, APPELLEE, V. J. F. SCHOMBERG, APPELLANT.

FILED APRIL 18, 1930. No. 27157.

1. **Chattel Mortgages: LIEN: CONSTRUCTIVE NOTICE.** The rule that a chattel mortgage on a growing crop is not constructive notice of a lien on the harvested product, when offered for sale

in the open market, does not necessarily apply to a chattel mortgage on a growing crop and also on the harvested crop.

2. ———: REGISTRATION. As between the mortgagee and the mortgagor named in a duly executed chattel mortgage the registering of the instrument in the proper public office is immaterial.

3. ———: DESCRIPTION OF PROPERTY. "A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite." *Farmers & Merchants State Bank v. Sutherlin*, 93 Neb. 707.

4. ———: ———. The rule that a chattel mortgage enabling a third person, aided by inquiries suggested by the instrument itself, to identify the mortgaged property is sufficiently definite applies to chattel mortgages on growing crops.

5. ———: ———. As described in the opinion, the contents of a registered chattel mortgage on growing grain and also on the matured crop, whether "in the field, in cribs or bins, in elevator or any other place," *held* sufficient to suggest to a third person inquiries which, if pursued, would elicit knowledge that such grain, when delivered by the mortgagor at an elevator and sold by him there, was incumbered by the lien of the chattel mortgage.

6. Banks and Banking: AUTHORITY OF CASHIER: CHATTEL MORTGAGES. A cashier who exercises authority to notify a purchaser of grain at an elevator that the grain is mortgaged to the bank and enters into an agreement that a check for subsequent purchases of the mortgaged grain not yet sold shall be drawn jointly in favor of mortgagor and mortgagee may bind the bank by that arrangement.

7. Trial: PEREMPTORY INSTRUCTION. Where the pleadings and proofs are sufficient to sustain a verdict in favor of defendant, a peremptory instruction against him is erroneous.

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

M. H. Leamy, for appellant.

Douglas Cones and *Allen Ardell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

ROSE, J.

This is an action to recover $755.90 for conversion of

mortgaged corn and oats. To secure an indebtedness of $4,545.10 the chattel mortgage was executed June 9, 1927, and was a lien on live stock, farming implements, crops and other personal property in Pierce county. The crops were then growing on a half section of land definitely described in the chattel mortgage—land on which mortgagor was a tenant. He owned specified shares of the growing crops for the year 1927 and had 165 acres of corn and 110 acres of oats. The chattel mortgage contained recitals that he was in possession and that the lien included also "the matured crops of growing grain," whether "in the field, in cribs or bins, in elevator or any other place." The chattel mortgage was in proper form, was specific in describing the property, was duly filed in the office of the county clerk of Pierce county and was indexed on the public records. The Security State Bank of Osmond was mortgagee and is plaintiff herein. A. J. Konvalin was the mortgagor and the tenant occupying the land on which the crops were growing. After they matured his shares were separated on the premises from the shares of the landlord. Beginning September 30, 1927, and ending January 26, 1928, the mortgagor and tenant sold to J. F. Schomberg, defendant, at eleven different times, mortgaged corn and oats amounting in value to $755.90 and received the proceeds. To the extent of $2,231.27 the secured debt remained unpaid. The grain sold was delivered by mortgagor to defendant at the latter's elevator in McLean, a village within two miles of the farm on which the mortgaged corn and oats grew. Plaintiff alleged in its petition that defendant, with knowledge of the incumbrance, wrongfully received and converted the grain without the consent of plaintiff to the latter's damage in the sum of $755.90.

Defendant inserted in his answer a general denial of unadmitted allegations of the petition, and pleaded further that he had no knowledge or notice of the chattel mortgage; that plaintiff notified him, January 24, 1928, it had a lien on the crops described in the petition; that plaintiff then agreed with him to deduct from the purchase price of mort-

gagor's subsequent deliveries of the 1927 crops the amount of an account owing by mortgagor to defendant; that pursuant to such agreement defendant thereafter, January 26, 1928, received from mortgagor 679 bushels and 26 pounds of corn, deducted from the purchase price $124.50, the sum of the account mentioned, and drew a check payable to mortgagor and plaintiff for $317.15, the remainder of the proceeds; that the check is in the possession of plaintiff.

The reply to the answer was a general denial.

Upon a trial of the issues the district court directed a verdict in favor of plaintiff. From a judgment against defendant for $792.10 he appealed.

The order directing the verdict in favor of plaintiff is challenged as erroneous. Under this assignment it is argued that the chattel mortgage was not a lien on the grain when offered for sale in the open market at the elevator and that therefore defendant was not liable for conversion. In support of this proposition defendant relies on the following principle of law:

"A chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin; and a dealer in grain who in good faith in open market purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage." *Gillilan v. Kendall & Smith,* 26 Neb. 82.

Referring to this ruling in a later case the court said:

"It was held in *Gillilan v. Kendall,* 26 Neb. 82, contrary to the rule in other jurisdictions, that a chattel mortgage on a growing crop is not constructive notice of a lien upon the harvested product when offered for sale in the open market. We adhere to the principle announced in that decision." *Chicago Lumber Co. v. Hunter,* 58 Neb. 328.

In the latter case, however, the report shows that the crop was mortgaged as growing corn and that the contract of purchase was made while it was on the stalk in the field and it was held that the registered chattel mortgage imparted to the purchaser constructive notice of the lien.

An examination of the opinion in *Gillilan v. Kendall & Smith,* 26 Neb. 82, shows that it does not sustain the position of defendant herein, for the reason that the chattel mortgage there considered was confined by its terms to a lien on growing corn, while in the present instance the lien covers growing grain and "matured crops" whether "in the field, in cribs or bins, in elevator or any other place."

In support of the peremptory instruction plaintiff cites *Eigbrett v. State,* 111 Neb. 388, but that case is not in point. In a criminal prosecution Eigbrett was accused of selling mortgaged property in violation of law. He was the mortgagor and had actual knowledge of the lien. As between him and the mortgagee, the lien on the growing crop extended to the harvested grain which he unlawfully sold, the parties having intended to secure the debt by a lien on the matured crop. In the present case the purchaser in the open market was not a party to the chattel mortgage and he was without actual knowledge of the lien.

Independently of the cases cited by the parties the question now to be determined is: Did the registered chattel mortgage impart to defendant constructive notice that the grain was incumbered by a chattel mortgage? The rule in Nebraska has been stated thus:

"A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite." *Farmers & Merchants State Bank v. Sutherlin,* 93 Neb. 707.

This rule applies to growing, mortgaged crops. 11 C. J. 468, sec. 96. A general principle has been stated in this form:

"The description of a crop is sufficient if it be such that a prudent, disinterested person, aided and directed by such inquiries as the instrument itself suggests, is able to identify the property." 11 C. J. 468, sec. 96.

What is sufficient to suggest inquiries is indicated by the following rule:

"A mortgage covering all or the entire crop of the mort-

gagor, taken in connection with the mortgagor's residence or the location of the land on which it is to be grown, is ordinarily sufficient to suggest such inquiries." 11 C. J. 468, sec. 96.

A copy of the chattel mortgage was on file in the office of the county clerk. What the public record disclosed was constructively imparted to defendant. If the chattel mortgage itself did not give him constructive notice that the grain delivered at his elevator by mortgagor was incumbered, it suggested inquiries which, if pursued, would have elicited knowledge of the lien. Defendant had an opportunity for inquiry every time mortgagor delivered a load of grain at the elevator. The chattel mortgage suggested inquiry by stating definitely the name of mortgagor; by describing in technical language the land occupied by him as tenant; by naming the mortgagor and the mortgagee; by specifying the different kinds of crops growing on the land described and the acreage of each; by reciting the indebtedness secured; by extending the lien on growing crops to the matured grain, whether "in the field, in cribs or bins, in elevator or any other place;" by indicating that the growing crops were within two miles of defendant's elevator. It is a fair inference that a simple inquiry directed to either party to the chattel mortgage would have elicited knowledge of the lien with resulting protection to both the mortgagee and the purchaser. In this view of the record absence of notice was not a defense.

On another ground, however, the order directing a verdict in favor of plaintiff was erroneous. The evidence was sufficient to present a question for the jury on the issue that plaintiff gave defendant actual notice of the lien January 24, 1928, and that, pursuant to an agreement between them on that date, defendant, two days later or on January 26, 1928, received 679 bushels and 26 pounds of the mortgaged corn, deducted from the purchase price $124.50 due him from mortgagor, drew a check jointly in favor of mortgagor and plaintiff for $317.15, the remainder of the proceeds, and delivered it to mortgagor. Under the agree-

ment plaintiff made mortgagor its agent to receive the check. The evidence shows that the check was in possession of plaintiff at the time of the trial. Defendant testified positively to the outlined facts. There was sufficient testimony to support this defense. For the purpose of testing the peremptory instruction on appeal the testimony of defendant on this issue is conclusive. At least to the extent of the two items mentioned, $124.50 and $317.15, or $441.65, defendant made a defense for the consideration of the jury.

The evidence shows that the agreement under consideration was made by defendant and the cashier of plaintiff, a banking corporation. In this connection plaintiff contends that the directors of the bank were its managers and argues that the cashier had no authority to bind it by such an arrangement. In entering into the agreement defendant was entitled to rely on the following statement of the law as recently adopted:

"While a cashier of a bank is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank, or which are usually done, or held out to be done, by such an officer, still the test is whether the transaction is with the bank and in its business, or with the cashier personally and in his business. As to the former, all presumptions are in favor of its regularity and binding force. As to the latter, no such presumptions arise." *Division No. 1, Railway Employees' Department, A. F. L., v. American State Bank,* 113 Neb. 196.

The first actual notice of the mortgage was given directly by the cashier. The action in tort had not been commenced. The cashier was acting for the bank and not for himself personally. The business in hand was the bank's business. The cashier had authority to accept a partial payment on the secured debt and to reduce the lien to that extent. The check that he agreed to accept was issued for the proceeds of mortgaged corn and was equivalent to a payment of $317.15 on the debt secured by the chattel mortgage. The bank was a beneficiary in the transaction. Before the agreement was made defendant's purchases of

the mortgaged grain amounted in value to $314.25 only. Thereafter he was induced by the agreement to make additional purchases of corn aggregating in value $441.65. Under the circumstances defendant had a right to assume that the cashier had the authority he exercised in the name of the bank. Defendant's part in the transaction was not precarious enough to outlaw the defense pleaded and proved.

The instruction directing the verdict in favor of plaintiff was prejudicially erroneous and for that reason the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF LIZZIE FRELING.
C. C. HAYNES, APPELLEE, V. ROY W. MATSON, EXECUTOR, APPELLANT.

FILED APRIL 18, 1930. No. 27136.

1. **Homestead:** LIFE ESTATE: RIGHTS OF CREDITORS. Where a spouse, on the death of her husband, succeeded to a life estate in a homestead, upon her death such life estate became extinct and also, as well, the rights of her common creditors as to such homestead.
2. **Executors and Administrators:** DUTIES. An executor of the estate of a deceased person, owning both lands and personal property at the time of his death, is chargeable with the duty of acquainting himself with the title to such real estate and personal property and of enforcing an accounting thereof as against all persons who may be in adverse possession thereof or who may claim an adverse title or interest therein as against such estate.
3. ———: ASSETS. "All the chattels of the deceased, wherever situated, are assets, if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them." 2 Schouler, Wills (5th ed.) sec. 1209.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed in part, and reversed in part.*

W. A. Ehlers, for appellant.

B. N. Robertson, contra.

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY, and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

DEAN, J.

Lizzie Freling, a widow, died in Douglas county. By the terms of her will she devised her property to Eugene R. Freling, her legally adopted son, who was then 20 years of age. Roy W. Matson was named in the will as executor and, shortly after Mrs. Freling's death, he qualified as such executor and assumed the duties pertaining thereto. In his final report, which was approved by the county court, Matson alleged that the personal property was insufficient to pay the costs of administration and that the estate was without funds to pay certain claims theretofore allowed by the county court. C. C. Haynes, the undertaker in charge of the funeral and burial obsequies, is the plaintiff herein and he has filed objections to the above final report of the executor. Haynes' claim in the sum of $352.50 for funeral expenses was duly allowed by the county court and he rightfully contends, and it is clearly disclosed, that his claim is a valid and subsisting claim against the estate. Haynes charges that the report of the executor fails to disclose the disposition that was made of the real estate, or any part thereof. And, pursuant to Haynes' appeal in the district court, the order of the county court, approving the final report of the executor, was there reversed. Thereupon the following stipulation was entered into by the parties:

"It is stipulated by and between the parties hereto that the copy of the petition for discharge and the final account, in the estate of Lizzie Freling, deceased, and the copy of objections and exceptions to the petition for discharge and final account shall constitute the pleadings in this case; that the trial herein shall be upon such copies, in so far as they relate to the pleadings. It is further stipulated that both parties hereto may at any time apply to the court for leave to amend such copies either before or during the trial of the cause in the district court."

From the judgment rendered by the district court, the executor has prosecuted an appeal to this court.

The district court found and decreed that the estate in question consisted of an undivided one-half interest in a lot in an addition to the city of Omaha, and that $1,700 is the value of such interest. The court also found that Lizzie Freling inherited the interest in the lot from her husband and that her interest in such lot was subject to sale for the payment of debts contracted by her after her husband's death. And the court further found that Matson took charge of the real estate above described, which was the homestead of the Frelings, and that he retained charge thereof until May 18, 1929, which was the date of the trial, but that he had not accounted for the rental value of the undivided one-half interest belonging to the Lizzie Freling estate. Thereupon the court found and decreed that the executor was and is chargeable with $210 for such rental value from March 6, 1928, to the time of the trial.

Section 2832, Comp. St. 1922, provides:

"If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter: Provided, further, that in case the surviving spouse wilfully fails to provide a suitable home and maintenance for the minor children of the deceased during their minority or elects to partition the homestead premises, the homestead right of the survivor shall then terminate and the homestead premises shall then descend as other real property of which the decedent died seised."

The executor points out that the real estate, as the home-

stead of Lizzie Freling, is exempt from sale for her debts. We do not think that a lien was established as against her life estate arising out of her homestead right, by her simply contracting debts in her lifetime. Upon her death her life estate in the homestead became extinct, and the rights of her common creditors as well as to such homestead.

In *Judson v. Creighton*, 88 Neb. 37, this is said: "Where a homestead is selected during the lifetime of both husband and wife, and after the death of one the survivor resides upon the premises during his or her life, the real estate is not subject to sale for the satisfaction of the debts of either, which are not a lien thereon, nor to pay the costs of administering the estate of such survivor; but, if the title-holding spouse dies intestate, the title descends to his or her heirs, whether direct or collateral, exempt from such debts."

And in *McFarland v. Flack*, 87 Neb. 452, we held: "Upon the death of the owner of the fee in a homestead estate the same descends to the surviving spouse for life, and the remainder to the children of the owner of the fee title."

We do not think the record shows negligence on the part of the executor in failing to rent the premises. He testified, and it is not denied, that he was unable to find a tenant and that therefore the son of Lizzie Freling, after paying for the household furniture, lived in the home to protect it against fire, molestation, and destruction, under an agreement whereby he was to vacate the premises on three days' notice that a tenant had been procured. Clearly, the executor was not negligent in the premises and is not chargeable with the rental value of the home in question.

It also appears that when Freling died he was the owner of personal property consisting of an interest in a certain leather goods business which had been theretofore carried on under the firm name of Freling & Steinle. And the court found that Mrs. Freling inherited $1,012.28, as her interest in the partnership assets. The court also found that "no prudent attempt on the part of said executor has been made to collect and enforce or obtain possession of

said personal property or any part thereof or the proceeds thereof, or any interest therein, and that the said Roy W. Matson, executor, is chargeable with the value thereof."

The executor filed an application wherein he prayed that the court direct the administrator of the Eugene R. Freling estate to "show cause by an early date, to be fixed by the court, why the personal property belonging to the estate of Eugene R. Freling, to wit, an interest in the firm of Freling & Steinle, should not be sold and converted into cash." Subsequently, a proceeding in bankruptcy was instituted by Steinle, the surviving partner. W. A. Ehlers, attorney for the executor, testified that the assets of the business were sold, but that the returns therefrom were considerably less than the amount of the claims filed against the firm, and that there were no assets remaining from the firm that could be reduced to cash as belonging to the estate herein. And it also appears that, under a court order, $1,260 was directed to be paid to Lizzie Freling as widow's support during her lifetime by the Freling & Steinle firm, but that $540 thereof remained unpaid. It also appears that, after the death of her husband, Mrs. Freling had nothing to do with the affairs of the firm, but that such affairs were managed solely by the surviving partner.

The executor's contention is that Lizzie Freling's estate was a member of the Freling & Steinle partnership, and that it was not a creditor of Richard Steinle, the surviving partner, and that, since the business was bankrupt, the estate of Lizzie Freling could recover nothing. It does not appear to us that the estate of Lizzie Freling became a partner of the firm. The record appears fairly to disclose that the business was managed solely by Steinle as his own for several years after his partner's death, and that he paid the debts of the firm that were owing when Freling died. And Steinle appears thereafter to have conducted the business as his own without interference by, or participation in, or suggestion from, Mrs. Freling. In 1926, two years after Freling died, it appears from an inventory which was

prepared by the executor of the Eugene R. Freling estate that the decedent's interest in the partnership then amounted to $11,826.89. That Matson was closely and intimately associated with the affairs of the firm in question throughout his connection with the Lizzie Freling estate appears to be established. And the record also appears to disclose that Matson was justly chargeable with neglect, as found by the trial court, in failing to force the collection or an accounting of the claim in question from the estate of Eugene R. Freling in behalf of the Lizzie Freling estate.

In 2 Schouler, Wills (5th ed.) sec. 1209, it is said: "All the chattels of the deceased, wherever situated, are assets, if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them."

An executor of the estate of a deceased person, owning both lands and personal property at the time of his death, is chargeable with the duty of acquainting himself with the title to such real estate and personal property and of enforcing an accounting thereof as against all persons who may be in adverse possession thereof or who may claim an adverse title or interest therein as against such estate.

In *Russell v. McCall*, 141 N. Y. 437, the court said: "While, upon the death of one of two copartners, the successor has the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and to dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief."

From a review of the record and the law applicable thereto, we conclude that the judgment of the district court must be and it hereby is reversed in so far as it relates to the sale of the homestead and the rental value thereof.

That part of the judgment is affirmed, however, wherein the court found the executor chargeable with the value of the Lizzie Freling estate's interest in the estate of Eugene R. Freling.

AFFIRMED IN PART, AND REVERSED IN PART.

JAMES J. BLAHA, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 18, 1930. No. 27132.

1. **Release:** AVOIDANCE: FRAUD: BURDEN OF PROOF. The general rule is that, where one seeks to avoid the consequences of a release for personal injuries, the burden is upon him to establish by a preponderance of the evidence that the said release was secured through false and fraudulent representations. *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730.
2. ———: ———. The statement of a physician employed by defendant as to plaintiff's condition, if false, may be sufficient to avoid a release executed in reliance upon such false statement.
3. **Trial:** INSTRUCTIONS. "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." *Parsons v. Chicago & N. W. R. Co.*, 110 Neb. 836, quoting from *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668.
4. **New Trial:** NEWLY DISCOVERED EVIDENCE: DISCRETION OF COURT. "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the court, and will not be overruled unless a clear abuse of discretion is shown." *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694.

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

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

John A. McKenzie, contra.

HEARD before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

DAY, J.

This is a suit by James J. Blaha, a car repairer, employed by the Chicago & Northwestern Railway Company, for damages for personal injuries, alleged to have been sustained by him on account of being struck on the head with a sledge hammer, in the hands of a codefendant and coworker, who was striking a long chisel bar which was then held by the plaintiff, in the performance of their duties as car repairers. From a verdict in favor of the plaintiff, the railroad company appeals.

About three weeks following the accident, the plaintiff settled with the company for the resultant damages and executed a release therefor. He seeks to avoid the consequences of this release, alleging that it was secured by false and fraudulent statements and representations made by an agent of the company. Since the right of the plaintiff to maintain an action depends upon this question, it will be considered first.

The general rule is that, where one seeks to avoid the consequences of a release for personal injuries, the burden is upon him to establish by a preponderance of the evidence that the said release was secured through false and fraudulent representations. *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730. In this case the jury were so instructed and the verdict has resolved that question in favor of the plaintiff, since in this jurisdiction it is a question of fact for the jury. *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779; *Osborne v. Missouri P. R. Co.*, 71 Neb. 180; *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730.

The question for us to determine here is whether the evidence is sufficient to sustain the verdict. The plaintiff was cared for by a physician employed by the defendant. This physician, according to the evidence most favorable to the defendant, minimized and deprecated the plaintiff's injuries. After a very short time (less than a month), he discharged the plaintiff from his care and directed that he return to work. The plaintiff, relying upon this physician's statements as to his physical condition, settled with the

defendant for a nominal sum, $150, and returned to his work. This physician contended then, and still contends, that the plaintiff's injuries were slight and inconsequential. Granting that the physician was acting in good faith (and the evidence does not justify a finding that he was not) there is evidence tending to prove that the plaintiff was seriously injured. For example, the plaintiff, after attempting to work about two weeks, and finding that his physical condition was not such as would permit him to continue, called upon this physician, who, after some argument, sent him to a hospital. At the hospital ice packs were placed upon his head and Dr. Jonas, a physician and surgeon, also employed by the Chicago & Northwestern Railway Company, performed a serious operation upon his skull. This evidence, together with the inadequacy of the settlement, sustain the finding of the jury that the settlement and release in this case were secured by false representations. The statement of a physician employed by defendant as to plaintiff's condition, if false, is sufficient to avoid a release, executed in reliance upon such false statements. 48 A. L. R. 1486; *Haigh v. White Way Laundry Co.*, 164 Ia. 143, 50 L. R. A. n. s. 1091; *Wingfield v. Wabash R. Co.*, 257 Mo. 347; *Granger v. Chicago, M. & St. P. R. Co.*, 194 Wis. 51.

The defendant contends that fraud and false representations necessary to avoid a release must be proved by clear and convincing evidence. In support of this contention, it cites *Krause v. Long*, 109 Neb. 846. In the cited case, a suit in equity, a judgment secured in a court of law was vacated because said judgment was procured by fraud and perjury. The appellant's application of this rule to the avoidance of a release secured by an employer from an injured employee is novel and untenable. The defendant, in its reply brief, admits the soundness of this rule in the following language: "We would not contend that if, in fact, a man is deceived by the false statements of the attending physician as to his condition, and if he signed a release in reliance upon such false statements, he would be bound by the release." The question, then, as we have

stated, is whether the evidence supports the verdict. The fact is undisputed in this record that after the representation was made, and after the release was signed, another physician and surgeon, employed by the company, performed a proper, if not a necessary, operation upon the skull of the plaintiff. That evidence is sufficient to support the verdict as to the avoidance of the release.

The next question, in degree of importance, presented, is whether any actionable negligence was proved. The plaintiff, with a coworker, was working for the company as a car repairer at the time of the accident. He was holding a chisel to cut off a bolt, which was accomplished by his companion striking the chisel with a sledge hammer. In the prosecution of this operation, the plaintiff was hit on the head with the sledge hammer. Both of these men were familiar with this work. When the plaintiff was holding the chisel, he could not see the man with the sledge hammer, and his safety depended upon his coworker's care in striking the chisel. The plaintiff did not know how the accident happened, except that he was hit on the head and rendered unconscious. His companion, the only other witness present at the time, and the only one who could know anything about it, testified that he hit the chisel a glancing blow. This man was wielding the sledge hammer and was in a position where he could see the plaintiff's head as well as the chisel he was striking. He knew plaintiff could not see how he was striking the blow. He testified on cross-examination that, if he had used care, he could have avoided the accident. True, he also testified that he always used care, when questioned later by the company's attorneys. There is some conflict in the testimony, and particularly in the conclusions which each party has drawn from the same. However, we have examined the evidence as to how the accident happened, and, taken in connection with the physical facts surrounding, it is sufficient to sustain the verdict as to the liability of the defendant on the question of negligence.

This brings us to a consideration of the sufficiency of

the evidence to sustain the verdict on the question of plaintiff's injuries. Suffice it to say that we have examined the record relative to the question of the plaintiff's injuries, and find the evidence sufficient to sustain the verdict. To detail the evidence would require too much space, but summarized it is as follows: The plaintiff was injured by a blow with a sledge hammer on March 14, 1927; he was sick in stomach and weak; he was attended by a doctor; he was home for four weeks; he returned to work April 11; he worked nine days until he was compelled to quit, when he called upon the railroad physician, who took him to the hospital, where a company surgeon operated upon his skull; that he was in the hospital for 12 days before the operation, during which time he had ice bags on his head; he was confined to his bed about five weeks after the operation, and he lost weight and could not sleep. This indicates with certainty that there is ample evidence in the record, if believed by the jury, to support the verdict as to the injuries of the plaintiff.

The defendant complains that the court in its instructions did not limit the consideration of the jury to the negligent acts set out in the petition, and refused to give the defendant's instruction on the question. In the first instruction the court delineated the allegations of negligence in plaintiff's petition as follows:

"(a) The defendant Ben Heldt allowed the hammer to glance off the chisel bar and to strike the plaintiff; (b) in allowing and permitting said defendant Ben Heldt to strike the said hammer from a position in which, if the hammer did glance from said chisel bar, it would strike the plaintiff; (c) in failing to provide the plaintiff and the defendant Ben Heldt with proper and adequate tools and appliances with which to perform their duties in a proper manner; (d) in allowing and permitting the defendant Ben Heldt to use said hammer, when he was not properly skilled in such work; (e) in not providing the plaintiff with a track chisel so that the same could be held in a position with safety by the plaintiff."

By a subsequent instruction the court told the jury that, before the plaintiff could recover, the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that the defendant railway company and the defendant Heldt were negligent, in the particulars as set out in the petition. It is claimed that there is no evidence to support some of these allegations of negligence. Certainly there is evidence in the record to support allegations under "a," "b," and "d" of said instructions. In *Parsons v. Chicago & N. W. R. Co.*, 110 Neb. 836, quoting from *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, it was held: "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." This is merely a restatement of the rule announced in a long line of cases too numerous to need citation here. From a careful perusal of the record, including the instructions, while it is improper to give an instruction upon an issue not having proper support in the evidence, even though it may be alleged in the pleadings, nevertheless, reversible error cannot be predicated if it is clearly shown by the record that the jury could not have been misled or prejudiced thereby, and otherwise clearly understood the issues actually tried. No reversible error was committed in this regard in this case.

Finally, the appellant contends that the trial court erred in overruling the motion for a new trial. The ground upon which it is urged that the motion should have been sustained was that of newly discovered evidence. The newly discovered evidence is that, 11 years prior to the accident involved in this case, the plaintiff was injured in an accident while working for another railroad. Defendant contends that plaintiff concealed from it that he had worked for another railroad, or that he had been injured. At the beginning of his testimony he stated he went into railroad work as a car repairer in 1911 and had been working as

such ever since; that he had worked for the Northwestern since August, 1918. Surely this testimony was notice to defendant that the plaintiff had worked for a railroad other than it for a period of seven years, yet they did not inquire about it upon cross-examination. The import of this newly discovered evidence, according to the defendant, is that the plaintiff's present physical condition is due wholly or in at least a large measure to his previous injury. The newly discovered evidence would largely be the testimony of Dr. Young, who testified in the trial as a witness. His testimony was based upon an examination of the plaintiff and the testimony of other witnesses at the trial. The testimony of men with whom plaintiff worked was to the effect that he was irritable, flighty, and hard to get along with. With this in mind, Dr. Young testified that plaintiff was an "emotionally unstable individual;" that "emotional unstability may be a constitutional characteristic of the individual;" that "an injury such as he received * * * might and would undoubtedly increase the degree of emotional unstability;" that he found no organic injury to the brain; that the pendency of a law suit for damages is recognized as one of the reasons for emotional unstability which claimants sometimes exhibit. In the affidavit of this witness, filed to support the motion for new trial, he states that he has now found, although he did not remember it at the time of the trial, that he examined the plaintiff in 1916, at the time he was injured while in the employ of another railroad; that his records show that his complaints then are identical with his present complaints; that in 1926 he caused the wife of plaintiff to be interviewed, and that his records show that she stated his condition had not improved from the time of the accident; and that, in his opinion, his present complaints and symptoms are the result of the former accident. All this evidence is as to his physical condition, and is largely a restatement of much of the evidence on the trial. The plaintiff had worked for the Northwestern for more than 10 years as car repairer. He had worked steadily, faith-

fully, and apparently satisfactorily. Let it also be remembered that this witness testified at the trial for the defendant; that at the request of the railroad company he had made a previous examination; that all the information he has now was then in his records, available to him and the defendant. A new trial will not be granted where witness testified on the trial (*Fitzgerald v. Brandt,* 36 Neb. 683; *Van Dorn v. Mengedoht,* 41 Neb. 525); nor where a witness omitted to testify on the trial as to the facts urged as newly discovered evidence (*State v. Ginger,* 80 Ia. 574; *Sioux City Stock Yards Co. v. Sioux City Packing Co.,* 110 Ia. 396). In fact, this case had been of sufficient interest to him that he caused an investigation to be made two years before, when his investigator told him that plaintiff's wife told him the plaintiff's condition had not improved. Of course, his testimony as to this fact was hearsay, and therefore incompetent evidence. A new trial will not be granted on the ground of newly discovered evidence, unless such evidence would be competent upon a retrial of the case. *McNeal v. Hunter,* 72 Neb. 579.

In addition to the affidavit of Dr. Young, who testified at the trial, the affidavit of Dr. Tyler was also filed. He was a doctor who cared for him at the time of the prior injury and describes it in detail. He did not state, and he apparently could not state, that his present disability is due to the injury suffered more than 10 years before. The trial judge had in mind all the evidence in the case, including the undisputed fact that this plaintiff had sufficiently recovered from the previous injury to perform more than 10 years of service for the defendant. "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the court, and will not be overruled unless a clear abuse of discretion is shown." *Christensen v. Omaha & C. B. Street R. Co.,* 85 Neb. 694; *Peterson v. Kouty,* 103 Neb. 321; *Phegley v. State,* 113 Neb. 138.

There is no evidence in this case tending to prove that the prevailing party testified falsely on a vital issue, nor

upon any issue, which would require the granting of the new trial. *City Savings Bank v. Carlon,* 87 Neb. 266. The conclusion is forced upon us, after a careful consideration of the record, that the action of the trial court in overruling the motion of the defendant was not an abuse of judicial discretion.

We have carefully read the record in this case, as suggested by appellant; we have examined all the instructions requested as well as those given by the court, and we find no reversible error in the instructions as given. We have discussed only those assignments of error argued orally before the court, or discussed in the briefs. In conformance with the foregoing opinion, the judgment of the trial court is

AFFIRMED.

HARLEY H. FETTY V. STATE OF NEBRASKA.

FILED APRIL 18, 1930. No. 27249.

1. Witnesses: OATH: WAIVER. Where, during the trial of a case, the testimony of a witness is taken without an oath being administered, a party litigant not making an objection at the time waives said objection.
2. Jury: DRUNKENNESS OF JUROR. Where, as in this case, there is evidence in the record, uncontradicted, that a juror, during a recess of the court, was found wandering about the streets of the city wherein the court was sitting, in a drunken and irresponsible condition, and where he was arrested in such condition by the sheriff of the county upon a warrant issued upon a complaint charging drunkenness, and was in jail at the hour for resumption of the trial, it is the duty of the trial court to determine whether the juror's condition is such as to require the discharge of the jury.
3. ———: ———. In the determination of this question, the trial court may also consider the appearance and condition of the said juror at the time of hearing on his qualifications, as well as the evidence adduced therewith.
4. ———: ———. DISCHARGE OF JURY. If, after hearing the evidence and an examination of said juror, it is the judgment of the trial court that said juror is unable or in an unfit condition to proceed with the trial on account of his drunkenness, such

drunkenness is an accident or calamity as contemplated by section 10151, Comp. St. 1922, requiring the discharge of the jury.

5. ———: PEREMPTORY CHALLENGES. "The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in the jury-box having the qualifications of jurors." *Mathes v. State*, 107 Neb. 212.

6. ———: EXAMINATION FOR CAUSE. The right to examine a juror for cause is a substantial right to which the defendant is entitled and he cannot be deprived of said right, which continues until the jury is finally impaneled for the trial. A denial of said right of examination for cause is prejudicial error.

ERROR to the district court for Webster county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

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

HEARD before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

DAY, J.

Plaintiff in error, hereinafter designated defendant, was convicted of an intent to extort money by means of written communications threatening the life of Ralph E. Hunter. This is the second appearance of this case in this court. Former opinion reported in 118 Neb. 169.

It appears that, after the trial had proceeded for an entire day, the jury had been impaneled and sworn and the opening statements of counsel had been completed and seven witnesses had testified on behalf of the state, the court adjourned until the following day. It further appears that, during this interval and while the jury were separated, one of the jurors was arrested for drunkenness during the evening and was in jail pending trial on said charge the next morning at the time designated for the resumption of the trial. Before proceeding with the trial, the court held an investigation of the situation of this juror, to which investigation of the juror defendant made no objection at the time. The defendant now objects to the pro-

ceedings for that the witnesses were not sworn. The record reveals that the sheriff testified as to the whole circumstances relative to the juror's disqualification, and that he had previously been sworn as a witness in the case. The testimony of the other witnesses with respect to the matter upon inquiry was merely cumulative. The defendant, having made no objection at the time as to the method of taking the testimony, cannot now complain. *City of O'Neill v. Clark,* 57 Neb. 760. The defendant complains now, although again he did not complain at the time of the trial, that the evidence relative to the disqualification of the juror who was discharged was not sufficient to sustain the action of the trial judge in removing him from the jury. Section 10151, Comp. St. 1922, provides, in so far as applicable to this case: "In case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, * * * the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice." Where, as in this case, there is evidence in the record, uncontradicted, that a juror, during a recess of the court, was found wandering about the streets of the city wherein the court was sitting, in a drunken and irresponsible condition, and where he was arrested in such condition by the sheriff of the county upon a warrant issued upon a complaint charging drunkenness, and was in jail at the hour for the resumption of the trial, it is the duty of the trial court to determine whether the juror's condition is such as to require the discharge of the jury. In the determination of this question, the trial court may also consider the appearance and condition of the said juror at the time of the hearing on his qualifications, as well as the evidence adduced therewith. If the juror is unable or unfit to proceed with the trial in the judgment of the trial court, after hearing the evidence and an examination of said juror, on account of his drunkenness, such drunkenness is an accident or calamity as contemplated by section 10151, Comp. St. 1922, requiring the discharge of

the jury. The court discharged the juror, which also required the discharge of the entire jury. As a jury and a legal entity, it ceased to exist. *Davis v. State,* 51 Neb. 301; *Quinton v. State,* 112 Neb. 684; *Salistean v. State,* 115 Neb. 838.

The defendant contends that since the trial court did not find the juror sick, or that an accident or calamity had occurred, or that there had been a failure of the jury to agree, the act of the court was, in law, an acquittal, and that he was placed in jeopardy. In *Quinton v. State, supra,* this court, in an opinion by Mr. Justice Thompson, discussed this question in the following language, which is applicable to this case: "From such a contention, reason and justice revolt. While the words 'accident' and 'calamity' are usually used in a physical sense, we hold that they include as well a case where a biased juror is discovered during the progress of the trial, as in this case. The object of the statute is to insure a fair trial to all litigants. We held in *Davis v. State,* 51 Neb. 301, that the insanity of a juror authorizes the discharge of the jury, being an 'accident or calamity.' And in *Sutter v. State,* 105 Neb. 144, we held that the discharge of the jury because of failure to agree is not an acquittal.

"The right, in the absence of statute, to exclude a juror and discharge the jury in a proper case, without prejudice to a future trial of the case on its merits, is and of necessity must be inherent in the court, within its sound discretion. This is necessary to the protection of the state, as well as for the protection of the defendant. To deny it to either would be a flagrant abuse of the discretion imposed. *Simmons v. United States,* 142 U. S. 148; *State v. Vaughan,* 23 Nev. 103; *State v. Wiseman,* 68 N. Car. 203; *State v. Washington,* 89 N. Car. 535; *State v. Diskin,* 34 La. Ann. 919; *King v. Ketteridge,* 1 L. R. K. B. Div. (Eng. 1915) 467.

"Thus, we conclude that the court, in considering the juror disqualified, in discharging the jury, and in sustaining the demurrer to the plea in bar, was clearly within the

law, and that its acts and doings, as shown by the record, did not place defendant twice in jeopardy. *State v. Hansford,* 76 Kan. 678; *State v. Allen,* 46 Conn. 531; *People v. Sharp,* 163 Mich. 79; *Gardes v. United States,* 87 Fed. 172."

The other assignment of error urged by the defendant is the method by which the trial court proceeded to select a jury, after the discharge of the disqualified juror. The court proceeded to have men called for examination for the purpose of selecting a juror to take his place. In order to supply the missing man, the court required the clerk to draw from the remaining jurors of the panel, and they were examined for cause. When the regular panel was exhausted, talesmen were called by the sheriff. On the former proceedings the state used one peremptory challenge and waived one, the defendant used two and waived one. The state, therefore, had four remaining and the defendant had three. The court permitted the peremptory challenge to go to any man then in the box, including the eleven who had formerly been examined. In addition, the defendant was allowed another peremptory challenge to take the place of the one waived the day before, upon his complaint that he had not waived as to the men then in the box. The serious objection to this procedure is that the defendant was required to exercise two of his peremptory challenges before the jury-box was filled. "The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in the jury-box having the qualifications of jurors." *Mathes v. State,* 107 Neb. 212. The exercise of peremptory challenges relative to the present case is governed by section 10133, Comp. St. 1922. In *Mathes v. State, supra,* Mr. Justice Dean said: "The rule that is applicable here, and to which we adhere, was announced in *Rutherford v. State,* 32 Neb. 714. In that case, in an opinion by Maxwell, J., it was held that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve men are in the box. To hold otherwise is there said to be an undue exercise of power prejudicial to the accused." In fact, by

the unique procedure, the defendant was deprived of two peremptory challenges allotted to him by statute, when he was charged with two challenges, exercised when a former jury was impaneled. He was thus denied two peremptory challenges in the impaneling of the jury before whom the case was tried. This was prejudicial to the defendant. In this case, eleven men were placed in the jury-box by the trial court and the defendant was denied the right to examine them for cause. When the court found the one juror disqualified, such a finding required the discharge of the jury, and the jury, as such, no longer existed and was not constituted by the eleven remaining men. These men resumed their status as members of the jury panel. They no longer retained their status as members of the jury impaneled in this case, but were subject to call on any case pending before the court, including the case at bar. The right to examine a juror for cause is a substantial right to which the defendant is entitled and he cannot be deprived of said right, which continues until the jury is finally impaneled for the trial. A denial of said right of examination for cause is prejudicial error. In this case it was prejudicial error for the trial court to deny the defendant the right to examine and challenge for cause all the jurors called.

It is urged by the state that the judgment of the trial court in this case ought to be affirmed under the provisions of section 10186, Comp. St. 1922, and *Baker v. State,* 109 Neb. 558, is cited, wherein it is said, "It is the duty of this court, in every case where error is shown, to determine the question of prejudice before reversing the judgment." We are of the opinion that the rule is not applicable to this case. The state would have us apply it to this case by having this court determine from the record that the defendant was guilty, and that therefore defendant has not been prejudiced because no other verdict could have been returned. The guilt or innocence of the defendant is not to be determined *de novo* in this court, but is one for a jury, drawn, summoned, and impaneled as provided by law. Since we have already determined that the errors occurring at the

trial, as before related, were prejudicial, the rule in the foregoing statute is therefore not applicable to this case. The statutes and the decisions of this court definitely set out the course to be pursued by the trial court, when confronted by such an emergency as arose in this case, and we cannot approve a radical departure therefrom.

Other questions are discussed in the briefs; but, since the case must be retried, and the alleged errors are unlikely to occur on said trial, we do not deem it necessary or useful to discuss them here.

REVERSED AND REMANDED.

W. G. SUMMERS, APPELLEE, V. AUTOMOBILE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED APRIL 18, 1930. No. 27225.

1. **Appeal:** ISSUES. It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter after the first trial.
2. ———: ———. Where, in an appeal from the judgment of the county court, the petition filed in the district court is assailed on the ground that it tenders other and different issues than those tendered in the court below, the question of fact, raised by such motion, is ordinarily determinable by a comparison of the petition filed in the district court with that upon which the cause was submitted to the county court.
3. ———: ———. The rule requiring cases on appeal to be tried on the same issues as those upon which they were tried in the court below does not require that the petition filed in the appellate court be in the precise language of that filed in the lower court; but, unless the ultimate facts relied upon for a recovery are substantially the same, and provable by evidence of the same character, it constitutes a change of the issues.
4. ———: CHANGE OF ISSUES. The pleading of a waiver in the district court for the first time, after an appeal from a judgment in a term case in the county court, constitutes a change of the issues, and a motion to strike the same should be sustained.

APPEAL from the district court for Garfield county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Montgomery, Hall, Young & Johnsen and *Davis & Vogeltanz*, for appellant.

B. A. Rose and *E. M. White, contra.*

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This is an action brought in the county court of Garfield county, Nebraska, to recover damages for loss of crops under the terms of a hail insurance policy. The answer admitted the contract of insurance, but alleged that it contained a provision that the company was not liable unless sworn proof of loss should be furnished the company within 60 days after the loss, setting forth specific information relative to the loss, and that said proof had not been furnished as required by the policy. No reply was filed. A trial was had, judgment awarded plaintiff, and an appeal taken to the district court.

In the district court plaintiff filed a petition almost identical with the petition filed in the county court. Defendant filed its answer raising the same issue as was raised in the county court. The reply was a general denial. Trial was had and a verdict and judgment awarded plaintiff. An appeal was taken to this court, where the judgment was reversed. *Summers v. Automobile Ins. Co.*, 117 Neb. 318.

After the mandate of this court had been filed in the district court, plaintiff asked leave to file an amended petition alleging a waiver of the terms of the policy that had been previously pleaded as a defense. Written objections were filed to the allowance of the motion for leave to amend, on the ground that such an amendment, if allowed, would change the issues as presented on the trial of the case in the county court. The district court overruled the objections and permitted the amendment. Defendant then moved to strike the allegations alleged to constitute a waiver for the reasons previously set out in its objections to the amendment, which motion was also overruled. Defendant refused to plead further, a trial was had, and a judgment

entered. From this judgment the defendant appeals.

The defendant (appellant here) contends that the district court erred in overruling defendant's objections to the waiver allegations in the amended petition, and in overruling defendant's motion to strike from the amended petition that portion alleging waiver by the defendant of the terms and conditions of the policy. The only question for us to decide is whether the amendment permitted by the district court constitutes a change in the issues as pleaded and presented in the county court. The plaintiff in the county court alleged that he had complied with the terms and conditions of the contract of insurance. The defendant alleged as a defense a failure to furnish proofs of loss as required by the policy. No reply was filed. Under these pleadings, the question of a waiver of the conditions of the policy was not an issue. The question of waiver raises an issue that must be pleaded, and cannot be shown under a general denial. *Mordhorst v. Nebraska Telephone Co.*, 28 Neb. 610; *Swett v. Antelope County Farmers Mutual Ins. Co.*, 91 Neb. 561; *Summers v. Automobile Ins. Co.*, 117 Neb. 318. A waiver has been defined in an early holding of this court as "an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it." *Livesey v. Omaha Hotel Co.*, 5 Neb. 50. In accordance with the general rule as to the burden of proof, it devolves upon the party claiming a waiver to prove the facts on which he relies to establish it. It is, therefore, more than a mere issuable fact, it is a complete defense to a breach or forfeiture when established by competent evidence. Its very nature discloses that proof of a different character is required to support it. After a pleading of a waiver, the identity of the cause of action is not the same as it was before. In a recent case this court said: "The motion to strike was sustained to that part of defendant's answer which alleged, in substance, that defendant advised plaintiff of his intention to claim two-thirds of the fee and that plaintiff made no objection thereto, but permitted the defendant to brief and

argue the case on appeal and brief and argue two motions for rehearing, and that by such conduct and silence on his part, when advised of the intention of defendant, plaintiff was thereby estopped from claiming a 50 per cent. division of the fee. An examination of the answer in the county court shows that nothing of this kind was alleged. If the new allegations of the answer in the district court were sufficient to plead an estoppel, then it presented a change of the issues from what these were in the county court, and the ruling of the trial court striking out such allegations was right." *Langdon v. Kennedy, Holland, DeLacy & McLaughlin,* 118 Neb. 290. We believe the rule set out in the foregoing case to be the rule to be applied in the case at bar.

When the district court permitted the amendment setting up the waiver of the conditions of the policy that had been pleaded as a defense, the evidence necessary to sustain the allegations of the amended petition must necessarily be of a much different character than that required to sustain the allegations of the petition filed in the county court, and, such being the case, the issues are not the same and the identity of the cause of action was changed. After the amendment, the facts alleged to constitute a waiver became ultimate facts relied upon for a recovery by the plaintiff in the district court which were not presented to the county court. This court has repeatedly held that actions must be tried in the appellate court upon the same issues upon which they were tried below. This rule does not require that the petition in the appellate court shall be in the precise language of that upon which the cause was submitted below. The most that it requires is that the ultimate facts relied upon for a recovery shall be the same in both courts, and provable by evidence of the same character. *Jacob North & Co. v. Angelo,* 75 Neb. 381; *Coleman v. Spearman, Snodgrass & Co.,* 68 Neb. 28. It is the settled law of this state that a cause is to be tried in the appellate 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 first trial. *Merchants Nat. Bank v. American Eagle Tire Co.*, 107 Neb. 48; *Inglehart v. Lull*, 64 Neb. 758, 69 Neb. 173; *Cobbey v. Buchanan*, 48 Neb. 391; *Darner v. Daggett*, 35 Neb. 695.

The reason is, an appeal, when a bond is given as in this case, has the effect to vacate the judgment of the court below, and presents the same issue to the appellate court for its determination as was presented in the court below. If new issues can be raised in the appellate court it is not a trial of the same cause, not in fact an appeal. An appeal brings up the case presented in the court below for a new trial, and the issues cannot be changed in the appellate court, except by consent, or in the manner above suggested. *O'Leary v. Iskey*, 12 Neb. 136. This being an appeal from a judgment of the county court in a term case, and the petition having been assailed on the ground that it tenders other and different issues than those tendered in the court below, the question of fact, raised by such motion, is ordinarily determinable by a comparison of the petition filed in the district court with that upon which the cause was submitted to the county court. *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28. A careful examination of the petitions filed in the county and district courts discloses a change in the issues. For the reasons herein set out, the learned trial court erred in overruling defendant's motion to strike the allegations of the amended petition alleging a waiver of the conditions in the policy.

The plaintiff having admitted in his amended petition that the allegations of defendant's answer are true, and, it having been determined herein that the amendment setting up a waiver of the conditions of the policy pleaded as a defense should have been stricken, the judgment is reversed and the cause remanded.

REVERSED.

NELLIE MAY SCHLEE VANCE, EXECUTRIX, APPELLANT, V. J. E. SUMNER, APPELLEE.

FILED APRIL 18, 1930. No. 26881.

1. **Injunction:** REMEDY AT LAW. The extraordinary remedy by injunction is not available to enforce a legal right, where there is a plain, adequate and speedy remedy at law.
2. ———: ———: LEASE: POSSESSION. Where a lessee has breached the conditions of a lease, which breach, by the terms of the lease, grants to the lessor the right to retake possession of the demised premises, a judgment and a writ of restitution in a forcible entry and detainer suit affords a plain, adequate and speedy remedy at law, and the plaintiff is not entitled to an injunction restraining the lessee from interfering with the lessor's entry upon the premises.
3. **Pleading:** INSOLVENCY: PRESUMPTION. Where insolvency of a defendant is averred in the pleadings, which is denied by the answer, the issue of insolvency must be proved like any other controverted fact, and the court will not presume insolvency of the defendant.

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

F. C. Radke, Magdelene Craft Radke and *Orville C. Wisdom,* for appellant.

Roland V. Rodman and *John H. Kuns, contra.*

HEARD before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

RHOADES, District Judge.

This is a suit in equity seeking injunctive relief against the defendant, who was the tenant of the plaintiff, to enjoin the tenant's interference with plaintiff and her agents entering upon the leased premises for the purpose of planting wheat prior to the termination of the defendant's lease. The parties entered into a written lease in 1922, which terminated March 1, 1925, the tenant holding over under a leasing from year to year until March 1, 1929, where, by reason of a written and timely notice, the lease was terminated. Said lease provided: "It is further agreed that the party of the first part (plaintiff) and her agents may

go upon said premises at any time * * * to plow for future crops and to sow small grain in corn and stubble ground in the fall before the expiration of the lease." Plaintiff, in August 1928, leased the premises to one E. J. Kiddle, for the year 1929, authorizing him to enter onto and plant fall wheat in the available ground, pursuant to the above referred to clause in the lease. It appears that some time in September, 1928, the exact date becoming immaterial, plaintiff, by her new tenant, attempted to go upon the premises for the purpose of planting fall wheat thereon, and defendant refused and prevented entry upon the land.

This suit in equity was instituted seeking injunctive relief, and on September 14, 1928, the county court of Kimball county issued a temporary restraining order against the defendant enjoining interference with plaintiff and her agents, and on September 17, 1928, the district court granted a temporary injunction. On final hearing the court entered its decree finding that the plaintiff is entitled to possession by reason of the fact that the defendant violated the conditions of the lease by refusing to allow plaintiff to sow stubble ground to crop in the fall of 1928, and that plaintiff has a right to declare said lease forfeited, and that due notice had been given to terminate the lease as of March 1, 1929. The trial court found that there was no proof of insolvency of the defendant, and that plaintiff had an adequate remedy at law and cannot maintain a suit in equity for an injunction. Whereupon plaintiff's action was dismissed.

It is elementary that a suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law. *Hahn System v. Stroud,* 109 Neb. 181; *Western Union Telegraph Co. v. Douglas County,* 76 Neb. 666; *Brown v. Reed,* 72 Neb. 167.

In *Mohat v. Hutt,* 75 Neb. 732, where plaintiff sought by injunction to restrain defendant from interfering with his possession of land, this court held that the equitable relief by injunction cannot be substituted for ejectment or for-

cible entry and detainer. It is said in the opinion: "It is clear to us that this suit is simply an attempt to employ the extraordinary writ of injunction to enforce what, at most, is a mere legal right, and one which the ordinary remedies at law are amply adequate to protect. In other words, it is an attempt to substitute the remedy by injunction for ejectment, and forcible entry and detainer, and the prayer for an injunction for that purpose should have been denied. *Warlier v. Williams*, 53 Neb. 143; *Wehmer v. Fokenga*, 57 Neb. 510. See, also, *State v. Graves*, 66 Neb. 17."

In *Warlier v. Williams*, 53 Neb. 143, plaintiff sought to regain possession of real estate by the extraordinary remedy of injunction. This court there held that plaintiff might have instituted against the defendants an action of forcible entry and detainer under the statute. The question was there presented whether or not the statutory remedy was an adequate one, and it was said: "This remedy is not only an adequate one but it is a summary and a speedy one. * * * A judgment and a writ of restitution in a forcible entry and detainer suit would afford him the same and a more speedy redress than a proceeding by injunction." This case likewise disposes of the argument presented in reference to the insolvency of the defendants, which was pleaded, but not proved. It is said in the opinion: "If the defendants in error are insolvent, then the plaintiff in error has no redress for the costs and expenses that he may incur in prosecuting either an injunction suit or a forcible entry and detainer suit."

The case of *State Bank of Nebraska v. Rohren*, 55 Neb. 223, relied upon by the appellant, is distinguishable from the case at bar, as it was said in that case that the landlord cannot cancel the lease and retake possession of the leased premises by forcible entry and detainer because of the lessee's refusal to permit appellee to enter upon the land and fall plow it, "as the lease makes no provision for its forfeiture on that ground." In the case at bar the lease provides: "It is further expressly agreed that * * * if the second party * * * violate any of the conditions of this

contract, then this lease shall thereby terminate." Defendant's refusal to allow the plaintiff and her agents to enter upon the land violated the provisions of the lease, and thereby terminated the lease; whereupon the plaintiff had a right to institute an action in forcible entry and detainer which provides a plain, adequate and speedy remedy at law.

In *Carlson v. Koerner*, 226 Ill. 15, a case similar to the facts presented in case at bar, the lease provided that, if appellant failed to keep the covenants therein contained, the appellee should have the right to declare the lease null and void and retake possession. The court in the opinion said: "If appellant refused to allow appellee to enter for the purpose of doing what the lease expressly provides she might do, appellant violates the terms of the lease, and appellee had her election to bring an action of forcible entry and detainer and thereby secure possession of the premises."

Other assignments of error which have been presented need not be considered, as, the plaintiff having an adequate remedy at law for the relief sought to be had by the extraordinary remedy of injunction, equitable relief must be denied and the judgment of the trial court affirmed.

Pursuant to stipulation of the parties hereto, each party shall pay his own costs.

AFFIRMED.

NELLIE WEST ET AL. V. STATE OF NEBRASKA.

FILED APRIL 25, 1930. No. 27300.

1. **Larceny**: ESSENTIAL ELEMENTS: FELONIOUS INTENT. The felonious intent to deprive a person of his property is an essential element of grand larceny.
2. **Criminal Law**: FELONIOUS INTENT: PROOF. To sustain a conviction for grand larceny, the felonious intent to defraud the owner of property taken by accused must be proved beyond a reasonable doubt.
3. ———: ———: CIRCUMSTANTIAL EVIDENCE. Where the felonious intent essential to a conviction for grand larceny is inferable alone from circumstances, they must be such as to ex-

clude every reasonable hypothesis on that issue except the guilt of accused.

4. Larceny: SUFFICIENCY OF EVIDENCE. In a prosecution for the larceny of an automobile, where accused claimed to be the owner of it by oral gift and proved that it was taken under advice of counsel, the evidence outlined in the opinion *held* insufficient to sustain a conviction.

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

N. M. York and *Ted R. Frogge,* for plaintiffs in error.

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

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

ROSE, J.

In a prosecution by the state in the district court for Gosper county Nellie West and William E. Lacey, defendants, were convicted of the larceny of an automobile valued at $400. For that felony Nellie West was sentenced to serve a term of one year in the state reformatory for women at York and William E. Lacey was sentenced to serve a term of one year in the state penitentiary at Lancaster. As plaintiffs in error the defendants named have presented for review the record of their conviction.

The controlling question for determination is the sufficiency of the evidence to sustain the conviction. There was a plea of not guilty, which included the defense that Nellie West claimed in good faith to be the owner of the automobile by betrothal gift and took it under advice of counsel. It is contended on behalf of defendants that evidence of the criminal intent essential to a conviction for grand larceny is entirely wanting and that consequently the sentences should be reversed and the prosecution dismissed.

It is settled law that the felonious intent to deprive a person of his property is an essential element of grand larceny. *Waidley v. State,* 34 Neb. 250; *Dobson v. State,* 61 Neb. 584; *Jones v. State,* 101 Neb. 847; *McIntosh v. State,*

105 Neb. 328. To sustain a conviction, therefore, the felonious intent must be proved beyond a reasonable doubt. *Hayward v. State,* 97 Neb. 9. Where felonious intent is inferable alone from circumstances, they must be such as to exclude every reasonable hypothesis on that issue except the guilt of accused. *Smith v. State,* 61 Neb. 296; *Lamb v. State,* 69 Neb. 212; *Lillie v. State,* 72 Neb. 228; *Lowe v. State,* 110 Neb. 325. In this particular is the evidence in the present instance sufficient to sustain the conviction?

There was no dispute about the taking of the automobile by Nellie West. She took it, claiming to be the owner. The information contained the charge that the automobile, a Chevrolet sedan definitely described, was the personal property of J. C. Utterback, special administrator of the estate of John C. Sanders, deceased, and that defendants, on or about March 4, 1929, in Gosper county, Nebraska, "did then and there unlawfully and feloniously take, steal, carry and drive" it away "with intent thereby to defraud the owner." Sanders was a bachelor and resided on a farm a few miles from Holbrook, Gosper county. He asked where he could get a housekeeper, and in reply William E. Lacey, to whom the inquiry had been directed, recommended Nellie West, a divorced woman who had two small children. She was employed by Sanders and entered upon her duties in his home June 17, 1928, where she resided with her children until Saturday, March 2, 1929. On that date Sanders committed suicide in a room in his house. The county attorney, who was also coroner, held an inquest the same day, appointed custodians of decedent's property, immediately placed them in charge of it and procured the appointment of Utterback as special administrator. Appraisers were on the premises Sunday, March 3, 1929, appraised the property March 4, 1929, and listed the Chevrolet sedan as part of decedent's estate. Nellie West took the automobile out of the garage Monday, March 4, 1929, and drove it away. March 5, 1929, was the date of the funeral. Defendants were present at the services.

In connection with the facts outlined, the evidence adduced by the state on the issue of the felonious intent essential to a conviction may be summarized as follows: Sanders bought the automobile June 29, 1928, and paid for it; had the bill of sale and an insurance policy drawn in his own name; procured for himself the necessary license and paid the fee therefor; provided a garage near his house where the car was kept when not in use; carried a set of the Chevrolet keys in his pocket, where they were found on his person after his death; drove the car himself on two or three different occasions between the date of purchase, June 29, 1928, and the date of his death, March 2, 1929; never transferred the title by bill of sale or by other instrument in writing; once referred to the car as his own and at another time indicated a purpose to sell it. The record also contains evidence tending to prove the following facts, in substance: Nellie West was present when the inquest was held, when the custodians and the appraisers were appointed, and when property of decedent was listed, but made no claim to ownership of the automobile. She said she hated to see the car sold and would buy it, if she had the money. Promptly after the appointment of Utterback as special administrator he told Nellie West her services were no longer needed. She expressed a purpose to go to Oxford, in Harlan county, and he told her not to take the car.

Whether the circumstantial evidence is sufficient to exclude every reasonable hypothesis except the felonious intent of Nellie West to steal the automobile depends upon all the circumstances in connection with established facts. She testified positively that she was engaged to be married to John C. Sanders and that he gave her the car as an engagement gift. With her two small children his home had been her home for nine months. Finding herself suddenly in an appalling situation there March 2, 1929, she reported the tragedy by telephone to Oxford, where Lacey, her friend, resided with his wife and four children. He met Nellie West at the Sanders home the next day, advised her

to consult an attorney about her claim to the car, and recommended a capable lawyer in good standing at Red Cloud. She pursued that course. Her testimony, corroborated in many particulars by other witnesses, tends to prove the following facts: She and her children spent Sunday night, March 3, 1929, at the home of the Laceys in Oxford. In Lacey's car she went to Red Cloud the next morning, March 4, 1929; called at the office of the attorney recommended; told him the car was given to her by Sanders as an engagement gift, but did not know there would be trouble with the estate over it; said it was unlocked in the Sanders garage where she had placed it and that she had a set of keys for it; asked if she could take it; was told that it would be all right to do so, to store it and to notify the administrator; returned to Oxford and went from there to the Sanders place the same afternoon, Monday, March 4, 1929, backed the car out of the garage and loaded it with her personal belongings; drove it in the evening to Orleans with her children and one of Lacey's daughters; stored it for the night in a garage there; went back to Oxford with Lacey's son, Paul, and spent the night with the Lacey family; took the car to Red Cloud the next morning, March 5, 1929, and stored it in a garage there; again conferred with her attorney, and, acting on his advice, wrote and mailed to the administrator a letter stating that the car had been given to her by Sanders and asking him to write to her attorney, naming him, if he wanted to know more about it. The letter is in the record and is dated and postmarked at Red Cloud, March 6, 1929.

The attorney consulted by defendants testified as a witness and said that they had called at his office in Red Cloud in the morning on two different occasions and consulted him about the car. Asked to give the substance of the conversation with them, he testified, referring to Nellie West:

"As I recall, the title of this car was in dispute; that is, she claimed it. And as I remember she told me that this man's brother, or the administrator, I have forgotten which, was claiming it. And she told me how long she had

lived here—a few months in this county—and had nothing, as I remember, and could not put up a bond—a bond of replevin. And I said then, 'If I were you, I would take the car to Orleans, over in Harlan county, and make the other side replevin it. They will have to put up a bond, and if you are a stranger up in that county you would have more of a chance in Harlan county than you would up there.' And I think that is about all I can remember. I said, 'I would not want to go away up to Elwood to defend your title to that car. If you want to bring it to Orleans, and, after it is brought there, then tell the administrator or brother where it is, and, if he claims it or wants it, he can replevin it, and the matter can be settled in court.'"

The garage-keeper at Red Cloud, a witness for the state, testified in substance on direct and cross-examination: Defendants delivered a Chevrolet sedan to him for storage March 5, 1929. They said it might be there a week or longer; were having a little trouble with it; had been advised by the attorney to leave it there until they got the trouble settled; were notifying the estate. The car remained there under that arrangement until the sheriff took it away.

The Chevrolet dealer at Holbrook, another witness for the state, testified that Nellie West called alone at his place of business and negotiated for the car; that the deal was consummated with Sanders at his farm when she was present and that she did most of the talking; that when delivered two sets of keys were in the car; that Sanders and Nellie West drove it away, the latter at the wheel.

A Buick salesman testified that Nellie West negotiated with him at Arapahoe for an exchange of the Chevrolet sedan and a payment in money for a Buick car about a week before the death of Sanders; that the negotiations were continued the next day with her and Sanders at the latter's house; that the deal was not closed, but that Sanders, in presence of witness, while the exchange of cars was under consideration, said to Nellie West:

"I have bought you one car, and I have bought you a

radio, and I paid for having your teeth fixed. Now, if I do this, you will do what I want."

The principal argument by counsel for the state on the sufficiency of the evidence to prove felonious intent was directed to the proposition that she did not claim it when the custodians, the administrator and the appraisers were present in the performance of their duties. The inference of hostility toward her is unavoidable. The home of herself and children had been lost. After the death of Sanders the officers were promptly and continuously in charge of the premises and the property of decedent. The car she had been driving for months was in his garage. She was ordered not to take it. She was peremptorily told that her services were no longer needed. The administrator went through her trunk in search of papers belonging to the estate, but found none. The dead body of the man who had provided a home for herself and her children was still in the house that had sheltered them. There is nothing in the record to indicate that any relative of his or any officer who kept a vigil there spoke a kind word to her. Before she consulted her attorney there was nothing to imply that she thought she could safely rely on an oral gift to establish her title to the car. She was present when it was purchased and knew the bill of sale was issued to Sanders. She also knew that her claim rested in parol and that the title of Sanders was evidenced by a written instrument. The motive that prompted her to consult an attorney would naturally make her shrink from asserting her claim under the circumstances before receiving legal advice. This would account also for the statement that she hated to see the car sold and would buy it if she had the money. When all the circumstances are impartially considered, the inference of good faith on her part is at least as strong as the inference of felonious intent. The prosecution did not meet the requirements of the criminal law. Grand larceny was not proved beyond a reasonable doubt. The circumstantial evidence does not exclude every reasonable hypothesis except the felonious intent of Nellie West. Both de-

fendants should have been acquitted. The county attorney informed the jury that he had adduced all the available evidence. The case, therefore, will not be remanded for a new trial. The judgment of the district court is reversed and the prosecution dismissed at the costs of Gosper county in both courts.

REVERSED AND DISMISSED.

Good, J., dissents.

FRED LISKE V. STATE OF NEBRASKA.

FILED APRIL 25, 1930. No. 27393.

1. **Intoxicating Liquors:** BOOTLEGGING STATUTE. Chapter 77, Laws 1929, construed, and *held* that it is not in conflict with any other of the liquor laws of Nebraska.
2. ———: THIRD OFFENSE: BAR. Inasmuch as the defendant was not informed against under section 3239, Comp. St. 1922, as amended by chapter 77, Laws 1929, he could not, of course, be lawfully tried or sentenced thereunder, but such amendment is not a bar to defendant's arrest and conviction for a third offense under section 3288, Comp. St. 1922, although the first and second offenses were committed prior to the adoption of the amendment.
3. **Statutes:** REPEAL BY IMPLICATION. "Repeals by implication are not favored, and a later act will not be construed as repealing, by implication, a former act where it is possible that they may stand together." *Lingonner v. Ambler*, 44 Neb. 316.

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

Emil F. Lucky and *M. O. Cunningham*, for plaintiff in error.

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

HEARD before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

DEAN, J.

Fred Liske was informed against in Platte county,

December 23, 1929, and there charged with having had in his possession a quantity of intoxicating liquor. The defendant pleaded guilty, and it is shown by the record that this was at least his third offense. Thereupon the defendant was sentenced, pursuant to section 3288, Comp. St. 1922, to imprisonment in the state penitentiary for one year. Subsequently a "motion to correct sentence" was filed, and therein defendant contends that he should have been sentenced under chapter 77, Laws 1929, as a first offender only, the argument being that the court "was without power to enlarge said punishment except for convictions had subsequent to the adoption of said act." The court overruled the defendant's motion, and he prosecutes error.

The information charged that defendant "was on the 24th day of September, 1919, prosecuted and found guilty in the county court of Platte county, Nebraska, of a violation of one of the provisions of the liquor laws of said state, known as chapter 33 of the Compiled Statutes of Nebraska for 1922; and the said Fred Liske was on the first day of December, 1924, found guilty in the district court for Madison county, Nebraska, of a second violation of one of the provisions of chapter 33 of the Compiled Statutes of Nebraska for 1922; and the said Fred Liske was on the 22d day of September, 1925, prosecuted and found guilty in the district court for Platte county, Nebraska, of a third violation of one of the provisions of chapter 33 of the Compiled Statutes for 1922; and the offense charged in this first count of this complaint (the present case) is at least the third offense of the said Fred Liske against one of the provisions of chapter 33 of the Compiled Statutes of Nebraska for 1922."

The defendant's argument is that section 3288, Comp. St. 1922, under which he was sentenced, was amended by chapter 77, Laws 1929, and that all laws in conflict with chapter 77, including section 3288, were repealed. But the argument does not appeal to us. The above chapter 77 amends only section 3239, Comp. St. 1922, commonly known as the "bootlegging" statute, and the amended act does not

refer to any other section of the liquor laws, nor does it conflict with any other section thereof. The defendant's argument appears to be that section 3239, as amended, is a bar to his conviction for a third offense, in that the first and second offenses were committed prior to the amendment of this act. But inasmuch as the defendant was not informed against under section 3239, as amended, he could not, of course, be lawfully sentenced thereunder. The defendant was informed against under section 3247, Comp. St. 1922, which relates to unlawful possession of intoxicating liquor, and he was properly sentenced under section 3288, which covers all penalties for liquor violations except where some other penalty is expressly provided, as in section 3239, relating to "bootlegging."

In an opinion by Judge Irvine, we said: "Repeals by implication are not favored, and a later act will not be construed as repealing, by implication, a former act where it is possible that they may stand together." *Lingonner v. Ambler,* 44 Neb. 316. And in *State v. Omaha Elevator Co.,* 75 Neb. 637, the rule announced in the *Lingonner* case was adhered to. We think the present case comes within the rule above cited.

In view of the statute and of the decisions cited herein, we conclude that the judgment of the district court is right and must be and it hereby is in all things

AFFIRMED.

WILLIAM T. SACKS, APPELLEE, V. BERT H. LYTLE ET AL., APPELLANTS.

FILED APRIL 25, 1930. No. 27165.

1. Partnership: EXEMPTIONS. Record examined, and priority of liens and order of payment out of Lytle's share of the net proceeds of the partnership determined.
2. Judgment. That part of the judgment of the trial court, dated May 21, 1929, deciding the priority of liens and entering order of payment, is reversed and the cause remanded, with directions to enter decree in harmony with this opinion.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed in part, and remanded, with directions.*

Mockett & Finkelstein and *W. A. Robertson,* for appellants.

H. E. Holeman, Dale P. Stough and *J. C. McNerney, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY, and DAY, JJ., and LIGHTNER, District Judge.

THOMPSON, J.

This is an ordinary action in equity instituted by Sacks, the appellee, against Lytle, one of the appellants, to settle and wind up the affairs of a "farm lease-partnership," organized on November 13, 1924, in which they were equal partners, by and through a receiver. After the issues between Sacks and Lytle were duly joined and hearing had, the court on February 21, 1929, entered decree finding that the partnership existing between Sacks and Lytle should be dissolved, and a receiver appointed; and ordered the dissolution of such partnership; further, that Sacks have judgment of $2,282.46 against Lytle on four certain promissory notes, but that the priority of this Sacks judgment as a debt against Lytle should be withheld for determination until the final report of the receiver; that A. M. Longman be appointed receiver to collect the assets of such partnership, to receive claims and report the same to the court, upon his taking oath as such receiver and giving bond of $3,000; that on qualifying such receiver be authorized to sell the hogs, live stock and perishable property of the partnership, and report the same to the court. Such decree is in no way challenged.

In harmony with the above judgment, the receiver qualified on March 9, 1929, and on March 13, 1929, he filed his inventory and report. Thereafter on March 19, 1929, the court entered an order authorizing the receiver to sell all the partnership assets.

On March 29, 1929, the other appellants, individual creditors of Lytle, intervened.

At final hearing, May 21, 1929, the court entered judgment and decree of distribution (after making certain deductions here uncomplained of) finding that there was left to be distributed, after all partnership debts were paid, cash in the sum of $4,939.14, one-half of which, to wit, $2,469.57, was the property of Sacks, and the other half ($2,469.57) that of Lytle. As to the Lytle half the priority of liens was found, and distribution decreed to be made in the order and amounts here named: The Bank of Eagle, $250 (which is not complained of); Sacks' judgment against Lytle, $2,282.46; Lytle, $500 for claimed statutory exemption, if any balance of such fund remained; the residue, if any, to the respective interveners in equal priorities. Lytle and such interveners appeal.

While numerous claimed reasons for reversing the judgment of distribution of the trial court are urged by the respective appellants, in our view these may all be reduced to one contention: The court erred in not decreeing Lytle's claimed statutory exemption of $500 the second lien to be paid, the interveners' judgments the third, and Sacks' judgment the fourth.

Considering the rights of these would-be distributees in the order in which they are respectively placed by the trial court: Sacks and Lytle under the "farm lease-partnership" agreement were to each furnish one-half of all the personal property which went into the enterprise. Sacks had on the farm at the date of such agreement, hogs, cattle, horses, mules, poultry, grain, farm machinery, and other things ordinarily used on a farm, of the then agreed value of $2,467.52, and Lytle none. In order that each might have an equal share therein Sacks sold Lytle an undivided one-half interest in what he, Sacks, had and took in payment therefor (as stated in Sacks' petition) Lytle's promissory note in usual form for $1,233.76, due and payable March 1, 1926, on which note there was paid by Lytle on January 16, 1926, the sum of $362. No other payments having been

made, this note was set up in Sacks' petition, and the amount due thereon, as well as that due and unpaid on three other notes, made a part of the petition of Sacks (which latter three notes we find to be but personal obligations of Lytle running to Sacks), formed the basis of the original judgment of $2,282.46 entered, as heretofore stated, on February 21, 1929. Sacks prays that the amount thus found due him be decreed to be a lien on, and first paid out of, the Lytle share of the proceeds before Lytle's exemption is allowed, or any of Lytle's creditors, disconnected with the partnership, are paid. With respect to this contention: Sacks took Lytle's note in payment of the obligation which formed the consideration therefor, and pursued such note to a personal judgment against Lytle. Therefore, Sacks cannot now be heard to say it is the debt of the partnership, or that the partnership property shall be impressed with a lien for its payment, or that he was other than an ordinary creditor of Lytle.

As to Lytle's claimed statutory exemption of $500: His only appearance in the action, after the rendition of the judgment of February 21, 1929 (except to file a motion for a new trial after the entry of decree of distribution), was the filing of an affidavit, in usual form under our statutes, praying that he might be, as head of a family, allowed out of his one-half of the net proceeds of the partnership the sum of $500; that it be declared the prior lien in suit and first paid out of his aforesaid distributive share. Lytle did not plead to the petitions of the interveners, nor to the answer of Sacks thereto. However, as we find, he made application for his exemption timely and in a proper manner, and the same should be allowed.

As to the interveners: On July 21, 1928, the action to wind up this partnership was pending, and so continued. The "farm lease-partnership" agreement, as an entirety, formed an integral part of the petition of Sacks, as a copy of such agreement was attached thereto and made a part thereof. Such petition also included the claimed rights of the parties in and to the properties therein involved, being

the properties covered by the aforesaid "farm lease-partnership" agreement. Nine of these interveners obtained their judgments on February 11, 1929, and on the 13th day of the same month procured their executions and made their levies. The other two interveners recovered their judgments and made their levies at a slightly later date. The total face amount of such judgments of the interveners is $927.63.

Section 8595, Comp. St. 1922, so far as material here, provides: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title." Thus, each intervener, at the time of the recovery of his judgment and attempted levy, and long prior thereto, had constructive notice, binding upon him, as to the matters involved in this lawsuit, all of which were merged in the original judgment so entered herein on February 21, 1929. Then, in their respective petitions of intervention they, in substance, state that they levied on the undivided one-half interest of Lytle in and to specific chattels then on a farm of which Lytle was a renter under a lease with Sacks, but that they did not know the provisions of the lease. Thus it will be seen that they not only had constructive notice of the true status of these properties, by and through the pendency of this action, but actual notice that Lytle was, as to the properties about to be levied upon, the owner of but an undivided interest therein under a lease from Sacks. This actual knowledge, if reasonably and seasonably pursued, would have led to a full knowledge of the true status of these properties. It might further be said that whatever rights accrued to these interveners by reason of their levies, if a right could be said to have at any time existed, were abandoned; as these partnership properties that were levied upon were not sold under the levies, but by the receiver, with the other properties of his trust, and the proceeds commingled with the other trust funds. Further, the value of the specific chattels involved

was not proved by interveners, nor the price at which each article sold shown in the receiver's report. The interveners do not complain of the aforesaid treatment of the chattels levied upon, but on the contrary ask distribution out of the trust fund as an entirety. They stand in the same relation to the fund as does Sacks, that is, that of an ordinary creditor of Lytle. If, in law, the judgment of Sacks and that of these respective interveners stand on a parity as to the fund in question, it follows, in equity, that as the fund will not satisfy each judgment in its entirety a *pro rata* distribution thereof should be decreed. Hence, it is considered by us that the priority of liens and order of payment out of the $2,469.57 (Lytle's share of the net proceeds of the partnership) should be as follows: First, the Bank of Eagle, $250; second, Lytle his $500 statutory exemption; and, third, the remainder to Sacks and these respective interveners *pro rata;* each and all of such payments to be made as of the date of the decree of distribution.

The judgment of the trial court as to the priority of liens, entered May 21, 1929, is reversed and the cause remanded, with directions to enter decree in harmony with this opinion; each party paying his own taxable costs of this appeal.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

IN RE ESTATE OF ROBERT TAGART.
JOHN MURPHY, APPELLANT, V. ESTATE OF ROBERT TAGART, APPELLEE.

FILED APRIL 25, 1930. No. 27104.

1. **County Court: APPEAL: FEES: WAIVER.** In an appeal from the county court in a probate proceeding under a statute providing that it shall be the duty of the probate judge, upon payment of his fee therefor, to transmit to the clerk of the district court a certified transcript of the proceedings, said probate judge may waive the right to demand his fee in advance for the making of such transcript.
2. ——— : ——— JURISDICTION. Where the defeated party undertakes to perfect an appeal from an adverse ruling of the

county court in a probate proceeding, orders a transcript, and the county judge waives the payment of the fee in advance, and states to the appellant that the transcript will be made and filed, but through inadvertence neglects to file the same, and no lack of diligence on the part of the appellant appears, under such circumstances the failure to transmit such transcript to the appellate court will not defeat the appeal.

3. ———: ———: ———. From the facts disclosed, it appears that the appellant, within due time, did all that was legally required of him to do in perfecting his appeal. Under such circumstances, the district court did not lose jurisdiction of the case because the transcript was not filed within the time provided by law.

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

Bartos & Placek, for appellant.

J. C. Moore, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

On June 12, 1928, there was pending in the probate court of Johnson county proceedings in the matter of the estate of Robert Tagart, deceased. On said date the appellant herein filed a claim in said probate court against said estate claiming that there was due from him from said deceased the sum of $1,025.85. Appropriate objections were filed on behalf of the administrator against the allowance of said claim, the issues were formed, and the matter was heard in the county court and was taken under advisement. On December 4, 1928, the county court entered its judgment dismissing the claim. On December 31, 1928, the appellant presented to the county judge an appeal bond evincing his desire to appeal to the district court from the judgment disallowing said claim. Said appeal bond was approved and filed by the county judge on the 31st day of December, 1928. On December 29, 1928, the county judge received an order from appellant for a transcript of the proceedings. On December 31, 1928, the county judge pre-

pared the transcript. This transcript was never filed in the office of the clerk of the district court within the required time provided by statute. A motion was made in the district court to dismiss the appeal for the reason that the transcript was not filed in time. A hearing upon the motion was had, whereupon the district court dismissed the appeal, and from such judgment of dismissal the appellant prosecutes error to this court.

The appellant contends that he exercised due diligence in demanding the transcript, and that the county judge wrote him that the transcript would be prepared and filed, and that the failure of the county judge to file the transcript is through no fault of the appellant and it was error to dismiss his appeal. This appears to be the only question presented by the record for review in this court.

The evidence is undisputed that the transcript was prepared on the 31st of December, 1928. It appears from the affidavit of the county judge, F. C. Radke, that it was prepared on the 31st of December, 1929. The affidavit appears to have been sworn to on the 27th day of March, 1929, and therefore the date of December 31, 1929, appears to be in error and it doubtless was intended to be December 31, 1928. This being the case, the record is undisputed as to the date the transcript was prepared, which was December 31, 1928.

F. C. Radke, who was then county judge, in his affidavit states that he prepared this transcript on the date stated; that he never notified appellant or his attorney that the transcript was ready and had not been filed; that his term of office was about to expire and he was somewhat confused by the stress of business which occurred just previous to his departure from the office, and that he completely forgot to file the transcript, stating that that was the reason for not filing it.

In the counter showing of appellee, county judge F. C. Radke makes another affidavit in which he states that he caused a transcript for an appeal to be made in this cause and notified the attorney for the claimant that the fee for

the same was $2 and transcript should be delivered upon the payment of the fee.

Judge Radke's term of office expired on January 3, 1929, and Walter P. Campbell succeeded F. C. Radke as county judge of Johnson county, assuming the duties on the 3d day of January, 1929. There appears in the record an affidavit of Judge Campbell in which he states that when Judge Radke delivered the office of county judge to him Judge Radke informed affiant that this transcript had been prepared at the direction of attorney for the appellant, and that the transcript fee of $2 had not been paid, and that said transcript should not be delivered until said fee of $2 had been paid. There also appears in the record a letter written by Judge Radke under date of December 31, 1928, addressed to Bartos & Placek, at Wilbur, Nebraska, attorneys for appellant, which contains the following language:

"In re John P. Murphy claim against Tagart Estate.
"Gentlemen:

"Your letter received. Appeal bond filed and approved this date. Fee for transcript will be $2.00. Filing fee in district court $1.00. Please remit $3.00. Transcript will be made and filed."

There seems to be a rule of general judicial policy favoring the right of a litigant to have his cause determined by the court of last resort unless through some neglect or lack of diligence he has failed to comply with the rules of procedure entitling him to such hearing. It is a fact that this transcript was not filed within the time provided by law. If the trial court acquired no jurisdiction of the cause it properly dismissed the appeal. Then the issue is whether or not the appellant exercised due diligence in his endeavor to have the appeal properly perfected.

The statutes governing appeals from the county court in ordinary civil actions and in probate proceedings differ quite materially. In ordinary civil actions it seems there is no legal duty imposed upon the county judge to do more than prepare the transcript, while the statute regulating appeals in probate matters is as follows:

"When such appeal is taken, the county court shall, on payment of his fees therefor, transmit to the clerk of the district court, within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from." Comp. St. 1922, sec. 1475. It will be noted that this statute casts upon the county judge the duty to transmit the transcript to the clerk of the district court within ten days after perfecting such appeal, on payment of his fees therefor. The case cited, *Cheney v. Buckmaster*, 29 Neb. 420, is not authority here, for the reason that that was an ordinary civil action brought before the county judge upon a claim in excess of his justice jurisdiction, and was not in a probate proceeding, and therefore was regulated by a different statute from the one applicable in the instant case. The payment of the fee for making the transcript seems to be, by this statute, a prerequisite to the right of a party to have it transmitted to the district court.

The record is without dispute that the fee was not paid prior to the time fixed by the statute for delivering the transcript to the district court. It is evident that in the passage of this statute the legislature incorporated this clause for the purpose of protecting probate judges from a loss of fees in case there was any question as to the financial ability of the appellant. In *Drexel v. Reed*, 65 Neb. 231, in construing this identical statute, the court said that the right to demand and collect fees in advance could be waived by the county judge. In deciding that case the following language is used:

"This was under a general practice of the county court in such cases not to ask for fees in advance from reliable attorneys. There is no doubt of the correctness of the county judge's statement that nonpayment of fees had nothing to do with this delay. He waived their payment in advance of the service. That he could do so admits of no doubt. The direct reference in the statute to his performing this duty, 'on payment of his fees therefor,' was not intended to place this one on any different footing from

other duties, in respect to prepayment of fees. It was evidently inserted only out of abundant caution to preserve the right to demand them."

Judge Radke, in his affidavit offered by the appellant, states that the failure to file the transcript was not based upon the nonpayment of the fee in advance, but he prepared the transcript and wholly forgot the same because of the necessity of caring for many duties just prior to his departure from his office. This seems to be borne out by the letter herein quoted in which he writes counsel for appellant sending him a bill for the cost of preparing and filing the transcript and states in this letter that the transcript will be prepared and filed. He does not state that the transcript will be held and not filed until the fee is paid. He merely asks attorneys for appellant to remit $3. Then follows the statement that transcript will be made and filed. It seems to us that a reasonable interpretation of this statement is that he waived the payment of fees in advance.

From a consideration of all the evidence presented by the record, we think that the case falls within the rule announced in *Drexel v. Reed, supra,* and that the county judge waived the right to collect the fee in advance, and that appellant from the information he had received from the county judge acted as a reasonable and prudent person would have acted under the circumstances, and had a right to believe that the county judge would transmit the transcript within the time provided by law. This position is strengthened by the fact that the county judge, in one affidavit, states that the failure to file it was because he completely forgot it, and not because the fee had not been paid.

Under the facts as they appear, we reach the conclusion that the appellant had a right to have his case heard by the trial court and a denial of that right constitutes error. The judgment is therefore reversed and the cause remanded.

REVERSED.

IN RE ESTATE OF GUSTAF ROBERT NOREN. FEDERAL TRUST COMPANY OF LINCOLN, APPELLANT, V. ESTHER NELSON, APPELLEE.

FILED APRIL 25, 1930. No. 26614.

1. Trial: WILLS: QUESTIONS FOR JURY. Generally speaking, where the record in a law action contains evidence to support a proposition, and reasonable minds might differ as to whether the proposition is supported thereby, the question is one for the jury. Where, as in this case, competent evidence relating to mental capacity and undue influence is conflicting, the issues of fact are questions for the jury and it is not error for the court to submit such issues.
2. Wills: APPEAL: TRIAL DE NOVO. A defeated litigant in the contest of a will is not entitled to a trial *de novo* on appeal to the supreme court. On such appeal the issues of fact are determined by the sufficiency of the evidence to sustain the verdict of the jury or the findings of the district court. *In re Estate of Kerr*, 117 Neb. 630.
3. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence offered and received on the issue of mental capacity to make a will discussed, and *held* sufficient to sustain the verdict of the jury.
4. ———: ———: ———. On the issue of undue influence presented by the record in this case, evidence considered, and *held* sufficient to sustain the verdict of the jury.
5. ———: UNDUE INFLUENCE: PRESUMPTION. It may be stated generally that, where a testator who is aged and infirm, with his mental faculties impaired, makes a will which is unnatural in its provisions, and in favor of a confidential adviser who is actively concerned in the execution thereof, and who receives substantial and valuable property or rights under the will, there arises a presumption of undue influence, and in such case it devolves upon the beneficiary to overcome the presumption or inference which arises from the proof of these facts by competent evidence sufficient for the purpose.
6. ———: APPEAL: INSTRUCTIONS. Certain instructions claimed by appellant to be erroneous examined and discussed, and *held* to be free from error prejudicial to the substantial rights of appellant. Other instructions requested by appellant and refused by the trial court examined, and *held* properly refused.
7. Trial: INSTRUCTIONS. Mere inexactness in the language of an instruction is not ground for reversal, where the jury were not misled thereby.

8. ———: ———. The supreme court will disregard any error or defect in instructions given, or error in the failure or refusal to give instructions requested, where the same do not affect the substantial rights of the parties.

9. ———: ———. "Error cannot be predicated upon the failure of the trial court to state the entire law applicable to the questions submitted to the jury in one instruction. The charge must be considered as a whole, to determine whether or not the jury have been properly instructed upon all questions which are submitted to the jury for their determination." *In re Estate of Lyell*, 116 Neb. 827.

10. Wills: EVIDENCE: CONTESTANT'S FINANCIAL CONDITION. Evidence of the financial condition of the contestant in a will contest case is properly received and may properly be considered by the jury along with other evidence in the case, as bearing upon the issues of mental capacity to make a will and undue influence in the execution of such will, where such issues are in the case by proper pleadings. Especially is this true where the contestant is in close relationship to the testator and claim is made that the provisions of the will are unnatural.

11. Affirmance. Upon consideration of the whole record, *held* the entire case was properly submitted to the jury, and that the verdict of the jury is sustained by sufficient evidence.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

John J. Ledwith, Max Towle and *H. N. Mattley*, for appellant.

Wilmer B. Comstock and *Clark Jeary, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and CHARLES H. STEWART, District Judge.

CHARLES H. STEWART, District Judge.

This is an appeal from a judgment of the district court for Lancaster county, denying probate to an instrument as the last will and testament of Gustaf Robert Noren, deceased.

Gustaf Robert Noren lived for many years on his farm near the village of Waverly, Nebraska. His family consisted of a wife and an adopted daughter, Esther Nelson,

contestant herein. Noren died at his home on June 15, 1927, at about the age of 84 years. His wife died a few months before this. The instrument offered for probate was executed at the city of Lincoln on March 30, 1927. It is in legal form, was signed by Gustaf Robert Noren as testator and was witnessed by five attesting witnesses. This instrument is too long to be set forth in full. It purported to direct the payment of debts; the expenses of testator's last illness and burial, and the expense incident to the administration of his estate.

In the instrument the testator expressed a desire to be buried in the cemetery lot where his departed wife reposed and provided for the erection of a monument at a cost not to exceed the sum of $1,000. By the express terms of the instrument the adopted daughter, Esther Nelson, was given the sum of $1,000 as her own absolutely, and there was given to the Federal Trust Company of Lincoln, Nebraska, as trustee for said adopted daughter, the sum of $5,000, upon terms and conditions providing that such trust company should have power to manage, handle and control said trust fund and semi-annually pay to said adopted daughter the net proceeds thereof. By the terms of said trust, said fund to continue during the lifetime of said adopted daughter and upon her death immediately terminate, and said trust fund in the amount of $5,000 become a part of the residue of said estate. Other provisions practically make the fund a spendthrift trust. Bequests of $1,000 each are directed to be paid to each of two brothers and one sister, and a further bequest of $3,000 is directed to be paid to a niece. Said instrument purports to give, devise and bequeath all the rest, residue and remainder of the estate to the Federal Trust Company of Lincoln, Nebraska, as trustee, upon terms and conditions giving it general power to manage, handle and control said estate; to sell the personal property and if necessary, upon proper order of court, to sell the real estate and invest the proceeds in bonds and securities described in said trust. The trust further directs that semi-annually said trustee shall

pay to Lancaster county, Nebraska, the net income from said trust estate, to be used by said county for charitable purposes in said county. In this connection, request is further made that Lancaster county give personal care to the cemetery lot before referred to. The instrument nominates and requests the court to appoint said trust company executor, and the attorney who drew the will is requested to represent said estate in the administration thereof. By the terms of said trust no bond is required of the trustee. These we think are the important provisions which must be considered in connection with this appeal.

The Federal Trust Company of Lincoln offered this instrument for probate as the last will and testament of Gustaf Robert Noren, and objections were filed by the adopted daughter, Esther Nelson, as contestant. On appeal to the district court for Lancaster county issue was joined on the petition and objections, and a trial was had before the court and a jury. A verdict concurred in by eleven members of the jury was returned for the contestant and against the proponent. Upon this verdict judgment was entered by the court denying probate to the instrument offered as the last will and testament of Gustaf Robert Noren, deceased. Upon the overruling of a motion for new trial, proponent appealed to this court.

In the trial below mental capacity and undue influence were the only issues submitted to the jury. It is claimed by the appellant that a further issue of fact was submitted, but our views on this will be made plain in a later discussion of the instructions.

As we view them, the errors assigned by appellant present but two questions, namely, the sufficiency of the evidence to sustain the verdict of the jury, and the further question of alleged error in the court's instructions. We shall, however, consider one important ruling of the court on evidence offered and received.

It is the claim of appellant that on this record there was no question of fact to be submitted to the jury and that proponent's motion for peremptory instruction in its favor

should have been sustained by the trial court. We shall first consider the evidence by contestant on the issue of mental capacity raised by the pleadings.

At the time the purported will was executed, Noren was at least 84 years old and his physical health was impaired to some extent, not only by the burden of many years, but by reason of severe burns which he received a short time before the instrument was drawn. Death from a complication of disorders followed two months later.

Evidence was offered by the contestant tending to show certain fixed delusions of suspicion and persecution, not concerning strangers, but rather those closest to him in contact, acquaintance and relationship. This evidence is found in the testimony of lay witnesses who were close neighbors and long acquaintances. This is to the effect that, without any foundation in fact and wholly without provocations, Mr. Noren for a number of years before his death harbored deep resentment and manifested great dislike for a brother who lived in the immediate neighborhood. It is related by one witness that at the time of the funeral of Mr. Noren's wife this brother visited the home and expressed natural sympathy for his bereaved brother, and that thereupon Mr. Noren stated that he wished to give the brother a memory verse, and calling for a Bible requested that a minister there present turn to the thirty-fifth Psalm. Assuming that all who may ever have occasion to refer to this opinion are familiar with this particular portion of the old testament, no extended comment will be made, except to say that it is significant that this old man should select this Psalm in which David prays for the confusion of his enemies and asks to be delivered from them. The entire record contains no evidence which even suggests any reason for this feeling.

It further appears from the evidence that in later years Mr. Noren manifested lack of confidence and affection for his adopted daughter, the contestant, in marked contrast to the close and friendly association of the two at an earlier time. This appears to have come about through a belief

on the part of Mr. Noren that false and reckless statements of and concerning him by his daughter had brought him trouble. It nowhere appears in the evidence that any such statements were in fact ever made. This attitude was a marked departure from the intimate and friendly relations existing between Noren and his daughter for nearly 17 years, during which time the daughter remained in the home and was everything a loving and dutiful daughter should be. During these years Noren showed the greatest solicitude for the welfare of this girl and guarded her association with other children to the point where it seemed she was being denied even ordinary freedom in social affairs.

In the year 1896 a will was drawn by Noren and his wife in which, upon the death of Mr. and Mrs. Noren, all of the property was to go to the adopted daughter. By this will, John Warner, a neighbor and resident of Waverly, was appointed guardian for her. This will was witnessed by two citizens of Waverly, Nebraska. In 1926 another will was drawn by Noren in which the adopted daughter was given the sum of $2,000 and no more. This will was prepared by an officer of the Federal Trust Company of Lincoln, Nebraska; was witnessed by parties residing at Lincoln, and in it the Federal Trust Company was named as executor. This will placed the remainder and residue of the estate with said trust company, in trust, upon conditions differing little in general terms from those contained in the instrument under consideration. The third will drawn is the will in controversy.

Evidence was further introduced tending to show that Noren for a number of years before his death entertained groundless suspicions against most of his neighbors and believed they were trying to steal his property. In addition to all this, the evidence shows many acts from time to time on the part of Mr. Noren which would indicate marked peculiarities and eccentricities to say the least.

Finally, it is shown by the record that Dr. Griffith, who qualified as an expert on the subject of mental diseases, in

answer to a hypothetical question propounded to him, stated that in his opinion Mr. Noren on the date the instrument was drawn was of unsound mind. The evidence in this case is voluminous and a more minute analysis at this time is impracticable.

Proponent offered testimony in volume on this question sharply in conflict with that offered by the contestant. It is not, however, for this court to weigh the evidence and determine which party has presented the more convincing proof. The case is not for trial *de novo* here. We are called upon to determine the single question of the sufficiency of the evidence to sustain the verdict of the jury. *In re Estate of Kerr*, 117 Neb. 630.

Where the record in a law action contains evidence tending to support a proposition, and reasonable minds might differ as to whether the proposition is supported thereby, the question is one for the jury. *Zinkula v. Zinkula*, 171 Ia. 287.

Taking into consideration the age of Mr. Noren and his relationship to the contestant and the provisions of the will itself; the circumstances related and opinions expressed by the witnesses on the subject of this man's mental condition at the time the instrument was drawn, we conclude that the trial court was right in submitting this question to the jury, and that the verdict of the jury in this regard is supported by sufficient evidence and should not be set aside.

It is also contended by the appellant that on the question of the exercise of undue influence in this case there is a total failure of proof, and that the trial court erred in submitting this question to the jury. With this we cannot agree. Undue influence as condemned by the law in this class of cases is a subtle thing. Much like crime, it is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity

afforded designing persons for the exercise of improper control.

It is the theory of the contestant in this case that the Federal Trust Company of Lincoln, by and through its officers and agents, through the exercise of undue influence upon Mr. Noren at and before the time the purported will was drawn, and at a time when he was physically and mentally unsound, caused him to execute an unnatural will, and not a will prompted by his own intelligent volition.

It appears from the evidence that this company as early as the year 1925 was advising Mr. Noren with respect to his investments; that he sought and received from officers of the company advice and suggestion as to the selection of a bank with which to do business. He appears to have acted upon this advice with the greatest confidence. We have heretofore indicated the activity of the company and its officers in the matter of the formal execution of the will. It must be obvious to any reasonable man that by the terms of the will this company, when it was named trustee of a trust fund amounting to probably $40,000 which it would possess for a long term of years, if not forever, received something of value to it far in excess of any statutory fees which would ever be allowed by the court. It was the very choicest business of a kind it was organized to transact and through the handling of which its chief profit is realized.

It nowhere appears from the evidence that there was any special need for charity in Lancaster county, as distinguished from similar needs in other counties. Nothing in the record suggests that Mr. Noren during his lifetime ever had even a passing interest in matters of either public or private charity.

The will drawn, as heretofore indicated, was unnatural and resulted in direct benefits to the trust company having to do largely with its execution. In this connection, the age and physical condition of this man become most important and the evidence in the record suggesting serious mental trouble is most significant.

It is true that none of the facts and circumstances dis-

closed by the record would, standing alone, be sufficient to warrant the court in submitting the issue of undue influence to the jury, but when all these facts are grouped; when the unnatural provisions of the will are noted; when the age and general state of health and mind of the testator are considered; when the relationship of all the parties is frankly analyzed, and the substantial benefits enuring to the trust company are accurately appraised, it becomes apparent that a real question of fact is raised and that the court properly submitted this issue to the jury.

It is pointed out by appellee in her brief that it is a modern practice of trust companies to interest themselves in the matter of drawing wills for clients. It is a part of their business. We can see no difference between the relationship of such a company and one availing himself of such service and that of attorney and client. In both, special trust and confidence are reposed; the parties are not equally informed or skilled on the subject of their transactions, and unusual opportunity is afforded for the violation of confidence by reason of information freely given in reliance upon the peculiar faithfulness and integrity implied by the relationship. Such a relationship is fiduciary.

We shall now consider the matter of alleged erroneous instructions given by the court on its own motion.

Complaint is made that the trial court, after taking from the jury the question of the due execution of the will by instruction No. 5, resubmitted the same question by parts of instructions Nos. 6 and 13. Instruction No. 6 was a general instruction covering the subject of the burden of proof, and here the court told the jury that the burden of proof was upon the proponent to establish by a preponderance of the evidence "that he (the testator) indicated in some manner in the presence of two or more competent witnesses that he intended to sign the instrument as his will, and that said witnesses subscribed said instrument in his presence." Instruction No. 13 contained this language: "Your inquiry should be directed to the issues before you,

as laid down in these instructions, to wit, whether the will was executed according to law." Instruction No. 5 informed the jury that "in this case every formality prescribed by statute for the execution of a will was observed."

Considered together, these three instructions amount to nothing more than a general statement of the burden of proof in Nos. 6 and 13, and a most explicit statement by the court in instruction No. 5 that in this particular case the proponent had fully sustained this burden. It is our view that the jury could not be confused or misled by these three statements. This situation is little different than that arising from an approved practice of trial judges in stating the strict rule of the burden of proof, and in a separate instruction telling the jury that certain stated facts have been conclusively proved or are undisputed. We find no prejudicial error in the giving of these three instructions.

Objection is made to instruction No. 10 given by the court. This instruction in substance informed the jury that the provisions of the will itself might be considered by them in determining the question of mental capacity, and added: "However, such matters will not alone warrant the presumption of mental incapacity, but are proper to be considered by the jury in connection with other facts proved, bearing upon the condition of the mind of the testator." While possibly not the most guarded and exact in the language employed, this instruction, in view of other instructions given by the court, was a fair statement of the law under the evidence being submitted, and is held to be free from error prejudicial to the substantial rights of the proponent.

"Error cannot be predicated upon the failure of the trial court to state the entire law applicable to the questions submitted to the jury in one instruction. The charge must be considered as a whole, to determine whether or not the jury have been properly instructed upon all questions which are submitted to the jury for their determination." *In re Estate of Lyell*, 116 Neb. 827.

Instruction No. 7 is vigorously assailed on the theory that it improperly places the burden of proof on the proponent on the issue of undue influence. We do not so construe this instruction when considered in connection with other instructions given. Instruction No. 15 given by the court on its own motion deals with the question of undue influence and is as follows: "You are instructed that before influence becomes undue influence to vitiate a will, it must be such as to amount to force and coercion destroying the free agency of the testator and there must be proof that the will was obtained by this coercion and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence which cannot be presumed but must be proved by the contestants and must be proved by them as having been exercised in connection with the will and not with other things." This was a correct statement of the law applicable to the issue of undue influence generally and in the absence of fiduciary relationship.

Instruction No. 7 complained of is as follows: "You are instructed that while the burden of proving undue influence is upon the contestant, yet if the evidence shows that the person who benefits materially by the proposed will stands in a confidential or fiduciary relation to the testator, then the duty devolves upon the person so benefited, to show that said purported will was not signed by the testator through undue influence."

It may be stated generally that, where a testator who is aged and infirm, with his mental faculties impaired, makes a will which is unnatural in its provisions, and in favor of a confidential adviser who is actively concerned in the execution thereof, and who receives substantial and valuable property or rights under the will, there arises a presumption of undue influence, and in such case it devolves upon the beneficiary to overcome the presumption or inference which arises from the proof of these facts by competent evidence sufficient for the purpose. 28 R. C. L.,

146, and cases there cited; *In re Estate of Paisley,* 91 Neb. 139; *In re Estate of Kubat,* 109 Neb. 671.

In the cases of *In re Estate of Paisley,* 91 Neb. 139, and *In re Estate of Kubat,* 109 Neb. 671, this court cites with approval the following holding in the case of *Carroll v. Hause,* 48 N. J. Eq. 269: "Against a beneficiary having a testator under his control, with power to make his will the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator."

Further complaint is made that Instruction No. 11 does not correctly define mental capacity, as applied to cases of this kind. Specifically, error is claimed because said instruction contained the following language: "The kind of mental capacity which the law requires as essential to the making of a valid will is such as enables the person * * * to have a reasonable conception of the value and uses of property or money, and a reasonable conception of how property or money may be employed or enjoyed." Taken as a whole, this instruction fairly defines mental capacity as applied to will cases. The part complained of does not appear in many approved instructions covering the subject. However, the instruction otherwise is sufficient as defining the state of mind essential to the making of a valid will. The added portion complained of modifies the strictness of the rule otherwise stated and could not operate to the prejudice of the proponent in this case. This instruction follows closely one given in *In re Estate of Kubat, supra,* and is in accord with the rules laid down in *Brugman v. Brugman,* 93 Neb. 408.

We have considered appellant's criticism of instruction No. 12 and find it without merit. While not drawn in the exact words of many approved instructions defining "in-

sane delusions," the substance of the instruction is not open to the criticism directed against it. We hold the instruction as given is free from error prejudicial to the substantial rights of the proponent.

Mere inexactness in the language of an instruction is not ground for reversal, where the jury was not misled. *Reams v. Clopine,* 87 Neb. 673.

The supreme court will disregard any error or defect in instructions given, or error in the failure or refusal to give instructions requested, where the same do not affect the substantial rights of the parties. *Maxson v. J. I. Case Threshing Machine Co.,* 81 Neb. 546. The instructions requested by the proponent and which were refused by the trial court, in a general way reflect appellant's theory of this case and it follows from the foregoing that the refusal of the trial court to give such instructions was not reversible error.

Considering the instructions as a whole in this case, we are convinced that they fairly stated the law of the case; that the jury were not misled thereby, and that they were free from error prejudicial to the substantial rights of the proponent.

In the trial of this case, the court, over the objections of the proponent, admitted evidence of the financial condition of the contestant. Such evidence was helpful to the jury in its consideration of the provisions of the will and was competent proof as bearing upon the issue of mental capacity as well as the issue of undue influence. It was proper for the jury to consider this evidence, along with other evidence in the case in determining such issues. *In re Estate of Gunderman,* 102 Neb. 590; *Manatt v. Scott,* 106 Ia. 203; *Stutsman v. Sharpless,* 125 Ia. 335.

For the reasons stated in this opinion, the judgment of the district court is

AFFIRMED.

THOMPSON, J., dissenting especially to the rule as announced in the opinion as to instruction No. 7.

CITY OF LINCOLN, APPELLEE, V. FERDINAND J. FOSS ET AL., APPELLANTS.

FILED MAY 1, 1930. No. 27196.

1. **Municipal Corporations**: ZONING ORDINANCE: BOARD OF APPEALS. Section 9 of the zoning ordinance of the city of Lincoln, providing for a board of appeals and defining their powers examined and *held* not to show on its face that it conferred on the board any delegated authority or arbitrary power, at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for the carrying on of business in a residence district.
2. ———: ZONING: INJUNCTION. The city may properly bring an injunction suit against defendants carrying on a restaurant or commercial business, in violation of the ordinance, in a district zoned for resident purposes, and, where the ordinance allows a public school in the same district, it will not be said that the suit is wanting in equity merely because the city does not proceed against the school for maintaining in its school building a cafeteria for the use of its pupils.
3. ———: ZONING ORDINANCE: VALIDITY. Zoning ordinance No. 2646 of the city of Lincoln examined in the light of the facts shown in this case and *held* to be constitutional under the police power, having substantial relation to the public health, safety, and general welfare.

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

Wilmer B. Comstock and *John H. Comstock*, for appellants.

Frank A. Peterson, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

GOSS, C. J.

The defendants appeal from a final decree enjoining them from conducting a restaurant and mercantile business at their home in violation of the provisions of a city zoning ordinance.

The petition for injunction alleged that the city is organized and exists under a home rule charter adopted pur-

suant to the Constitution and attached a copy of the charter as a part of the petition; and alleged that on March 22, 1926, it duly passed ordinance No. 2646, commonly referred to and known as the "Zoning Ordinance," taking effect March 31, 1926, and still in effect, a true copy of said ordinance, including the certificate and map, being attached to the petition. The map shows the zoned classification of each piece of property in the city. The answer of the defendants admitted the foregoing allegations. The petition also alleged, among other things, that, in violation of the ordinance, the defendants, on or about September 17, 1927, established and maintained a restaurant and mercantile business in their dwelling house on the premises under consideration and have as their patrons and customers a large number of pupils attending the public school in the vicinity; that defendants sell to such pupils lunches, sandwiches, candies, and confections which these customers obtain in large numbers in paper wrappings, and with the consent of the defendants remove said wrappings from their purchases on said premises and adjacent thereto and scatter the same, together with such food as they do not consume, about said premises and on the streets adjacent thereto, to the detriment and injury of the property in the vicinity as residence property. The answer of the defendants alleges that they purchased the property and built their home there intending always to use the same exclusively as a dwelling, but thereafter the Irving school was constructed immediately across the street from their home and the natural conduct of school children, described at some length, impaired the market value of their home; that in order to recoup a portion of their loss they made such use of their basement as has been heretofore described in this opinion, but kept no sign indicating that sales were carried on within the premises, that the premises retained their strictly residential appearance, and that nothing was done about said premises which gave to them any aspect of business or affected or conflicted with the character or general atmosphere of the residence neighborhood; that

the zoning ordinance, by its own provisions, or through action of the board of appeals, at other places where there are schools and under conditions similar to this, permits restaurants and candy shops to be operated, and so the ordinance, if not permitting such use of the premises of the defendants, is an unreasonable and arbitrary discrimination against the defendants; that the ordinance is not applicable to nor does it prohibit the use made by the defendants of the premises, because such use does not violate the purpose and spirit of the ordinance but conforms to the conditions and circumstances created entirely by the maintenance of a large school at that place; that, under the conditions, the use of the property is in effect exempted from the operation of the ordinance by reason of the provisions therein attempting, by an unlawful delegation of judicial and legislative authority, to grant to a so-called "board of appeals" the right to recognize exemptions in such a case; and defendants say that all such exemptions must therefore be read into the ordinance without action of the board of appeals, or the entire ordinance be held void; and that the ordinance, if held applicable, and to prohibit the said use of the property of defendants, is arbitrary, unreasonable, and void, and in violation of sections 3, 21, and 25, art. I of the Constitution of the state of Nebraska, and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

We have read the record and find there is little material dispute in the evidence. The defendants are husband and wife. They acquired title to the lot in question by deed dated January 24, 1923. Mrs. Foss testified that she was the exclusive owner, but the deed in evidence ran to both as tenants in common. This is not material as both were parties. That year they built a home and double garage and made other improvements on the lot. The total cost of the lot and improvements was $9,800. The property is at the southeast corner of Woodcrest and Twenty-second streets. The home faces north and is known as 2201 Woodcrest. The neat two-storied brick and stucco house is on

a terrace about five feet above the grade of Twenty-second street. Irving Junior High School is located across the street west of the Foss home. The school grounds occupy the equivalent of four city blocks. The building is located on the eastern part of the tract, is 313 feet east and west and 189 feet wide. At the time of the trial there were 911 pupils in attendance. The school board acquired the property in 1920, erected the building in 1926 and 1927, and it was opened for school purposes on September 12, 1927. On September 17, 1927, Mrs. Foss applied for and secured from the agricultural department of the state a certificate of registration to conduct a restaurant at the family home. A year later the certificate was renewed for another year. The intent in securing the certificate was to comply with state regulations, and not to conduct a public restaurant. The purpose was to cater to the pupils from the school. The evidence does not indicate that the appellants intentionally departed from this purpose. For a considerable time they served the pupils with hamburger sandwiches, candy, pop, and the like, served from the back door for a time and later from the garage. When cold weather set in they let the children go through the house to the basement to eat. Sometime during the first year they remodeled the basement. They cut the terrace and the wall on the west side of the house and made an entrance to the basement from the street. The pictures in evidence show a neat entrance, with sidewalls of masonry through the terrace and with a paved walk from the curb to the basement door. The basement is plastered, is furnished with a few tables and with a showcase to protect the merchandise carried for the pupil customers. The cooking is done in the basement. Candy sales run from $5 to $10 a day. In warm weather they sell from 24 to 36 bottles of pop a day. They have four small tables and serve about 30 each day with food. They purvey hot lunches of mashed potatoes, gravy, meat loaf, salmon loaf, and baked beans. The evidence shows that for a long distance north, south and east is a high class, exclusively residential neighbor-

hood. Except for the school the same condition prevails to the westward. In this locality the deeds appear to carry restrictions as to setbacks from the street and as to the minimum values of improvements to be permitted. This is stated merely for whatever bearing it may have on the reasons for fixing zoning provisions and of the reasonableness of the provisions as fixed.

The zoning ordinance consists of 13 sections. The first section divides the city into five classes of districts—residence, apartment, local business, commercial, and industrial. The third section defines the use to which buildings in the residence district may be put and prohibits any other use. The permissible uses do not allow a restaurant in a residence district. They do allow a school. Section 11 of the ordinance declares each section and subdivision of a section independent of every other so far as inducement for the passage is concerned; and that the invalidity of one shall not invalidate another.

A map attached to the ordinance and made a part of it shows that the residence of the defendants was and has been, from the time the ordinance went into effect, located in a residence district. The evidence clearly indicates that it is used as a restaurant contrary to the terms of the ordinance, and that such use did not begin until more than a year after the ordinance became effective. If the ordinance is valid, the facts pleaded and proved in this case are sufficient to prevent the use of the property by the defendants for restaurant purposes.

Section 9 of the ordinance provides for a board of appeals consisting of the city engineer and the five members of the city council. It provides for an appeal from the refusal of the building inspector to grant a building permit, provides that the building inspector may, on application for a permit, request the board for an interpretation and application of any provision of the ordinance, and provides also that the board shall have power to adopt rules and regulations from time to time to carry into effect the provisions of the ordinance and to interpret its provisions so as to

carry out the intent and purpose of the plan. These powers are all made subject to the power and to the final action of the city council. The section provides adequately for an appeal to the council.

The appellants argue that this section of the ordinance is unconstitutional and void because it delegates legislative and judicial power to a board of appeals without any rules to guide it. On the facts at bar that objection in the terms in which it is made affords no help to appellants, because, as we find the facts, the board of appeals as such had nothing to do with the zoning of this particular property. It appears that in the ordinance this was zoned in the residence district. But the appellants seek to aid the above stated proposition as to the delegation of power by the further proposition that the ordinance thus authorizes discrimination between citizens in respect to the enjoyment of property. That power of discrimination, they argue, is inherent in the authority granted the board of appeals to use their arbitrary power, without regard to a reasonable legal discretion, to allow one to carry on a restaurant business in a residential district but to refuse it to another in similar circumstances.

The leading case cited by them is *Yick Wo v. Hopkins*, 118 U. S. 356 (decided in 1886). Ordinances of the city of San Francisco made it unlawful to carry on a laundry within the corporate limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." Plaintiffs were convicted of violations of these ordinances by operating laundries in wooden buildings. They were discharged on writs of habeas corpus by order of the supreme court of the United States. That court very properly held that the ordinance was unconstitutional on two grounds: First, in its administration, as shown by the facts, it "makes arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances;" second, it shows on its face that it conferred arbitrary power upon the munici-

pal authorities "at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected, for the carrying on of the business." In the course of the opinion the court touched the vice of the ordinance when it said: "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons." The appellants cite other cases from state courts to the same general effect. The principle is sound. The question here is whether it is applicable.

We find nothing in the body of section 9 of the ordinance nor elsewhere, nor have appellants pointed out anything either in the ordinance or in the practice of the board, that suggests any exercise of delegated authority or any favored treatment of one citizen or of any single piece of property as compared with any other citizen or any other property. The ordinance and the map seem to show that all lands and lots within the city limits were zoned. The application of the zoning principle to the home of the appellants was by virtue of the ordinance duly passed by the city council itself under and by virtue of the home rule charter of the city. There was no act by the board of appeals. The section adjures them "to carry out the intent and purpose of the plan." We are of the opinion that section 9 of the ordinance has not been shown, in the circumstances of this cause, to be unconstitutional in this phase. If the power claimed by the appellants to be delegated to the board of appeals should be exercised in an arbitrary or discriminatory way as to parties, classification of business, or as to different real properties in the same general situation, then will be the time to pass upon that feature of the ordinance.

In the second point of their argument the appellants assert that the city, by seeking this injunction, has shown an interpretation of its zoning ordinances which makes its

provisions arbitrarily discriminatory. This point relates to the fact, appearing in the evidence, that in the junior high school, just across the street, the board of education maintains, during the school year, a well-equipped cafeteria where about 600 of its 911 pupils—all who desire it —are furnished lunches at cost. The school district is an entity, distinct and separate from the city. The district and the city are not coextensive. The district comprises all of the city and more. Its taxes are not only levied but are collected by the county authorities. The officials of the district were probably in sympathy with the suit. As shown by the evidence, at least one member of the board of education and some of the teachers believed that the operation of the restaurant by the appellants was injurious to the discipline of the school and not helpful to the health, safety and welfare of the pupils. It created an extra hazard in the crossing and recrossing of the street by the pupil customers of the restaurant. But it cannot be argued with much plausibility that the city is not the real party in interest here and that it does not come into a court of equity with clean hands when it asks that the appellants be enjoined from violating the ordinance, even though the school board favors the suit and even though it operates a cafeteria in the same neighborhood.

The city has a real interest in the enforcement of all proper ordinances regulating building and zoning of property within the corporate limits. We see no good reason why it may not act to further the interests of any citizen or legal entity when those interests coincide so vitally with its own. If, on the other hand, the board of education is violating the zoning ordinance by maintaining a cafeteria within an area restricted against such an activity, the city could not join it with the appellants. Moreover, the ordinance does not prohibit schools within a residence district. The school property was purchased by the board of education years before appellants purchased theirs and six years before the property was zoned. There may be presented good reason and authority for saying that among the pro-

gressive things of this age the serving of lunches to pupils by the school authorities is a proper function of a board of education. It affords proper food and time to eat it to those pupils whose homes are too remote to allow them to go there for the usual midday meal. It fits into the subject of education on the line of home economics. It assists the spirit of social democracy in a way that was unknown a generation ago. We have always had in our public schools, to a greater or less extent, the democracy of study and of play. Now we have the democracy that comes from the meeting of pupils of all classes at the lunch table.

We do not undertake to decide a case in which a party is not before the court. While we do not decide the ultimate merits of any future controversy between the city and board of education over the right to operate a cafeteria in a public school, yet it is proper here, in view of the issues raised by the appellants, to refer briefly to the law in other jurisdictions. In *Harvard College v. Assessors of Cambridge,* 175 Mass. 145, it was held that the use of real estate owned and furnished rent free by the college for the use of students who club together for the purpose of obtaining, with the assistance of the college, food at cost, does not subject the real estate to taxes when the revenue laws exempt property used for college purposes. In *City of Chicago v. University of Chicago,* 228 Ill. 605, it was held that dormitories, dining halls and club houses located upon a college campus, used for conducting the educational work of the university, and not for gain, are well within the meaning of an ordinance remitting water rates to all buildings used for educational purposes. In a case relating to a zoning ordinance (*Western Theological Seminary v. City of Evanston,* 325 Ill. 511) it was held that a provision allowing schools and colleges to be erected in a residence district permitted the erection of dormitories where students would use a students' common or dining room. Whatever may be the attitude of the city of Lincoln in any controversy between it and the school district, or whatever may be the opinion of this court if and when such a contro-

versy come to us, we cite the above cases merely to exempt the city from any conclusive suggestion of bad faith or discrimination in any legal sense in not prosecuting the school district for running a cafeteria while it enjoins the appellants from operating a restaurant.

The remaining point argued by appellants is that the police power cannot be invoked here to sustain the application of the ordinance. Regulating the uses to which real property in cities may be put is a matter of comparatively recent origin. The zoning of cities in this country began well within the present generation. Naturally it had its origin in our state more recently than in some of the older states where the problems of varied industries and business and a more congested population emphasized the need for regulation and found a justification in some aspect of the police power asserted in the interests of the welfare of the public. It is difficult, if not impossible, to lay down any general rules describing the exact field of operation of such power that will fit cases arising in the future. Each must be controlled by the special conditions and circumstances surrounding it. It must be controlled by constitutional principles, the meaning of which does not change but the application of which to new conditions varies with the everchanging conditions of a growing civilization.

For examples of the cases we have had where zoning laws were passed upon: In *State v. Edgecomb*, 108 Neb. 859, it was held that a zoning ordinance was unreasonable as applied to the particular circumstances of that case because it denied the right to a church to erect its edifice upon its own lots for the sole reason that the building would cover 37½ per cent. of the area while the ordinance limited the area to 25 per cent.; and in *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, it was held that the police power would sustain an injunction against the use of a residence by a college fraternity in violation of the classification of such property in a zoning ordinance. This latter decision received much of its support from *Village*

of Euclid v. Ambler Realty Co., 272 U. S. 365, in which that court reversed a decree of the district court enjoining the enforcement of a zoning ordinance. We content ourselves with quoting one sentence therefrom: "The police power supports also, generally speaking, an ordinance forbidding the erection in designated residential districts, of business houses, retail stores and shops, and other like establishments, also of apartment houses in detached-house sections, since such ordinances, apart from special applications, cannot be declared clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare."

Under the authority of our own holding in the *Pettis* case and of that of the supreme court of the United States in the *Euclid* case, we are of the opinion that the zoning ordinance as appealed against here is not unconstitutional. It is sustainable under the police power as having substantial relation to public health, safety, and general welfare.

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

AFFIRMED.

JOSEPH J. LUTHER, APPELLEE, V. FARMERS UNION COOPERATIVE ASSOCIATION, APPELLANT.

FILED MAY 1, 1930. No. 27351.

1. Trial: QUESTION FOR JURY. The general rule is that, where there is a substantial conflict in the evidence upon a material matter and when different minds may honestly draw different conclusions from the evidence, the question is for the jury.
2. ———: REQUEST FOR INSTRUCTION. "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State*, 115 Neb. 65.
3. ———: ———. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been

a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Marshall v. State*, 116 Neb. 45.

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

Wilmer B. Comstock and *John H. Comstock*, for appellant.

Max V. Beghtol, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

DAY, J.

This is an action to recover damages for personal injuries. From a verdict and judgment in favor of the plaintiff, the defendant appeals.

The first of the two errors assigned and argued is that the verdict is not sustained by sufficient evidence. The petition of the plaintiff alleges that the defendant owns and operates a grain elevator; that as a part of its machinery it maintained a dump and driveway for unloading wagon-loads of grain, which were so constructed that a wagon loaded with grain and drawn by horses is placed upon a movable platform in such a manner that a mechanical operation depresses the rear of the wagon and elevates the front so that the grain is unloaded by gravity; that during the operation it was necessary for the plaintiff in unloading said grain to cause his horses to stand on a narrow bridge elevated from the natural surface of the ground about two feet; that the gasoline engine operating the elevating machinery was near where the horses stood, so that the noise was intensified at that point; that the defendant maintained two large blocks of concrete so located that, if an unloaded wagon deviated from a direct line in driving out, the wheels would strike the blocks; that on the 19th of July, 1927, while the plaintiff, at the invitation of the defendant, in the exercise of due care, was unloading wheat, one of his team stepped off the

bridge, became frightened, and ran upon these stone blocks, tipping the wagon and throwing the plaintiff from his seat, thereby inflicting serious injuries. It is further alleged that the defendant was negligent in failing to provide a place of sufficient width on which to permit the horses to stand, or to maintain a guard-rail to prevent the horses falling from the bridge. The answer of the defendant admits the ownership of the elevator, and that the plaintiff was injured; but it alleges it was caused by the negligence of the plaintiff, in that he lost control of his team; that the plaintiff knew the team to be vicious and unruly before he drove into the elevator, and that if the plaintiff had exercised ordinary care in selecting the team or in driving into the elevator said accident would not have occurred. It is also alleged that the plaintiff was familiar with the elevator and all its apparatus, including the dump, bridge, engine house and rocks.

The plaintiff introduced evidence to support his allegations of negligence as hereinafter set out. Upon the day in question, the plaintiff was delivering grain to the defendant's elevator. He drove his wagon onto the dump for the purpose of unloading his wagon, with his team standing upon the bridge which connected the elevator with the driveway on which the unloaded wagon left the elevator. This bridge was 12 feet wide and 5 feet across and was elevated 22 inches from the ground. The dumping device was inclosed in an annex attached to the elevator building and the bridge was just outside of this covered part. The bridge was about two feet wider than the door, but the door was not in the center of the bridge. The bridge extended about six inches beyond the door to the south. There was no rail on this bridge. It was here the plaintiff's horse stepped off. About 10 feet to the east of the bridge were two rocks about one and one-half feet square and located about three feet from the wagon track of the exit driveway. The construction of the elevator was such that the gasoline engine which operated it had an exhaust out of the top of a small outbuilding at a place

which was approximately even with the horses' heads while standing for the dumping operation. There is evidence in the record tending to prove that in the proper construction of grain elevators the engine is located on the other side away from the horses, and that the bridge should be guarded by a rail to prevent the horses from stepping off. There had been trouble with horses becoming frightened at this elevator before and the men in charge of its operation had refused to stop the engine when other customers had complained that it frightened their horses. The plaintiff, himself, testified that the accident happened as follows: "Well, as the grain was running out—the engine scared them in the first place, being right in front of them, and when this started the machinery it began looking behind it and immediately pranced around and kind of stepped back, and he stepped off with his hind foot off of the bridge on the south side, and then in order to keep from falling he lunged ahead, and I had to give slack on the lines or it would have jerked me off the wagon, and before I could get the slack up it hit those rocks and throwed me off of the seat." "My going over those rocks threw me off."

It is the duty of the owner of property to exercise reasonable care to maintain it in a safe condition. *Perrine v. Union Stock Yards Co.*, 81 Neb. 790. There is evidence in this case to prove that the driveway through the elevator was not safe; that there was no guard-rail provided for the bridge; that customary and proper construction requires such a guard-rail; that the gas engine for operating the machinery of the elevator was located in a place that was not proper or customary in grain elevators; that its location was such as to be likely to frighten horses while wagons were being unloaded; that horses had been frightened in said elevator; that horses had been frightened by said engine; that rocks were laid upon the driveway so that a slight deviation from the track might tip a wagon in driving out. There is also evidence in conflict. All this raises a question of fact as to whether or not the owner of such elevator had exercised reasonable care to maintain it in a safe condition for persons using it.

It is argued by the appellee that, since this case was heretofore before the court, the previous decision became the law of the case. At the same time it is argued by the appellant that the evidence on the second trial is not identical with that of the first. This question presents some difficulty of determination where the assignments of error are that the evidence does not sustain the verdict. We have, however, examined this record fairly and completely, to determine whether or not the evidence in this case, now before the court, sustains the verdict, and we find that it does. Certainly such a situation presents a question of fact which would justify the jury in drawing an inference of negligence. The general rule is that, where there is a substantial conflict in the evidence upon a material matter and when different minds may honestly draw different conclusions from the evidence, the question is for the jury. *Henry v. Omaha Packing Co.*, 81 Neb. 237; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426.

The second assignment of error is that the court erred in overruling the motion of defendant to instruct the jury "that the testimony read from the bill of exceptions at the former trial shall not be considered by the jury as substantive evidence in this trial, and that it only goes to the credibility of the witness." Mr. Kuse, the manager of the elevator, was called as a witness for the defendant at the trial. In the course of his cross-examination by counsel for the plaintiff, he was interrogated concerning testimony given by him upon the former trial. The testimony given by him at the former trial was read to the jury for the purpose of impeachment. The witness admitted having made some of the statements attributed to him, denied others, and qualified some. The plaintiff offered in evidence from the bill of exceptions from the first trial the questions and answers showing the statement which the witness had denied. After such testimony had been introduced, the attorney for the defendant orally requested the court to direct the jury, specifically, "that this testimony read from the bill of exceptions of the former trial

shall not be considered by the jury as substantive evidence in this trial, and that it only goes to the credibility of the witness, Mr. Kuse, in this trial." At the proper time the defendant requested that six certain instructions be given by the court in this case, but did not request this one except by an oral motion at the time the evidence was introduced and before the testimony was concluded. While it is the duty of the trial court without a request and on its own motion to instruct the jury as to the general rules of law applicable to the issues of the case, it is also the rule that, if a party to a suit desires more specific instruction upon a point concerning one of the issues of the case, it is necessary for him to direct the attention of the trial court to the proposition by requesting such an instruction in writing. We have held: "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State,* 115 Neb. 65. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Marshall v. State,* 116 Neb. 45, citing *Georgis v. State,* 110 Neb. 352. See, also, *Grosh v. State,* 118 Neb. 517, which cites *Osborne v. State, supra.* It therefore becomes evident that the defendant did not make a request for more specific instruction in this case at the proper time, nor in the proper manner, and therefore it was not error for the court to omit giving such instruction.

Conformable with the foregoing opinion, we find no prejudicial error in the record, and the judgment of the trial court is

AFFIRMED.

ELMER J. WORTMAN, APPELLANT, V. JOSEPH P. ZIMMERMAN ET AL., APPELLEES.

FILED MAY 1, 1930. No. 27123.

1. **Appeal**: REQUESTED INSTRUCTION: REVIEW. Where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction.
2. **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.
3. ———: VIEW OF RES. The refusal of the trial court to permit the jury to view an automobile involved in a collision that is the basis of a suit for damages is not reversible error in the absence of an abuse of discretion.
4. **Negligence**: QUESTION FOR JURY. The issue of contributory negligence in a law action is one of fact for the jury, when the evidence relating thereto is in conflict or different inferences of fact may be reasonably drawn therefrom.
5. ———: ———. Where, in an action for damages arising from a collision between two automobiles at a highway intersection, there is evidence that the car in which plaintiff was riding had had the body removed and a box six or eight inches in height built thereon; that it also had a crated bathtub lying crosswise of the car on the edges of the box and wired in place; and further that plaintiff was sitting on top of the crated tub at the time of the collision, *held*, that under such circumtances the question whether plaintiff's negligence was the proximate cause of the accident or that it was more than slight in comparison with the negligence of the defendant within the meaning of the "Comparative Negligence Statute," is a question for the jury.
6. **New Trial**. The overruling of a motion for a new trial on the ground of newly discovered evidence is not ordinarily error, where the record discloses that the new evidence is of a cumulative or impeaching character.
7. **Evidence** examined and *held* to be sufficient to support the verdict of the jury.

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

Dort, Cain & Witte, for appellant.

Jack & Vette, Sanden, Anderson, Laughlin & Gradwohl, and *Frank A. Dutton, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This was an action brought by Elmer J. Wortman to recover damages for personal injuries sustained and alleged to have been caused by the negligence of the defendant Maude Belle Zimmerman in so operating her automobile as to cause a collision with the automobile in which plaintiff was riding and inflicting severe injuries to plaintiff's head and back, for which he asks judgment for the sum of $42,497.50.

The answer denies that the defendants were negligent, alleges the contributory negligence of the plaintiff, and alleges further that plaintiff was riding with one Oluf Rasmussen at the time of the accident, that plaintiff and Rasmussen were engaged in a joint enterprise at the time, that the negligence of Rasmussen caused or contributed to the injury, and that because of such fact the plaintiff could not recover.

The issues of fact were submitted to a jury; the verdict and judgment was for defendants, and plaintiff appeals.

The evidence discloses that on the morning of October 16, 1927, the plaintiff, Oluf Rasmussen and Carl Anderson left Lincoln, Nebraska, for Ruskin, Nebraska, in a Ford automobile, the body of which had been removed and a box six or eight inches high built thereon. The automobile was loaded with plumbing fixtures and supplies, including a bathtub and lavatory. The crated bathtub was laid across the truck behind the driver's seat and wired in place. Plaintiff sat on top of the crated bathtub and Rasmussen and Anderson sat in the seat, with Rasmussen driving. While occupying these positions and pursuing a westerly course on the Goldenrod Highway just north and west of the village of Ellis, Nebraska, the car in which plaintiff was riding was struck at an intersection by an automobile being driven by the defendant Maude Belle Zimmerman, the wife of the other defendant Joseph P. Zimmerman.

The testimony for plaintiff is to the effect that the Ford car was traveling 20 to 25 miles an hour and that defendants' car was traveling 35 miles an hour and that the Ford car was struck after it had entered the intersection.

Defendant Maude Belle Zimmerman testified that she stopped her car just before arriving at the intersection to allow another car to pass; that she saw the Ford car coming from the east at a rate of speed of 35 miles an hour; that she started across the intersection at a rate of speed of 10 miles an hour, and was struck by the Ford car just after she entered the intersection. Mrs. Zimmerman also testified that she saw plaintiff thrown from his seat on top of the crated bathtub.

The acts of negligence complained of are: That Mrs. Zimmerman was driving at an unlawful and reckless rate of speed; that she failed to keep a proper lookout for danger when entering the intersection; that she failed to give any warning of her intention to enter the intersection; that she turned her car to the right instead of to the left in attempting to avoid the collision; and that she failed to keep her car under control.

It is further disclosed that the plaintiff had been engaged in the dray business for a period of years preceding the accident and had on several occasions employed the witness Rasmussen to work for him on small jobs. The witness Rasmussen was engaged in the plumbing business at Ruskin and had been so engaged for several years. It appears from the evidence that some time prior to the accident plaintiff had made arrangements with Rasmussen to install some plumbing fixtures in plaintiff's home, including the bathtub and lavatory. On the morning of October 15, 1927, Rasmussen went to Lincoln to get some plumbing supplies and fixtures and was accompanied by plaintiff at Rasmussen's invitation. The evidence of both plaintiff and Rasmussen was to the effect that plaintiff had previously selected the fixtures he desired from a catalogue and that plaintiff accompanied Rasmussen for the purpose of attending the Nebraska-Grinnell football game in the after-

noon. Plaintiff left Rasmussen shortly after arriving in Lincoln and they had not again met until 5 or 6 o'clock that evening, at which time all the plumbing fixtures and supplies were loaded in the Ford car and ready for the return journey. Among the fixtures loaded in the car were a bathtub and lavatory which Rasmussen intended to install in plaintiff's home. Rasmussen paid for the gas and oil used on the trip, but the evidence does not disclose who paid the personal expenses of the two while they were together in Lincoln.

The plaintiff (appellant here) contends that any negligence shown on the part of the witness Rasmussen, the driver of the Ford automobile, is not imputable to plaintiff, and that the court erred in submitting the question of joint enterprise. The instruction referred to is as follows:

"The court instructs the jury that, if you find and believe from the evidence that Oluf Rasmussen was driving the automobile in which plaintiff was riding at the time and place of the collision, and that the said Rasmussen was then and there guilty of carelessness and negligence in that connection and which is shown by the evidence in the case, and which caused or contributed to cause the collision, said carelessness and negligence of the said Rasmussen, if you find he was careless and negligent, is not to be imputed to the plaintiff or held against his right to recover herein, unless you further find and believe from the evidence that the plaintiff and the said Rasmussen were engaged in a joint enterprise. By joint enterprise is meant not merely that they were riding together in the same vehicle. 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."

The plaintiff complains that there was no evidence upon which to base this instruction. Whether or not the evidence is sufficient, we need not decide, for the reason that the instruction given is exactly the same instruction as re-

quested by the plaintiff. Having himself asked the court to submit this issue to the jury, he cannot now complain. The foregoing instruction assumes that there was evidence before the jury from which they could find that plaintiff and the witness Rasmussen were engaged in a joint enterprise. If such evidence was adduced (and in view of the instruction we must presume that there was), then the jury would be justified in finding that plaintiff and the witness Rasmussen were engaged in a joint enterprise and in imputing the negligence of either to the other. It is the rule in this state that, where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction. *Waters v. Nebraska Mutual Ins. Co.*, 108 Neb. 1; *Farmers Bank of Nebraska City v. Garrow*, 63 Neb. 64; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.

The plaintiff also complains of the giving of other instructions by the trial court. A careful examination shows that all are correct statements of the law applicable to this case. Some of the grounds for objection are highly technical, but in considering the instructions as a whole they correctly and fairly state the law of the case. We are unable to find any reversible error in any of the instructions given.

The plaintiff also complains of the ruling of the trial court in excluding from the evidence a view of the Ford car. Under the law of this state, the viewing of property that is a subject of litigation by the jury is discretionary with the trial court. We believe the same rule should be applied in a case of this character. Clearly there is no abuse of discretion in the case at bar and the error alleged is without merit. *Alberts v. Husenetter*, 77 Neb. 699; *Beck v. Staats*, 80 Neb. 482; *Robison v. Troy Laundry*, 105 Neb. 267.

Plaintiff also complains that under the record and the law of this case plaintiff is not shown to have been guilty of any negligence to bar his right of recovery. Regardless

of the question of any imputed negligence, the jury could have found under the evidence that plaintiff was guilty of contributory negligence. The evidence is undisputed that plaintiff was riding on a crated bathtub which had been wired to the truck crosswise behind the seat. Under such a state of facts, it was for the jury to determine, after taking into consideration all the facts and circumstances, whether or not plaintiff was guilty of contributory negligence. Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury whether the guest or occupant of the motor vehicle was guilty of contributory negligence; and only in cases where the evidence is insufficient to carry the issue to the jury, or where the evidence is uncontradicted and the inference to be reasonably made therefrom is clear, is it for the court to rule as a matter of law with reference to the alleged contributory negligence of plaintiff or as to his liability for the contributory negligence of the driver. *Willis v. Schertz,* 188 Ia. 712.

In a recent case decided by the supreme court of Michigan involving a like case, the court in its opinion say:

"Most of the foregoing discussion applies to the claim that plaintiff was guilty of contributory negligence. One additional claim is made, however, that plaintiff was guilty of contributory negligence because he was riding on the running-board, and that he might have avoided injury by stepping off. The five seats in the Buick were taken by other workmen, and he had ridden some distance in an uncomfortable position, and he desired to rest himself for a time, so he got out and rode upon the running-board. As he stood there on the running-board, he was watching the traffic coming from the west, and the driver of the Buick was watching traffic coming from the east. It is within the province of a jury to say whether plaintiff, under such circumstances, might have stepped off and avoided the injury, but the court cannot say so as a matter of law." *Anderson v. Detroit Motorbus Co.,* 239 Mich. 390.

The court having properly submitted to the jury the questions as to whether the contributory negligence of the plaintiff was the proximate cause of the injury, and whether the contributory negligence of plaintiff was of such a nature as to bar a recovery under the "Comparative Negligence Statute," there being sufficient evidence in the record to support the verdict returned, the contention of plaintiff that the verdict of the jury is not supported by the law and the evidence is not sustainable.

The plaintiff next contends that the court erred in not sustaining plaintiff's motion for a new trial upon the ground of newly discovered evidence. We have carefully examined the affidavits in support of the motion for a new trial and find the contents thereof are of a cumulative and impeaching character. None of the parties making affidavits were present when the acts occurred; none of the new evidence that plaintiff offers to show is of such a controlling character as to probably change the verdict; and under such circumstances the trial court did not err in overruling plaintiff's motion for a new trial on the ground of newly discovered evidence.

There being no error in the record, the judgment is

AFFIRMED.

C. D. RIDENOUR V. STATE OF NEBRASKA.

FILED MAY 1, 1930. No. 27259.

1. **Larceny: STOLEN PROPERTY: POSSESSION: PRESUMPTION.** "Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possesson of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial." *Williams v. State*, 60 Neb. 526.
2. **Criminal Law: CAUTIONARY INSTRUCTION.** Evidence *held* to be entirely circumstantial, and refusal to give cautionary instruction on subject of circumstantial evidence constituted error.

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

Harry H. Ellis and *Hoagland & Carr*, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, EBERLY, and DAY, JJ., and FITZGERALD, District Judge.

FITZGERALD, District Judge.

C. D. Ridenour was informed against in the district court for Phelps county on a charge of chicken stealing, and on trial to a jury was convicted and sentenced to serve six months in the penitentiary. The record is before us for review on defendant's claim of error in the rulings of the trial judge.

It appears from the bill of exceptions that the defendant is a married man with three sons under six years of age. He lives upon and operates a farm, owned by his father-in-law, P. G. Henderson. Mr. Henderson is also the owner of land occupied and farmed by Martin Francis and Charles Reed, the complaining witnesses in this case. Henderson lives with defendant and his family. Defendant's house is three and one-half miles north of Holdrege and the Francis and Reed house is four miles north and one mile west of Holdrege.

On May 4, 1929, defendant was working in the field, disking for corn, which job he finished about 6 o'clock, after which he went to the house and burned some straw on his potato patch. He ate his supper and went to Holdrege with some cream which he sold to the Lincoln Pure Butter Creamery. The manager of this creamery testifies that it was about 8:30 or 9 o'clock when defendant delivered the cream, and that defendant, on request of said witness, then went to the depot to get some cream for the witness that had come in on the "High Line." Defendant was then given a check for the cream which he had brought from his home, and defendant's testimony is that he then went out and purchased some groceries and started home.

He testifies that on his way home he came upon one R. W. Johnson, who stated that his car had broken down and he had some chickens in sacks that were getting warm and requested defendant to take the chickens to the David Cole Creamery at Holdrege. After some discussion defendant testifies that he consented to comply, and, while he was unloading the chickens at the Cole Creamery, Francis and Reed came upon the scene, and there is some dispute in the testimony as to whether anything was said at this time that would warn defendant that Francis and Reed claimed the chickens and that they were stolen from their farm.

There is probably sufficient evidence in the record, including discrepancies, which the jury might find in defendant's explanation of his possession of the chickens, to sustain a verdict, and we would be required to sustain the trial court's action in the case if there were no errors of law occurring in the trial and instructions of the court to the jury.

The rulings of the trial court on the admissibility of evidence are on the whole remarkably free from error, but as shown by the bill of exceptions the county attorney asked: "Were these the first chickens that you had sold since you lived here at your father-in-law's?" And the court, having a perfect right to assume that the prosecutor would follow up by showing previous acts of defendant tending to show intent, overruled objection and allowed witness to answer. However, the county attorney evidently had no such testimony but he continued this line of questioning with the manifest purpose of prejudicing defendant in the minds of the jury. Question No. 248, though not objected to, is of the same character. A series of questions, not objected to, as to the ownership of defendant's car being in his wife, has the suggestion of disparaging the defendant. Question No. 421, another effort along the same line, was ruled out by the court. Question No. 1018 is of the same character and received the same treatment by the court, but had, like the others, a tendency to prejudice defendant by the mere propounding of the question.

Instructions Nos. 1 and 2, tendered by defendant, we feel should have been given by the court to the jury, and likewise find that, in setting out as the statute applicable to the case that part of the statute including the provision in regard to receiving stolen chickens, was prejudicial to the defendant, inasmuch as he is conceded to be in possession of the chickens that were undeniably stolen. This court has laid down the rule that mere possession of stolen property gives rise to no presumption of guilt, and that the inference to be drawn therefrom is for the jury when considered with all the other evidence in the case. *Williams v. State,* 60 Neb. 526. The jury should have been warned that possession of the chickens was not sufficient in itself to convict. Instruction No. 1 submitted by defendant, and refused by the court, contained such warning; and instruction No. 5 given by the court is silent on this point, and is the only instruction given on this subject.

Instruction No. 2 tendered by defendant should also have been given, or some instruction in its stead. *Wakeley v. State,* 118 Neb. 346. There is no instruction in the record on the subject of circumstantial evidence, and we have here a case peculiarly confined to circumstantial evidence. The only evidence offered is the possession of the stolen chickens and statements by defendant in his explanation of such possession, which might cause the jury to disbelieve his whole explanation, and yet a careful study of all the evidence shows that all of defendant's statements could be true, and, if true, he is not guilty as charged. He is entitled to all the safeguards of the law in having his case submitted to a jury, and we feel that he has been deprived of this protection by the refusal of the two instructions offered by him.

Counsel for the state urge that this is not a case entirely resting on circumstantial evidence, for the reason that defendant might be charged with theft and convicted as charged, upon evidence proving that he was an accessory. This is true if the evidence proved complicity of defendant before the fact, but here the evidence proves either theft

by defendant or nothing, so far as the charge in the information defines a crime. Receiving stolen chickens or accessory after the fact are not charged in the information, and there can be no conviction under the information on evidence proving either of these offences.

We are of the opinion that the order of the trial court should be and it is hereby reversed and the cause is remanded to the district court for further proceedings.

REVERSED.

WILCOX & COMPANY, APPELLEE, V. HENRY DEINES, APPELLANT: BANK OF BAYARD, INTERVENER, ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27150.

1. **Chattel Mortgages: VALIDITY.** Evidence examined and *held* to establish the true relation between the defendant Deines and the Bank of Bayard as that of landlord and tenant, and that the provision of the oral lease reserving the title of crops thereafter to be grown as security for an existing indebtedness was in the nature of a chattel mortgage and, under the facts in this case, void as to attaching creditors.
2. **Exemptions.** Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons.

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

T. F. Neighbors, for appellant.

Morrow & Morrow, contra.

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

EBERLY, J.

Plaintiff brought this suit in equity to reach certain funds held by the clerk of the district court for Morrill county as the property of Henry Deines for the Bank of Bayard "as their interests might appear, and to have said

funds paid by the clerk of said court to the plaintiff to apply on a judgment which plaintiff had obtained against the defendant Deines." There was a trial to the court, judgment for the plaintiff Wilcox & Company, and from which an appeal is prosecuted by the defendant Deines and the intervener, Bank of Bayard.

The parties in their briefs unite in stating the question presented to the court by the record as: "There is really only one question to be determined by this court: Whether the contract between E. R. Vanatta, in behalf of the bank, on the one hand, and Henry Deines, on the other, was in fact or in law a chattel mortgage, void as to creditors unless filed in the office of the county clerk of Morrill county." It appears that the following facts are agreed upon by all parties to the suit: That Henry Deines during the crop season of 1927 farmed the northeast quarter of section 26, township 21 north, range 51 west of the sixth P. M., in Morrill county, Nebraska, and planted 85 acres of the said land to sugar beets; that about March 1, 1927, the defendant Henry Deines was indebted to the Bank of Bayard in the sum of approximately $12,000; that the defendant E. R. Vanatta, who was the cashier of the Bank of Bayard, for and on behalf of said bank, personally entered into an oral contract with said Henry Deines, whereby it was verbally agreed that said Henry Deines would farm said described land owned by said Bank of Bayard during the crop season of 1927 and plant thereon 85 acres of beets, and that said Deines was to care for, cultivate and harvest said beets; that said Bank of Bayard at the time of entering into said contract was the owner of said premises and should retain the ownership of said beets grown on said land, and that E. R. Vanatta would officially enter into a contract with the Great Western Sugar Company for the growing and sale of said beets, and that said bank should advance sufficient money to cover the cost and expense of growing and cultivating said beets; that said bank should receive one-fifth of the growth of said crop, and that the balance of said crop was to be applied, first, on advance-

ments made by the bank to said Henry Deines in the growing and harvesting of said crops, and that the balance remaining from the proceeds of the crop, after deducting the expense and one-fifth of said beets, should be applied on the indebtedness of said Deines to said bank; and that E. R. Vanatta, for and on behalf of said bank, entered into a contract with the Great Western Sugar Company for the sale of all beets grown on said premises, and also entered into a labor contract for hand labor required to properly care for said beets while growing on said premises, and advanced the necessary expense for cultivating and harvesting said crop; that this was done, the advancements totaling $7,245.60; that the total proceeds from the sale of the beets grown on the farm for 1927 amounted in all to $10,163.12; payments were made by said Great Western Sugar Company each month for the beets delivered during the preceding month, and when said payments were received by the Bank of Bayard it placed to its credit one-fifth of said amount and credited the balance on the amount advanced to Deines for the growing of said crop and the balance remaining, if any, upon his indebtedness to said bank; that on or about the 8th day of November, 1927, an action was begun in the district court for Morrill county, Nebraska, by Diers Brothers & Company against Henry Deines, E. R. Vanatta, Great Western Sugar Company, et al., to reach the proceeds of the sale of said beets in satisfaction of a judgment which said Diers Brothers & Company had obtained against said Henry Deines in said case. Pursuant to a stipulation of the parties to that action the court released all sums of money then owing by said sugar company for beets delivered under this contract, except the sum of $2,000, and the excess over $2,000 was paid to the Bank of Bayard and Henry Deines, one-fifth of which was taken by the Bank of Bayard for the use of the land and the balance credited on the Deines indebtedness; that, of the $2,000 remaining in court, the court ordered that the sum of $418.75 be paid to the Bayard Motor Company in satisfaction of a lien which it claimed or had upon said

crop, and the sum of $1,116.46 be paid to Diers Brothers & Company in satisfaction of its judgment against Henry Deines, and the sum of $61.25 be paid on costs of that action, and the balance of $403.54, the amount involved in this action, was ordered paid to the defendant Henry Deines or the Bank of Bayard as their interests appeared. It is disclosed by the record that all sums advanced under this contract by the Bank of Bayard were upon promissory notes in writing, in usual form, executed by Henry Deines. The plaintiff and appellee in this case commenced an action in the county court of Morrill county against the defendant and appellant, Henry Deines, on the 8th day of November, 1927, and issued an order of attachment and garnishment against the Great Western Sugar Company. The order of attachment was levied on the silo of beets. The Great Western Sugar Company answered that it was not indebted to the defendant Henry Deines; and, thereafter, while the proceedings were still going on, Henry Deines hauled off the silo of beets that had been levied on under the attachment and sold the same to the Great Western Sugar Company, and it fairly appears from the record that the proceeds of the beets thus sold appear in the case before us. It appears in the evidence that defendant Deines had, prior to the commencement of these actions, treated the beets as his own property; that he had mortgaged the crop to the Bayard Motor Company, and that he had claimed to be the actual owner thereof to witnesses who testified in this case. The evidence on behalf of the bank of Bayard, in substance, admits that at least one of the purposes of the contract was to secure the indebtedness of Henry Deines to that institution which existed prior to March 1, 1927, the date upon which the verbal contract was made and entered into by Deines and the Bank of Bayard. The district court held that "said contract is in truth and in fact a chattel mortgage, (and, not being filed of record), that said contract was void as to purchasers in good faith and attaching creditors and was void as to the plaintiff herein, and that the plaintiff herein secured a lien on said

sum of money by reason of the attachment and garnishment proceedings issued out of the county court of Morrill county on the 8th day of November, 1927, and has now a valid and subsisting lien on said $403.54 for the payment of its said judgment obtained in the county court of Morrill county, Nebraska;" and an appropriate judgment was rendered consistent with the findings of fact thus made.

The case turns on whether the contract between the Bank of Bayard and Vanatta and Deines was a chattel mortgage and void as such as to the prevailing parties because not recorded prior to the attachment levy. Indeed, the matter to be determined is whether Deines is to be considered as a lessee or a cropper. This court is committed to the doctrine that a tenant is one who rents the land and pays for it either in money or part of the crops or an equivalent. A cropper farms the land and is paid for his labor or work in part of the crops. In one case the tenant pays for the use of the land with a part of the crops, in the other the crops belong to the owner of the land and he pays for the labor or cultivating with a part of the crop. It is to be remembered in the instant case that for all moneys advanced by the bank Deines gave his promissory notes. Deines also mortgaged the crop, and it is admitted that by the terms of the contract in question the debt of $12,000 owned by the bank and against Deines was to be secured by the crop of sugar beets thus raised. All these facts point to the conclusion that what was really in the mind of the parties was the creation of a security for the benefit of the bank, and this fact is at least partially admitted by Vanatta in his testimony given on the trial of the case; but it is to be observed that this agreement was made on the first day of March, 1927, and in the course of nature prior to the time of planting the crop. We are committed to the doctrine that a clause in a lease attempting to create a lien on future crops not then planted to be raised on leased premises is ineffectual to create either a legal or equitable lien on such crops. *Thostesen v. Doxsee,* 78 Neb. 40; *Brown v. Neilson,* 61 Neb. 765. And it further

appears that the attachment in the case was levied on beets prior to any change of actual possession as between Deines, the Bank of Bayard, or Vanatta.

It is quite plain that the principles announced in the case of *Skala v. Michael*, 109 Neb. 305, are wholly inapplicable to the situation presented by the present record. On the other hand, so far as the actual relation of the parties is concerned, there are no facts in the record which would justify or call for the application of the principles announced in *Robinson Seed Company v. Hamilton*, 87 Neb. 76, wherein the court held: "One who grows for and agrees to deliver a certain crop to the owner or possessor of real estate for an agreed price per hundred pounds, under a written contract by which it is expressly provided 'that nothing herein contained shall be construed to make the instrument a lease of the premises between the parties hereto, or divest the owner of his title to the crop,' is a mere cropper, and acquires no title to any portion of the crop, and cannot sell or mortgage the same or any part of it, without the consent of the owner." While the question presented by the record is one not without difficulty, considering all the facts set forth therein, we are constrained to the view that it establishes an oral lease between the representative of the Bank of Bayard and Deines; that the reservation of the title provided for was in truth and in fact intended for security only, and that the real relation of the parties was landlord and tenant, and that the rights of the attaching creditor under an attachment levied prior to the taking of actual possession by the lessor created a superior lien to the claims of the Bank of Bayard.

We have not overlooked the claim of appellant Deines that the money in suit is the proceeds of exempt property and therefore is not subject to attachment. It is to be remembered, however, that the amount here involved is but a portion of a sum of more than $10,000, and while it is true that, with the permission of the defendant Deines, that amount had been applied to various indebtedness, still

the facts fall within the doctrine announced in the case of *Kilpatrick-Koch Dry Goods Co. v. Callender*, 34 Neb. 727. The true rule is that whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the garnishee summons. *Kilpatrick-Koch Dry Goods Co. v. Callender, supra.* As thus applied the claim of exemptions cannot be sustained.

It therefore follows that the district court in its determination of the case was right and its judgment in the premises is

AFFIRMED.

SKELLY OIL COMPANY, APPELLANT, V. DON GAUGENBAUGH, APPELLEE.

FILED MAY 2, 1930. No. 27350.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: COMPENSABLE ACCIDENT. An injury arising solely as the result of an occupational disease is not compensable under the Nebraska workmen's compensation act; but, where the result is attributable in whole or in part to an accident, the fact that, but for the accident, the disease of which claimant suffered would be classed as occupational, will not prevent compensation, which in such case is awarded for the accident, and not the disease.
2. ———: ———: ———. It is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the accident arose out of the employment.
3. ———: ———: ———: NOTICE. Evidence examined and *held* (a) that the employer had such "notice or knowledge of the injury" suffered by claimant as rendered the service of written notice as required by section 3056, Comp. St. 1922, unnecessary; (b) that the facts in the record disclose a case to which the provisions of the Nebraska workmen's compensation act are applicable; and (c) that the judgment of the trial court is sustained by the evidence.

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

Battelle, Morgan, Strehlow & Anderson, Cliff V. Peery and *C. L. Swim,* for appellant.

Dressler & Neely, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and FITZGERALD, District Judge.

EBERLY, J.

This action arises under the workmen's compensation law. Comp. St. 1922, secs. 3024 to 3084, inclusive, as amended. Appellee, Gaugenbaugh, was an employee of the Skelly Oil Company. He was hired in Omaha under a written contract of employment which was signed at the office of the Skelly Oil Company in that city. He selected as his territory the southwestern part of Iowa. He went out from Omaha to the territory during the week, returning on Saturday and Sunday, there attending meetings of instruction which were held under direction of the zone manager and for the promotion of the business in which he was engaged. A portion of his work, it appears, was actually performed in Omaha. He also did work in Nebraska for the company under this employment at Blair, Herman, Lincoln, and South Sioux City. His principal duties as a salesman, however, were transacted in Iowa, but the establishment maintained in the city of Omaha by the Skelly Oil Company constituted the base of operation, where its merchandise was stored, worked over, repaired, and shipped from, and through which the territory contiguous thereto, including plaintiff's Iowa territory, was actually served and supplied. In the course of this employment as a salesman at Harlan, Iowa, which was under the immediate direction and control of the company officials at Omaha, to whom the employee made daily reports, on the 20th day of May, 1929, while the employee, in the course of his duties, was lifting on a stove assisting in the installation of a skelgas outfit, he sustained an accidental injury, a strain, the result of which immediately appeared in the form of a hemorrhage in his right groin and leg. The employee upon the same day following was treated by an

osteopath in Harlan, Iowa, without affording any relief from the pain which he suffered, and thereupon returned to his Omaha home. The manager of the Skelly Oil Company business at that place, under whose directions he was working, had knowledge of this fact and of the cause thereof contemporaneous with his arrival at Omaha, and thereafter visited this employee in the hospitals from time to time during a long and dangerous illness following this accident. Expert physicians employed by defendant examined plaintiff and reported his condition to the employer.

To defeat the claim for compensation it was alleged in the district court that the disabilities of appellee were not caused nor contributed to by any accident, but were due wholly to purpura which was in truth an occupational disease; second, that no notice either oral or written of injury was given as prescribed by section 3056, Comp. St. 1922.

First, it is the theory of the defendant oil company that plaintiff's condition is due to purpura and in no manner due to his duties as an employee of the oil company. On the other hand, the employee's contention is that the inception of the condition was due to inhalations by the employee of skelgas during the course of his employment; that this was induced by the representations of the oil company to its agents and its patrons that the product was wholly harmless and contained no poisonous substances whatsoever and could be safely inhaled; that, relying thereon, as part of the demonstrations made by plaintiff as salesman for the defendant oil company, he from time to time, believing the representations made to be true and that skelgas was in truth and in fact wholly harmless, inhaled the same; that, as a result of the inhalations thus made, the poisonous effects of the gas produced an "unexpected and unforeseen event happening suddenly and violently, with or without human fault, and producing * * * objective symptoms of an injury" (Comp. St. 1922, sec. 3075) by causing a state of purpura to exist in plaintiff's circulatory system, and due to the condition thus created

the effect of the accidental strain suffered by the plaintiff on the 20th day of May, 1929, was to "light up," aggravate and accelerate the results of the previous accident, and to cause the serious condition which undoubtedly existed after his return to Omaha and his reception into the hospitals of that place. As this is a trial *de novo,* it may be said that it appears undisputed that the employee, plaintiff herein, in the course of his employment by the defendant, suffered from mercurial poisoning in February, 1929; that he was then examined by an eminent physician employed by the oil company whom the latter called as a witness in the present case. From the testimony of this physician it appears without question that in February, 1929, he examined the plaintiff, employee, and at that time there was no indication that employee was then suffering from purpura. From this and other testimony in the record we are constrained to find, as a matter of fact, that the condition of purpura which prevailed at the time of plaintiff's injury hereinafter referred to was a development of a date later than February, 1929. The testimony of the oil company's experts was restricted to the subject of the elements which together constituted skelgas. Of course, their testimony did not relate to the skelgas that had been actually inhaled by the employee. The testimony of the experts on behalf of the employee was as to the effect of the deleterious character of skelgas when applied to animal life, but that furnished no evidence as to the nature of the elements constituting the same. However, we find it unnecessary to determine whether skelgas was the active agent, the deleterious effects of which contributed to the condition of purpura which prevailed in the employee's body at the time of the accident on the 20th day of May, 1929, for we are convinced from a consideration of all of the evidence that on this date the plaintiff sustained a strain which was the immediate and the proximate cause of plaintiff's condition. If this be true, then we must accept as a fact that, notwithstanding the prior existence of purpura and the fact that it contributed to plaintiff's con-

dition at the time of the accident, the actual strain itself and its effects in "lighting up" and aggravating the condition which then prevailed constitutes a proximate cause, and that the plaintiff's condition as it existed after the accident and, as well, as it now appears is therefore the direct result of an injury arising out of and in the course of his employment. But under the facts in this case it is found unnecessary to determine whether the condition of purpura with which the plaintiff was afflicted was the result of accident or was to be classed as an occupational disease. Assuming, but not determining, that purpura from which plaintiff was suffering was properly classified as an occupational disease, to sustain a recovery it was sufficient to show that the injury, the strain, suffered and this pre-existing condition combined to produce the disability, and it was not necessary to prove that the injury, the strain, either "lighted up," accelerated, or aggravated the purpura to satisfy the requirement that accident arose out of the employment. The rule is: "Death or injury arising solely as the result of an occupational disease is not compensable under the workmen's compensation act; but, where the result is attributable in whole or in part to an accident, the fact that, but for the accident, the disease of which claimant died would be classed as occupational, will not prevent compensation, which in such case is awarded for the accident, not the disease." *Van Vleet v. Public Service Co.*, 111 Neb. 51. In other words: "It is sufficient to show that the injury and pre-existing disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement that the accident arise out of the employment." *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246. This being true, the employee is entitled to compensation at the rate allowed by the district court, unless, because of lack of notice and failure to comply with the statute in this respect, his rights have been lost, and to that subject we will now address ourselves.

The appellant here has cited a large number of English

cases to the point that delay in giving notice, after the seriousness of the injury has become apparent, will generally be held to prejudice the employer in his defense. Section 3056, Comp. St. 1922, is the authoritative statute on this subject. This section contains the provision: "Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury." A comparison of section 7 of the "Employer's Liability Act, 1880," volume VIII, Chitty's English St. (6th ed.) p. 777, which is the corresponding provision of the English act on this subject with the provision of section 3056, Comp. St. 1922, will disclose that, not only is there a material difference in the sections, but the provision last above quoted is not incorporated in the English act. Indeed, the difference is such as renders inapplicable the conclusions which might otherwise be drawn from the English cases cited by the appellant in his brief. It is quite apparent from the evidence that the employer's manager at Omaha was not only early advised of plaintiff's serious condition, but had actual knowledge of the facts and circumstances which actually caused the same, and thus clearly brings the case within the provision last above quoted which in effect renders a written notice unnecessary where the employer had actual notice or knowledge of the injury. We conclude therefore that the failure to give notice in this case, in view of the circumstances disclosed in the evidence, does not afford the employer any defense in this action.

The employer also contends that employee in this case was not under the terms of the Nebraska compensation act. In view of the record as an entirety there can be no question upon this point. It plainly appears that the work of the employee in this case was an incident to an industry which was substantially carried on at Omaha, Nebraska. At that point was created what might be termed a base for operations and constituted in truth and in fact an essential industry as contemplated by our compensation statute. *Bradtmiller v. Liquid Carbonic Co.*, 173 Minn. 481.

Both parties appealed from the action of the trial court in the allowance of a $300 attorney's fee. It will be observed that these services were performed in the presence of the trial court and no evidence as to their value was offered below. We have only the record as shown in the bill of exceptions, and from it appears no expert evidence produced in that tribunal relating to the value of the services performed. In the case of *Davis v. Lincoln County*, 117 Neb. 148, there was evidence in the record which was directed to the value of the attorney's services, and in that case we sustained the action of the trial court in an allowance based upon the record. In view of the absence of this class of evidence in the present record, we do not see our way clear to increase the fee allowed for services in the district court, but the allowance there made is approved. For services in this court, however, the majority of the court deem that $200 is a reasonable fee, and said amount is fixed and required to be paid the employee's attorney, thus making the total attorney's fees in the district court and supreme court $500. The allowance by the district court of the doctors' bills, hospital, and nursing bills, on account of said accidental injury, of $1,438.50 is approved, and the credits allowed the employer by the district court in the sum of $600 is also approved. The finding and decree of the district court in all respects is adopted as and for the judgment of this court, and in addition the employer will pay the sum of $200 attorney's fees in this court and the costs of appeal.

AFFIRMED.

STATE, EX REL. BEN ALLEN, APPELLANT, V. CARL RYDER, SHERIFF, ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27073.

Criminal Law: SENTENCE. When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise.

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

Andrew P. Moran, for appellant.

George H. Heinke, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and L. S. HASTINGS, District Judges.

FITZGERALD, District Judge.

This matter comes here on an appeal from an order of the district court for Otoe county denying an application for a writ of habeas corpus presented by Ben Allen, appellant herein.

The facts disclose that appellant was convicted by a jury in the district court for Otoe county, on an appeal from a conviction in the county court of Otoe county, and the penalty fixed therein.

From the conviction in the district court for said county and the penalty of 30 days in the county jail of said county, defendant Allen appealed his case to this court, March 30, 1929, the order of the district court was affirmed, and mandate issued to the district court for Otoe county commanding it to execute its order previously entered. Whereupon the district court issued a commitment to the sheriff of said county to take possession of said Ben Allen and confine him in the county jail for a period of 30 days.

In the meantime, however, and on March 26, 1929, Ben Allen had pleaded guilty in the county court of said county to another offense similar to the one from which he had appealed, and as a penalty had been sentenced to serve 45 days in the county jail, wherein he was confined at the time the mandate was received by the district court and at the time the commitment issued by virtue thereof.

Appellant contends that he began to serve the 30 day sentence on April 5, 1929, while appellees contend that his service did not begin until the end of the 45 day sentence.

If the two sentences were pronounced by the same court

at the same term, there might be some consideration given the contention of appellant, but, since he was confined in the county jail on a commitment from another court at the time he was brought before the district court for sentence in accordance with the mandate from this court, he was not free to begin service on the district court commitment until the expiration of the county court term. It was not his right to be brought from the county jail to appear before the district court for sentence, and the fact that, as a matter of sufferance, he was allowed to appear cannot be taken advantage of by him in this proceeding. He brought on the sentence in the district court at the time it was pronounced, by his motion, and there is nothing in the record to indicate that the district judge knew he was not free to begin his sentence. If the district judge knew appellant was serving a sentence, he could have made the sentence fit those circumstances. It appears, however, that there might have been a withholding of the facts from the district court for the purpose of defeating its order.

We cannot lay down a rule that sentences pronounced in different courts run concurrently, even though they are both to be served in the same institution, when the sentence pronounced is silent on the matter.

We are of the opinion that the application for the writ of habeas corpus was properly denied, and that the order of the district court for Otoe county should be, and it is,

AFFIRMED.

AUGUSTUS W. DUNBIER, APPELLEE, V. CARL MENGEDOHT ET AL., APPELLANTS.

FILED MAY 2, 1930. No. 27109.

1. **Divorce: DECREE: ESTOPPEL: ALIENATION OF AFFECTIONS.** In an action by a husband against third parties for the alienation of his wife's affections, a decree of divorce, granted his wife on the ground of extreme cruelty, is not an adjudication or an estoppel by judgment against the husband in favor of such third

parties, so as to operate as a bar to his cause of action, although such decree is competent as evidence for other purposes pursuant to the provisions of section 1 (8837), ch. 75, Laws 1925.

2. **Husband and Wife:** ALIENATION OF AFFECTIONS. A husband may maintain an action for the alienation of his wife's affections where the defendant's conduct was the controlling cause of the wife's estrangement, although his own misconduct and other causes may have contributed thereto.

3. **Contract:** RIGHT OF RECOVERY. "When plaintiff can maintain his cause of action without the aid of an illegal act or one that might be construed as *contra bonos mores* he will be allowed to recover." *In re Estate of Lowe*, 104 Neb. 147.

4. **Husband and Wife:** ALIENATION OF AFFECTIONS: INSTRUCTIONS. Where there is evidence that plaintiff participated in certain illegal and immoral transactions not necessary to prove any part of his case, it was not error to refuse to instruct the jury to return a verdict in favor of defendants on account thereof.

5. ———: ———: DAMAGE. In an action where two or more persons are alleged to have formed a conspiracy to wrongfully alienate the affections of plaintiff's wife, cause their separation and divorce, and that, in pursuance of such conspiracy, each did certain acts and by reason thereof did alienate the affections of plaintiff's wife, cause their separation and her divorce from him, the damage done and not the wrongful confederation is the gist of the action.

6. **Conspiracy:** SEVERAL JUDGMENTS. "Where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, a judgment against one or more of such defendants may be sustained without proof of a conspiracy among all of them." *Harvey v. Harvey*, 75 Neb. 557.

7. **Instructions** complained of examined and *held* that the giving of such instructions was not error.

8. **Appeal:** EVIDENCE: RULINGS: REVIEW. "The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial." *Flower v. Nichols*, 55 Neb. 314.

9. **Evidence** examined and held *sufficient* to sustain the verdict of the jury.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Morsman & Maxwell and *John A. McKenzie,* for appellants.

Lovely & Lovely and *O'Sullivan & Southard, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and FITZGERALD and WILLIAM G. HASTINGS, District Judges.

HASTINGS, District Judge.

This action was commenced in the district court for Douglas county, by Augustus W. Dunbier, as plaintiff against Carl Mengedoht, William Mengedoht, Bertha Mengedoht, Max Rapp, and Elsie Rapp, as defendants, to recover damages for the alleged intentional and malicious alienation of the affections of his wife, Augusta A. Dunbier. The defendants, appellants, are the two brothers, stepmother, brother-in-law, and sister of the wife of plaintiff, appellee. Trial was had to a jury and a verdict returned against all of the defendants, assessing plaintiff's damages at $5,000. Judgment was entered on the verdict.

The defendant Bertha Mengedoht filed a separate motion for a new trial and the other defendants joined in a separate motion; both motions were overruled. The defendant Bertha Mengedoht has appealed separately and files a separate brief containing separate assignments of error; the other defendants jointly appeal.

The petition in substance alleges that the plaintiff and Augusta A. Dunbier were married on October 12, 1917; that plaintiff at the time of his marriage was a painter of portraits and landscapes; that after his marriage he continued his career as such painter; that sometime prior to January 31, 1924, while plaintiff was living happily and contentedly with his wife at the home of his wife's parents and enjoying her love and affection, the defendants conspired and confederated together with the wicked, malicious and wrongful purpose of interfering with the marriage relation existing between plaintiff and his wife and alienating her affections; that the defendants and each of them,

in furtherance of such conspiracy, by means of the acts alleged therein, alienated the affections of plaintiff's wife from him, caused her to separate from and leave plaintiff on the 29th day of January, 1926, and to go to Seattle where the defendant Carl Mengedoht was living, and induced her to file suit for a divorce on the 24th day of May, 1926, and to obtain a decree of divorce from plaintiff on the 11th day of January, 1927.

Defendants by their separate answers allege, as one of their defenses, that on the 24th day of May, 1926, plaintiff's wife brought an action against him for a divorce, and on the 11th day of January, 1927, she was granted a decree of divorce on the ground of extreme cruelty; that said decree is final and was and is a complete defense and bar to plaintiff's cause of action. The right of plaintiff's wife to a divorce was contested by plaintiff. On the trial defendants introduced the divorce decree in evidence. It is contended by counsel for defendants that the decree of divorce is an adjudication between Dunbier and his wife, to the effect that Dunbier's wrongful acts, his cruel treatment of his wife, caused the loss of the love and affection of his wife for him and all rights of the consortium of his wife. In other words, that the decree of divorce obtained against plaintiff by his wife is a complete bar to plaintiff's cause of action against third parties for alienating her affections. The contention is based upon the provisions of section 8837, Comp. St. 1922, as amended by chapter 75, Laws 1925. The amendment was made by adding the following to said section:

"Provided, however, the wife shall be a competent witness against the husband in all prosecutions arising under section 9584, Compiled Statutes of Nebraska for 1922; and either of them may be a witness against the other in any action brought by either husband or wife against a third person, relating to the marriage relationship between such husband and wife, or the interruption of such relationship; and any decree of divorce by one against the other shall be competent as evidence in any action by one of them

against a third person relating to such marriage relation or to the interruption thereof or interference therewith."

A determination of the question involved depends upon the meaning to be given to the phrase, "any decree of divorce by one against the other shall be competent as evidence." Unless the rule has been changed by the statute under consideration, the authorities are practically unanimous in holding that a decree of divorce is not a bar to an action by the husband against a third person for the prior alienation of his wife's affections, though the divorce be granted to the wife for the misconduct of the husband; the decree not being *res judicata* with respect to the husband's cause of action and not operating as an estoppel by judgment. 9 R. C. L. 496, sec. 317; 13 R. C. L. 1468, sec. 518; note, 20 A. L. R. 943.

The decree in a divorce action is only a judgment *in rem* so far as it effects the status of the parties, and thus far is an adjudication as against the world. As a judgment *in rem* it is admissible in evidence in this kind of an action to establish the prior existence of the marriage and its dissolution; in all other respects the judgment is *in personam* and binds only the parties thereto. A judgment *in personam* is not an adjudication or an estoppel by judgment in favor of strangers. We have held:

"A judgment record cannot be used in favor of a stranger to establish facts recited in the judgment unless such finding is based on an admission made by the party against whom it is sought to be used." *Sickler v. Mannix,* 68 Neb. 21.

And in *Hope v. Twarling,* 111 Neb. 793 it is said: "A prior decree of divorce may be admitted in evidence to prove marriage and the severing of conjugal relations, but it is not a former adjudication with respect to the subsequent cause of action and does not operate as an estoppel by judgment."

That case was decided about a year before the statute was amended. The rule announced is in accord with the great weight of authority and is supported by reason. An

action for divorce and one for alienation of affections are not the same, nor are they between the same parties. In this case plaintiff's cause of action arose before the commencement of the divorce action. The acts of the defendants complained of could not have been set up as a defense in the divorce action. Plaintiff may have been guilty of extreme cruelty and still the acts of the defendants the controlling cause of the alienation of his wife's affections and their separation. The wife may have had grounds for a divorce and not elected to avail herself thereof, but for the alleged acts of the defendants. The general rule is:

"On the other hand, a husband may maintain an action for the alienation of his wife's affections where the defendant's conduct was the controlling cause which led to the wife's estrangement, although other causes may have contributed thereto. Hence, where cruelty or other misconduct on the part of the husband is only a subsidiary cause of the alienation he is not thereby barred from recovery." 13 R. C. L. 1464, sec. 513. See 30 C. J. 1124, 1125, secs. 981, 982.

The statute does not provide for what purpose the decree shall be "competent as evidence." The statute does not provide that the decree shall be competent as evidence against a plaintiff in this kind of an action and in favor of a third party so as to operate as a bar to his cause of action against such third party. If the legislature had intended it to accomplish that particular end it would have been a very simple matter for it to have employed appropriate language with which to express such intention. To hold that the legislature intended the decree to operate as a bar would be to read an element into the statute that is not there. It will not be presumed, from the language used, that the legislature intended to set aside well-established rules of law. We hold that the decree was not competent as evidence in an action of this kind in favor of a third party, a stranger thereto, to prove an adjudication or an estoppel by judgment, except so far as it oper-

ated as a judgment *in rem,* and that it did not operate as a bar to plaintiff's cause of action. The decree was admitted in evidence, and the defendants had the full benefit of the findings therein against the plaintiff without any limitation placed on the consideration thereof by the trial court, except the refusal to instruct the jury that such decree, as a matter of law, was a bar to plaintiff's action. In such refusal error was not committed.

The defendants, other than Bertha Mengedoht, assign as error the refusal of the trial court to direct a verdict in their favor on the ground that plaintiff's cause of action is, in part, based upon an illegal and immoral transaction. The question raised by these defendants is not assigned as error, nor is it discussed in the brief of the defendant Bertha Mengedoht. The illegal and immoral transactions upon which error is predicated are: That plaintiff participated in two illegal abortions committed upon his wife, the first in April, 1918, and the second in March, 1919. It appears from the testimony of plaintiff that, with the consent of his wife and at the insistence of the defendant Bertha Mengedoht, he participated in two illegal abortions performed upon his wife by a doctor in the city of Omaha. The rule of law is well settled that no court will lend its aid to a litigant who founds his cause of action upon an immoral or illegal act, and if it was necessary for plaintiff to prove said abortions in order to establish his case, either in whole or in part, then he cannot recover. Where, however, he can maintain his cause of action without the aid of an illegal or immoral act he is entitled to recover. This is the general rule and the rule announced by this court in the case of *In re Estate of Lowe,* 104 Neb. 147. The general rule is well stated in the case of *Frost v. Plumb,* 40 Conn. 111, where that court said:

"We understand the rule to be this: The plaintiff cannot recover whenever it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transactions; but if he can show a complete cause of action without being obliged to prove his own

illegal act, although such illegal act may incidentially appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal."

It is claimed by counsel for defendants that the petition alleges said acts of abortion as part of the acts upon which plaintiff bases his claim and call attention particularly, in connection therewith, to paragraph 8 of the petition. A careful examination discloses no such allegations. The illegal acts complained of took place long before there is any evidence that there was any concerted or individual action on the part of the defendants to alienate the affections of plaintiff's wife. In fact, up to the time just before the death of the father of plaintiff's wife, in January, 1924, there is no evidence that would indicate that the defendants, either individually or collectively, had done anything that could be construed as a design or purpose to alienate the affections of plaintiff's wife and cause her separation from him. Proof of the acts of abortion performed upon plaintiff's wife were not necessary nor proper to prove any part of his case. Therefore, it was not error to refuse to instruct the jury to return a verdict in favor of the defendants on account thereof.

The giving of instruction No. 4 is assigned as error by the defendant Bertha Mengedoht. The trial court, after correctly instructing the jury upon the law of conspiracy, gave instruction No. 4, to the effect that the failure to establish a conspiracy would not defeat plaintiff's right of action nor his right to recover, but that the action might proceed for the recovery of damages against such of the defendants, if any, as were shown to be guilty of the wrongful acts complained of. The instruction correctly states the law. The rule in this state is:

"In an action for a conspiracy, the damage, and not the wrongful confederation, is the gist of the action." *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173.

And in *Harvey v. Harvey*, 75 Neb. 557, it is said:

"Where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, a judgment against one or more of such defendants may be sustained without proof of a conspiracy among all of them." Also, see *Booker v. Puyear,* 27 Neb. 346; 5 R. C. L. 1190, sec. 41; 2 R. C. L. Perm. Supp. 1586, sec. 41, par. 16; 12 C. J. 646, sec. 257; *Jones v. Monson,* 137 Wis. 478; *Ratcliffe v. Walker,* 117 Va. 569.

The tort alleged in the petition would be actionable if committed by one of the defendants alone, and the allegations of the petition are sufficient to sustain a judgment against one or more of the defendants participating in the wrongs complained of, without proof of a conspiracy. Counsel for defendants cite *Reid v. Brechet,* 117 Neb. 411, as authority in favor of their contention. The case does not support the contention made, nor is it in conflict with the authorities cited.

The defendant Bertha Mengedoht claims that error was committed in permitting the plaintiff, over objections of the defendants, to testify that just prior to his marriage plaintiff conferred with the defendants about his marriage and told them, in substance and effect, that he had no money, that he was an artist, that he would not earn any great amount of money for a number of years, and that he could not be expected to earn any money until he had pursued his art studies for a number of years; that all the defendants then said, "That's all right, go ahead and get married," and, when the question arose how the new bride and groom were to live, that Bertha Mengedoht said, "Stay right here." It is also claimed by all of the defendants that the giving of instruction No. 11, limiting the purpose for which that evidence might be considered, was error. In that instruction the jury were instructed in effect that such evidence was admitted for the sole purpose that it might tend to show good faith or lack of good faith of the defendants in giving advice or counsel to plaintiff's wife after her marriage to plaintiff, and that if they found that any such conversation took place, as related by plaintiff, they

would give such testimony such weight as they believed it entitled to as bearing solely upon the question of good faith or the lack thereof; and if they did not believe that such conversation or conversations took place or that, if they did, that same had no evidential value on that question, they should entirely disregard any and all of such conversations testified to by plaintiff. Where evidence is admissible for a certain purpose, it is proper for the trial court, by instruction, to limit it to the purpose for which it was admissible. *Salistean v. State,* 115 Neb. 838. The giving of the instruction was entirely proper and it would seem to be very favorable to the defendants. It was entirely proper to show the situation of the parties immediately before and at the time of the marriage; the feelings of the plaintiff and the defendants toward one another at that time; that plaintiff explained his situation fully, financially and as an artist; that defendants, knowing the same, were satisfied to have the marriage take place. The evidence tended to show that the defendants were not opposing the marriage, either on financial grounds or otherwise. We are unable to discover anything in the evidence complained of, or the giving of instruction No. 11, that was in any way prejudicial to the defendants.

The defendants, other than the defendant Bertha Mengedoht, in their brief discuss claimed errors occasioned by the admission of certain evidence and which are not discussed in the brief of the defendant Bertha Mengedoht. An examination of the record discloses that the rulings on the admission of the evidence complained of was not called to the attention of the trial court in the separate motion for a new trial filed by said defendants, either by general or specific assignments therein. The motion for a new trial does not even contain the usual assignment of "errors of law occurring at the trial." The record being in that condition, the rulings on the admission of the evidence complained of cannot be reviewed. *Flower v. Nichols,* 55 Neb. 314; *First Nat. Bank v. Hedgecock,* 87 Neb. 220; *Waxham v. Fink,* 86 Neb. 180.

It is insisted by all the defendants that the evidence is not sufficient to support the verdict. It is not practical to even outline the evidence. The evidence is contained in three volumes of over 1,400 pages. We have read the evidence and given it careful consideration. The evidence is in hopeless conflict. The evidence on behalf of the plaintiff seems to sustain all of the essential allegations of his petition, while the evidence on behalf of the defendants put in issue the truth of such evidence on behalf of plaintiff. The matters in issue were peculiarly within the province of the jury to determine. If the testimony of plaintiff and his witnesses were believed, then a verdict for plaintiff was proper; otherwise, if defendants and their witnesses were believed. The credit to be given to the several witnesses and the weight to be given to their testimony were matters entirely for the determination of the jury. The jury had the advantage of the opportunity to see and note the conduct and demeanor of the several witnesses while testifying, their apparent bias or want of bias, and it may be that the conduct and demeanor of the several witnesses while testifying prompted the jury to return the verdict they did. The testimony of one truthful witness may outweigh the testimony of many others whose appearance and testimony do not carry with it a conviction that it is true.

It appears from the statements in the briefs that this case has been submitted to two juries and both juries, on the evidence found for the plaintiff. This is entitled to some consideration. From a consideration of all the evidence, we hold that it is sufficient to sustain the verdict. From the record before us it appears that the case was fairly tried and properly submitted to the jury for their determination. We have given all the questions properly raised and discussed in the briefs by defendants careful consideration and find no prejudicial error. It follows, from what has been said heretofore, that the judgment of the district court should be and is hereby

AFFIRMED.

MILES N. LEE, APPELLANT, V. CHARLES P. HILDEBRAND, APPELLEE.

FILED MAY 2, 1930. No. 27079.

1. **Notes:** ACCOMMODATION MAKER. One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee.
2. **Parol Evidence:** NOTE: CONSIDERATION. Parol evidence is admissible to prove that the note was given without consideration as accommodation paper and for a special purpose.
3. **Notes:** ACCOMMODATION PAPER. Accommodation paper executed for a specific purpose cannot be enforced against the accommodation maker by a holder who took it, knowing it was being used for an entirely different purpose than that for which it was executed.
4. **Trial:** DIRECTION OF VERDICT. It is not error for the trial court to direct a verdict where the questions developed at the trial are purely questions of law and where the evidence will not support a conflict upon questions of fact for the jury to determine.

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

Miles N. Lee, Sullivan & Wilson and *George W. France,* for appellant.

W. L. Kirkpatrick and *Good, Kirkpatrick & Dougherty, contra.*

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

MESSMORE, District Judge.

This action was brought by appellant in the district court for York county to recover on a promissory note. His petition was in the usual form and prayed judgment against appellee for $2,427.24, with interest thereon at 10 per cent. from August 21, 1925.

Appellee's answer admitted the giving and delivery of the note, alleged the same was given without consideration and that he received no value therefor; further, the note

never was a valid and enforceable asset of the Farmers State Bank of Erickson and appellant was not the holder thereof in due course; that in the autumn of 1920 the bank owned and carried among its current assets two notes made by R. E. Coe and Harry L. Patchen in the aggregate of about $2,000, secured by a chattel mortgage upon certain pop-corn; that Coe and Patchen delivered said corn to the bank in good condition in the fall and winter of 1920 and 1921, and said corn was of the reasonable market value of approximately $3,000; that said corn was kept by the bank until it was finally disposed of; that in November, 1921, the corn still remained in the possession and control of the bank, which still had among its assets the notes of Coe and Patchen which were overdue and unpaid; that the bank, desiring to close out its transactions with these men, agreed with them whereby the bank was to surrender to them their notes and they were to deliver and turn over to the bank said corn as its own property; further, the bank, being desirous of replacing and substituting in its current assets other paper in an amount equal to the Coe and Patchen notes and accumulated interest, persuaded appellee to give his original note, at that time representing to him that his note was merely a funding of values, that he would never have to pay the note, and the bank would in a short time sell said corn and retire his note from the proceeds of the sale thereof; that appellee had never seen said corn, and the bank represented to him, on the giving of each renewal note, that the corn was ample in quality, quantity and condition to satisfy the renewal notes appellee made from time to time, and that he relied on the representations so made to him; that the bank never made a demand on him for the payment of the original note nor any of the renewals thereof; that the security therefor was liquidated by the bank, the corn having been fed to swine, the swine sold, and the proceeds from the sale thereof in the sum of $655.27 indorsed on said note, all of which was without appellee's knowledge; that the guaranty fund commission of Nebraska took charge and control of said bank in January, 1926, and

made no demand on appellee for the payment of the note in question.

Appellant's reply admitted that appellee made, executed and delivered to said bank his promissory note on or about November 21, 1921; admitted that R. E. Coe and Harry L. Patchen were indebted to the bank, as set forth in appellee's answer, and that they transferred their title and interest in said corn to the bank; that appellee executed and delivered his note to the bank in an amount equal to the principal and interest of the notes of Coe and Patchen; admitted that the bank fed said corn to swine, sold the same, and the proceeds from the sale thereof in the sum of $655.27 were credited on appellee's note. Appellant denied each and every allegation of fact in appellee's answer; denied the existence of the alleged agreement; plead the illegality thereof and an estoppel to assert the same, if made; denied appellee was an accommodation maker and that the note was given for a funding of values; set out the renewals of the original note made by appellee, the appointment of a receiver for the bank, and the sale of appellee's note to appellant by said receiver, and that said note was carried as an asset of the bank.

On the trial of the action, at the close thereof, the trial judge directed a verdict for appellee, from which ruling appellant appeals.

The evidence adduced at the trial shows the note sued upon to be a fifth renewal of the original note given by appellee to said bank and differs therefrom only as to the amount and date; that the president of the bank, Mr. Doran, obtained from appellee, his son-in-law, the original note on November 21, 1921, and at that time had a conversation with appellee as follows: "The conversation was this, that the Farmers State Bank at that time owned 1,500 bushels of pop-corn that they couldn't carry in the pouches of the bank, and he said that the price of pop-corn at that particular time wasn't very good, and they were holding the pop-corn for a higher market, and he asked me if I would sign my note for this amount that the bank had in the pop-

corn at that time, with the understanding that they would sell the pop-corn and cancel the note; and that's what I did."

It appears that Coe and Patchen each owed the bank on their separate notes, and the collateral for said notes was certain pop-corn; that the bank was examined on August 14, 1921, and a recommendation made that the Coe and Patchen notes must be liquidated; Coe and Patchen each later signed a waiver, assigning their title and interest in said corn to the bank; said notes were carried as assets of the bank on December 7, 1921, when the bank was examined, and on February 4, 1922, the Coe and Patchen notes were charged off the books as assets of the bank and appellee's note went into the bank at that time in the exact amount of the Coe and Patchen notes, with interest added.

Mr. Boyle, cashier of the bank, testified that Mr. Doran brought appellee's note with him when he came up on one of his trips to Erickson and said we could place it in the assets of the bank for this corn that we have taken over from these parties. He further testified he knew the note was given by appellee for the accommodation of the bank, and Mr. Doran said he preferred putting in the note for the corn rather than carrying it as an item of property the same as they carried real estate on the bank's books.

Mr. Jones, who succeeded Boyle as cashier of the bank, testified that appellee's note was carried as an asset of the bank.

There is evidence to the effect that the corn in question was fed to swine owned by the bank, the swine sold, and the proceeds from the sale thereof in the sum of $655.27 were indorsed on appellee's note. Appellee denied knowledge of this fact.

Witness P. D. Marshall, chief of the bureau of banking of the department of trade and commerce, whose deposition was read in evidence, testified that he examined the bank on May 4, 1925, and reported as follows: "C. P. Hildebrand $2,806.07. Accommodation note. Represents chattels, mostly corn, now being fed to hogs. Equity over expense

about $500. Balance $2,306.07 loss." He examined the bank again on January 6, 1926, and reported as follows: "C. P. Hildebrand, York, Druggist, $2,151.70. Accommodation note given for chattels, now sold." Again, on January 25, 1926, in an inventory filed by this witness with the banking department he reported as follows: "Number 6789, 7-22-24, C. P. Hildebrand $2,151.70. Accommodation note for bank." Mr. Marshall further testified that he received this information from the officers of the bank.

On February 1, 1927, a receiver was appointed for the bank and on August 7, 1928, appellant purchased appellee's note and other notes, mortgages, etc., of the bank at a judicial sale, said note at that time being more than one year past due.

The evidence further shows that appellant had a conversation with appellee to the effect that appellee's note went into the bank in place of the Coe and Patchen notes and to take up the same because the banking department objected to said notes. This conversation is denied by appellee.

It was further shown as to the condition of the bank and its indebtedness to a bank in York, Nebraska, of which Mr. Doran was president and the appellee a director. Appellant contends that appellee knew of the condition of the bank, that he was a stockholder therein and paid a stock assessment in 1923, that he was a director in the bank at York and knew the Erickson bank owed the York bank considerable money; that he was related to Mr. Doran, president of the Erickson bank, as son-in-law; that he received a consideration for the giving of his original note in that the bank was kept open and he escaped an assessment upon his stock, and that his note, having been taken as an asset of the bank, satisfied the banking department and gave notice to depositors and creditors of the bank that it was there as such an asset.

The first question to determine is whether or not appellee was an accommodation maker. "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of

the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." *Farmers Nat. Bank v. Ohman,* 112 Neb. 491.

There is no evidence that appellee knew, at the time the note was given, that the assets of the bank were depleted, or that appellee had knowledge of any difficulties of the bank, or appellee was connected in any way with the continued existence of the bank or was responsible therefor, or that the bank would be closed if the Coe and Patchen notes were charged off, or that appellee acquired any right or interest in the Coe and Patchen paper, or that appellee agreed to put in his note to represent such paper. The very agreement was to the effect that the bank owned certain pop-corn which it could not carry in the pouches of the bank, that appellee's note was put in the bank for the value of this corn, and an agreement made with him that when the corn was sold his note would be paid. The bank gave up nothing of value; it owned the corn in question; and appellee received nothing of value. The Coe and Patchen notes were charged off, but the bank still had an adequate remedy at law as against these notes. The evidence does not show that appellee had knowledge of any kind or nature that his note was to be a substitute note for the Coe and Patchen paper.

The evidence does show the examiner declared appellee's note to be an accommodation note. There was objection to this testimony on the theory that the examiner had not actual knowledge and on the theory of hearsay. It must be conceded that the examiner is charged with a certain duty to examine the bank and report the condition thereof and his findings are competent evidence. This note was listed as being unenforceable and an accommodation instrument for the accommodation of the bank. It is clear under the evidence that appellee did not receive any benefit or consideration for the giving of this note, either directly or indirectly, by way of this transaction, and that the transaction was primarily for the benefit of the bank, the payee. Appellee was an accommodation maker.

The next important assignment of error is the admissibility of parol testimony. This refers to the conversation between Mr. Doran and appellee which was admitted in evidence and which has heretofore been set out. It might be stated that upon each renewal of the original note made by appellee the appellee inquired as to why the corn had not been sold, and it was represented to him each time that the value of the corn was not sufficient at that time to sell it and the bank was holding it for a better market, and appellee each time thereupon renewed the note. Appellant's objection goes to the proposition that this conversation varies or contradicts the terms of a written instrument. In *Empson v. Richter,* 113 Neb. 706, the defendant Essie E. Davis was permitted to testify to a promise made to her at the time she gave her accommodation note to the bank that she would not have to pay the note. In *Spangenberg v. Losey,* 116 Neb. 112, parol testimony was admitted permitting defendants to testify, in substance, that the note was without consideration for the accommodation of plaintiff and for no other purpose. Parol evidence is admissible to prove that the note was given without consideration as accommodation paper and for a special purpose. The parol evidence admitted in the case at bar goes to this very proposition and is admissible.

The next assignment of error important in this case is based upon that portion of the negotiable instruments act, section 4640, Comp. St. 1922, wherein it is stated: "Such a person is liable (speaking of an accommodation maker) on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

In the case at bar appellant did not purchase appellee's note in due course, but did purchase it at a judicial sale from the receiver of the bank, when it was about a year past due, for value. While the provision of the statute cited takes away the defense as against a holder for value that he took the instrument with knowledge that it was accommodation paper and therefore without consideration, it does

not take away other defenses. In this case appellee gave his note to the bank as an accommodation maker for a specific purpose, namely, for the value of said pop-corn then owned by the bank, the agreement being that the bank would cancel appellee's note when the corn was sold. This was not done. When appellee's note was sold by the receiver it was diverted from the purpose for which it was originally given. Appellant, had he examined the records, would have discovered the true status of this paper, and, had he examined the records further, he would have readily ascertained that appellee's note was an accommodation note given for a specific purpose. Appellant had means of knowing about this paper. The evidence discloses that he was a lawyer, 27 years of age, had talked with the officers of the state banking department with reference to the assets of failed banks, and this was a second purchase of assets of a failed bank that he had made. This should have put him on inquiry and amounts to notice. It would then be his duty to exercise ordinary intelligence and understanding and examine the records, which he had an opportunity to do at the banking department. The general rule that whatever puts a party on inquiry amounts, in judgment of law, to notice, provided the inquiry becomes the duty and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding, applies to this case. With this in mind appellant had knowledge that appellee's note was diverted from the purpose for which it was given and he cannot maintain an action against appellee thereon.

In reference to that part of the testimony relating to the conversation appellant testified he had with appellee to the effect that appellee's note was given in substitution for the Coe and Patchen notes, which had to be liquidated because the banking department insisted upon a substitution of better paper therefor, and appellee's denial of that conversation, we deem such a conversation a conflict in the evidence, which would be insufficient, upon a question of fact for the jury to determine. It is immaterial whether

this conversation was had or not. The fact remains that the note was given by appellee as an accommodation note for a specific purpose and diverted from the purpose for which it was originally given.

The trial court did not err in directing the jury to return a verdict in favor of appellee. The questions arising during the trial were purely questions of law for the court to decide and justified a directed verdict in appellee's favor. From a consideration of the admissions in the respective pleadings, together with the evidence and the law governing each and every question presented, we deem it unnecessary to consider and find nothing in the other assignments of error advanced by appellant which would present a conflict of evidence upon questions of fact for the jury to determine. The judgment of the trial court in directing a verdict for appellee is sustained by the law and warranted by the evidence and should be and is in all things

AFFIRMED.

GEORGE A. HERRING, TRUSTEE, APPELLEE, V. E. C. WHITFORD ET AL., APPELLANTS.

FILED MAY 9, 1930. No. 27045.

1. **Bankruptcy:** PREFERENCES. A mortgage on real estate executed and delivered by the owners thereof within four months of the filing of a petition in bankruptcy against them and recorded by the mortgagee within that period will, in a suit by the trustee in bankruptcy to cancel the mortgage and to quiet title, be held to be a preference in so far as it mortgages property not exempt.
2. ———:———: EXEMPTIONS. In such circumstances, if the mortgage includes a homestead and the mortgage is valid under the evidence as between the makers of the mortgage and the mortgagee, it will not be held to be a preference as to the exempt statutory homestead.

APPEAL from the district court for Buffalo county: BAYARD H. PAINE, JUDGE. *Affirmed as modified.*

N. P. McDonald, for appellants.

Miller & Randall, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

GOSS, C. J.

This is a suit in equity brought by a trustee in bankruptcy to cancel a mortgage executed, delivered and recorded by his bankrupt (joined by her husband) within four months of the filing of the petition in bankruptcy and to quiet title to the real property involved. The mortgagee and mortgagors appeal from a final decree canceling the mortgage and quieting the title in the trustee.

The trustee here sues as trustee of the bankrupt estate of Una W. Donnell. He was also trustee of the bankrupt estate of Junius S. Donnell and as such trustee brought another suit in equity to cancel the same mortgage. The bankrupts are wife and husband. So the two suits, brought in the same court at the same time, are companion cases. They were tried together under a stipulation that the testimony in either case might be used in the other so far as applicable. As a fact, the bills of exceptions seem to be identical, one being a carbon copy of the other. The pleadings seem to vary only as required to show the status of the plaintiff as trustee for the estate of the wife in this suit and as trustee for the estate of the husband in the other.

On the trial it was stipulated, among other things, that on March 5, 1928, a petition for involuntary bankruptcy was filed in the Grand Island division of the United States district court against Una W. Donnell of Kearney, and that on April 2, 1928, she was adjudicated a bankrupt and George A. Herring was duly appointed and qualified as trustee; that then and for years prior the bankrupt and her husband were the owners, as tenants in common, of lots 1, 2, and 3, block 10, Ashland addition to the city of Kearney, in Buffalo county, Nebraska, occupy parts of these lots as a home and claim as their statutory homestead all of said lots except the east fifty feet thereof; that Una W.

Donnell was also the owner of six other described lots in the city of Kearney; that on December 22, 1927, a petition against said Junius S. Donnell was filed in the same court charging bankruptcy, and on February 10, 1928, he was adjudged bankrupt and the same trustee was appointed and qualified; that on November 8, 1927, the Donnells executed and delivered their mortgage to E. C. Whitford, the father of Mrs. Donnell, covering the home lots and the other lots to which we have referred, to secure $22,000 evidenced by four notes, all maturing November 8, 1927; that this mortgage was recorded November 19, 1927; that the Donnells were insolvent from and after May 14, 1927, being the date of the failure of the City National Bank in Kearney and the appointment of a receiver therefor; and that Whitford knew they were insolvent on November 8, 1927. The stipulation also recites claims against each of the Donnells filed as claims, allowed and unpaid in the bankruptcy court; it shows that since this action was begun E. C. Whitford has filed claims in the bankruptcy court against each of the Donnells, based on the indebtedness secured by his mortgage, but stating therein that he does not waive his mortgage security.

From the stipulated facts it is conclusively deduced that, when the Whitford mortgage was executed on November 8, 1927, it was within less than four months before the filing of the petition in bankruptcy of Una W. Donnell on March 5, 1928, as well as within less than four months before the filing of the petition in bankruptcy against Junius S. Donnell on December 22, 1927. Its record on November 19, 1927, was still further within the period. So the executing, delivering and recording of the mortgage all came within the four months' period. Under the evidence the effect, if the Whitford mortgage be held good in whole or in part, will be to lessen to that extent the estate of the bankrupt and the payments to other creditors. So on the face of the transaction itself it would appear to be a preference of Whitford over other creditors and violative of section 60 of the bankruptcy act (11 U. S. C. A. sec. 96).

But the defendants answer this by asserting that Whitford had an agreement for a mortgage which constituted an equitable mortgage. Whitford pleaded that, at the time the money was loaned as evidenced by the notes, the Donnells agreed to execute the mortgage, and that it was pursuant to the agreement that the mortgage was made. The evidence shows that the money was borrowed and used to purchase 200 shares of stock in a new bank called the City National Bank, in Kearney, which began business December 8, 1926. It was a consolidation or reorganization of two banks in Kearney, in one of which the Donnells were stockholders and he was an officer. It was desirable that he be an officer in the proposed new bank. He lacked the money. On November 6, 1926, Junius S. Donnell went with another son-in-law of Mr. Whitford to Nebraska City, where they met Mr. Whitford. Donnell asked Whitford for a loan of $22,000 to buy 200 shares of stock in the proposed bank. Whitford asked what he could give as security. Donnell said he would give a mortgage on the home, owned by himself and wife, and on her other lots in Kearney. Mr. Whitford said: "That wouldn't secure the $22,000." Thereupon, it may be fairly concluded from the evidence, it was understood that all but 10 shares of the stock should be put up as collateral, and that they would make out the mortgage when the organization was completed. Whitford prepared the notes, which were signed and delivered by the Donnells. He sent the $22,000 to a bank in Omaha, where payments by stockholders were received. When the required amount was paid in, the organization was perfected and the stock issued. No mortgage was made until long after the bank failed nor until within four months before the petition in bankruptcy. We have carefully read and considered the evidence and have come to the conclusion that, at most, as against the creditors represented here by the trustee, and as to the real estate not exempt as the homestead, there was merely an agreement to execute a written mortgage in the future. Moreover, we are of the opinion that, if there had been an agreement creating an

equitable mortgage, Whitford could not prevail as against the creditors and as to real estate not exempt.

In *In re Great Western Mfg. Co.*, 152 Fed. 123, Sanborn, J., it was said: "A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or validated by the fact that it was executed in the performance of a contract to do so made more than four months before the filing of the petition."

In *In re Traut's Estate,* 297 Fed. 458, an oral agreement was made to execute a mortgage on a farm as security for a debt. The mortgage was not finally delivered or recorded until within four months of the filing of the petition in bankruptcy. The circuit court of appeals of this circuit held that, although it be assumed for the sake of argument that the land was subject to an equitable lien created by an agreement made prior to four months, yet such title would pass unincumbered for the benefit of creditors and the mortgage executed pursuant to such agreement was voidable by the trustee. The same rule was announced by the circuit court of appeals for the third circuit in *Hayes v. Gibson,* 279 Fed. 812.

In *Corney v. Saltzman,* 22 Fed. (2d) 268, $5,500 was borrowed and the debtor executed notes therefor and adopted a resolution pledging all of the corporation land for the payment of the notes, all on May 27, 1925. On October 6, 1925, a written mortgage was executed. A petition in bankruptcy was filed November 19, 1925. The circuit court of appeals of the second circuit said that an agreement to make a mortgage may not be regarded as a mortgage, and while such an agreement may give rise to an equitable lien between the original parties, respect must be had for the rights of creditors, and under section 60 (a) (11 U. S. C. A. sec. 96a) a mortgage within four months of the filing of a petition in bankruptcy constitutes a voidable preference which is not made valid by being executed pursuant to a contract to make it, although the contract was made before the commencement of the four months.

So we are of the opinion that the mortgage, to the extent that it attempted to give a lien on that portion of the property of the Donnells that was not exempt, must be considered a preference and cannot prevail over the rights of the creditors represented here by the trustee in bankruptcy.

That leaves the question as to whether the mortgage should be held valid as to the homestead interest of the mortgagors. That interest was not available to creditors. The owners' right to incumber or dispose of it was unrestricted and was a matter of no concern to the creditors or to the trustee in bankruptcy. It is suggested that we should presume that the exemption will be preserved in the bankruptcy court, where Donnell has already applied for it. The present action, however, presents the claim of Mr. Whitford to a valid mortgage on the homestead interest, not the question of awarding exemptions to the bankrupt. The trustee has submitted his action to set aside the mortgage to the state court. This court has jurisdiction to decide whether the mortgage is void in whole or in part. If it is valid as to the homestead interest, it should not be held entirely void on the theory that the federal court can otherwise protect the homestead claimants. The decree appealed from denies Whitford any interest whatever under his mortgage. The validity of this mortgage as a mortgage on the homestead interest was sufficiently pleaded by the mortgagee and by the mortgagors.

It is well known that the homestead of a debtor is incapable of fraudulent alienation. *McCormick v. Brown*, 97 Neb. 545; *Smith v. Neufeld*, 61 Neb. 699; *Jayne v. Hymer*, 66 Neb. 785. Where the value exceeds the allowable exemption, a conveyance can "only be held fraudulent as to creditors in so far as it attempted to convey a surplus of the homestead which would, if still remaining in the hands of the grantor, be subject to sale on execution." *Brown v. Campbell*, 68 Neb. 103. In 27 C. J. 445, we find this text, supported by numerous authorities: "Since the creditors are affected only to the extent that the value of the property conveyed exceeds the value of the homestead, where a con-

veyance includes both property which is exempt as a homestead and a property not so exempt, the creditors are entitled to reach the property not so exempt if the conveyance is fraudulent as to them. This, however, is the extent of their rights on setting aside the conveyance, and they can recover nothing beyond the excess over the homestead right."

Similarly the conveyance of a homestead cannot be set aside as an unlawful preference, except where it includes an interest which is not exempt, and then it is a voidable preference only as to the excess value. Section 67 of the bankruptcy act (11 U. S. C. A. sec. 107) provides that transfers or incumbrances made or given by the bankrupt within four months before the filing of the petition shall be void, where the property "is not exempt from execution and liability for debts by the law of his domicile." Section 70 (11 U. S. C. A. sec. 110) vests title in the trustee to all of the bankrupt's assets "except in so far as it is to property which is exempt."

In the case of *In re Bailey,* 176 Fed. 990, it was held: "The title to the homestead property did not pass to the trustee. The fact that it was mortgaged to certain creditors did not make it assets to be administered in bankruptcy. *Lockwood v. Exchange Bank,* 190 U. S. 294, 23 Sup. Ct. Rep. 751, 47 L. Ed. 1061; *In re Nye,* 133 Fed. 33, 66 C. C. A. 139. * * * A mortgage constituting an unlawful preference, where it includes both exempt and nonexempt property, is only voidable by the trustee as to the nonexempt property, and remains a valid mortgage as to the exempt property. *In re Tollett,* 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222; *Vitzthum v. Large,* 162 Fed. (D. C.), 685; *In re Eash,* 157 Fed. (D. C.) 996." And in *First Nat. Bank v. Lanz,* 202 Fed. 117: "A mortgage given by an insolvent debtor within four months prior to his bankruptcy on his homestead to secure an antecedent debt, although accepted by the creditor with reason to believe that it was intended as a preference, could only operate as a preference as to

the excess in value of the property over $2,000, but as to such excess it was voidable."

There was informality in the act of acknowledging the mortgage but not in the form; and the trustee claims this renders the mortgage invalid. The lack of due acknowledgment of the mortgage is not a defense available to a third party (*Johnson v. Kelley,* 112 Neb. 60; *Cobbey v. Knapp,* 23 Neb. 579; 29 C. J. 925) unless the third party has a valid lien upon the homestead, as in *Trevett, Mattis & Baker Co. v. Reagor,* 112 Neb. 470, and *Anderson v. Cusack,* 115 Neb. 643. A trustee in bankruptcy, as we have seen, has no interest in the exempt portion of the homestead; as to it he is not in privity with the mortgagors.

We are of the opinion that the mortgage is a valid lien to the extent of the $2,000 homestead interest on the portions of the lots actually occupied and claimed by the Donnells as their homestead and as heretofore described, and that the district court erred in the decree in refusing to allow the mortgage as a lien and to decree foreclosure to that extent. We cannot close our eyes to this error by assuming that, perchance, the bankruptcy court might find this exemption in favor of the bankrupts and that they in turn may pay it to the mortgagee. The trustee submitted himself to the jurisdiction of this court when he brought this action. The right to the homestead exemption is controlled by the law of domicile. This court has jurisdiction of the parties and of the subject-matter. Equity and the law under our interpretation suggest that this exemption be assigned by decree here to the mortgagee to whom the mortgagors assigned it by their written contract.

For the reasons stated, the judgment of the district court should be affirmed as to all of the property therein described save as to the homestead interest, and as to the homestead interest the decree should find and decree the mortgage to be a lien of $2,000 thereon and direct a foreclosure thereof on failure to pay the same.

AFFIRMED AS MODIFIED.

The following opinion on motion for rehearing was filed October 10, 1930. *Rehearing denied.*

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

GOSS, C. J.

The appellants duly filed a motion for rehearing and the court ordered oral argument thereon directed especially to the question of the effect of the giving of the Whitford mortgage within four months of the bankruptcy. Upon consultation, after the argument covering that question and the merits of the case generally, it was assigned to the writer of the former opinion to express the views of the court.

So far as the facts are stated in the opinion they are singularly accurate. But the appellants forcefully and ably present their views that the opinion fails in its statement of the law and of the facts. They argue that, under the facts and the applicable law, there was an oral agreement and intent to give such a written mortgage and therefore an equitable mortgage, in accord with the maxim that equity regards that as done which ought to be done; and that, when this culminated in the written mortgage, it was binding upon the trustee in bankruptcy.

As indicated in the opinion, there was no written agreement whatever between the Donnells and Whitford that a mortgage would be required or given; and the mortgage was executed, delivered and recorded, all within the four months' period before the bankruptcy proceedings against either of the Donnells. These conclusions of fact are fully supported by a careful reexamination of the bill of exceptions. The evidence shows that the certified check of Mr. Whitford for the $22,000 loan was paid by his bank on November 27, 1926, and that the notes of the Donnells for a like total, dated November 8, 1926, were executed and delivered to Mr. Whitford "a few days afterwards" according to his own testimony. About the first of December, 1926, he went to California and remained until June, 1927. The new bank probably began business in December, 1926.

It failed on May 14, 1927, and a telegram to that effect was received at Mr. Whitford's Pasadena home on the same day. On that evening Mrs. Donnell arrived there from Nebraska and learned the fact of the failure. On the trial it was stipulated that the Donnells were insolvent from and after May 14, 1927. Mrs. Donnell returned from California to Kearney with Mr. Whitford, arriving there June 30, 1927. Mr. Whitford then asked Donnell if the mortgage had been made out and was informed that it had not. "He said he would make it but he didn't say just when he would make it; that he would carry out his contract." Mr. Whitford testified there was no correspondence or conversation about the mortgage between June and the time he received the recorded mortgage in November, 1927, and that he never received or demanded the bank stock as collateral.

Do the facts, under the rules in force in this jurisdiction, make out a case where we should say that there was an oral agreement for a mortgage and we should apply the maxim that equity requires to be done that which ought to be done, as demanded by appellants?

Section 2451, Comp. St. 1922, now section 36-103, Comp. St. 1929, reads as follows: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

As affecting probably the major portion in value of the property involved—that is, the homestead of the Donnells —we are confronted by section 2819, Comp. St. 1922, now section 40-104, Comp. St. 1929: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Only a few of the many cases on various states of fact under this homestead statute need be cited to show that it

means what it says: *Whitlock v. Gosson,* 35 Neb. 829; *Teske v. Dittberner,* 70 Neb. 544; *Solt v. Anderson,* 71 Neb. 826; *Trevett, Mattis & Baker Co. v. Reagor,* 112 Neb. 470. In the last case cited above it was also held that, even though husband and wife failed to assert the invalidity of a prior mortgage on the homestead, yet a subsequent mortgagee holding a valid mortgage on the homestead may take advantage of the invalidity.

As to the effect of the general statute of frauds, section 2451, Comp. St. 1922, heretofore quoted, we have a learned opinion by Judge Frank Irvine, which discusses the principles which we think are involved in the case before us. *Bloomfield State Bank v. Miller,* 55 Neb. 243. There was involved the deposit of title deeds but without any contract in writing; and there the loan had actually been received by the one who deposited the deeds as security. The opinion discusses the meaning of the statutory phrase "by operation of law" and holds that it does not embrace cases where the creation of the estate depends solely on the intention of parties to a contract; holds that a mortgage by the deposit of title deeds, without writing, violates the statute of frauds, is contrary to the policy of the recording acts and is not effective in this state; holds that a court of equity cannot give effect to an oral contract declared void by the statute of frauds under pretense of aiding an imperfect attempt to execute a contract; and, finally, holds that an equity court cannot enforce such a mortgage on the ground that the consideration has been actually paid. It seems to us that the case is so analogous in principle and so alike in general fact that we cannot accede to the position of the appellants in the case at bar without overruling this decision which has stood for a generation as the rule in this jurisdiction. This decision has been cited with approval in other jurisdictions. We content ourselves with citing *Sleeth v. Sampson,* 237 N. Y. 69. The case was in the court of appeals and the opinion was by Judge Cardozo. It was held that advancing money in consideration of an agreement to secure it by mortgage on real property is not suffi-

cient part performance to take it out of the statute of frauds. After citing *Bloomfield State Bank v. Miller*, 55 Neb. 243, the opinion says: "A different holding would open wide the door to the entry of evils against which the statute is directed. Any one who made a loan would be free to transmute it into a loan with a lien upon the land." One who has performed, by payment only, his part of a contract for an interest in land under an oral contract that is contrary to the statute of frauds is ordinarily relegated to his remedy to recover back the money paid. 25 R. C. L. 571, sec. 170.

It will thus be seen that equity could not require the Donnells to make a mortgage to Whitford because they had promised to do so, nor because he had performed his part of the oral agreement and had loaned them the money agreed upon. Nor do we think we should decree that, when they have made a mortgage in pursuance of a previous oral agreement, it shall relate back and take effect as of a date when the agreement was only oral in order to permit the parties to it to evade the preferences denounced by the bankruptcy law. In the circumstances this would be especially abhorrent and would be to sanction a constructive fraud against the creditors of the bankrupts. For we cannot close our eyes to the implication naturally arising from the facts: Whitford and Donnell were both bankers of long experience. Both knew the property mortgaged was all the unincumbered property Donnell had. Both must have known that it would have been harmful to the new bank in Kearney if its customers and creditors knew that Donnell, one of its chief officers, had mortgaged his home. Secret equities between relatives are looked upon with suspicion.

We believe that our former opinion was right and that we went as far as equity and the law demanded when, because all the parties were before us, we permitted the homestead exemption in the statutory amount to be set off to Whitford and considered as if coming under the mortgage. The rehearing should be denied.

REHEARING DENIED.

GEORGE A. HERRING, TRUSTEE, APPELLEE, V. E. C. WHITFORD ET AL., APPELLANTS.

FILED MAY 9, 1930. No. 27046.

1. **Bankruptcy**: PREFERENCES. A mortgage on real estate executed and delivered by the owners thereof within four months of the filing of a petition in bankruptcy against them and recorded by the mortgagee within that period will, in a suit by the trustee in bankruptcy to cancel the mortgage and to quiet title, be held to be a preference in so far as it mortgages property not exempt.
2. ———: ———: EXEMPTIONS. In such circumstances, if the mortgage includes a homestead and the mortgage is valid under the evidence as between the makers of the mortgage and the mortgagee, it will not be held to be a preference as to the exempt statutory homestead.

APPEAL from the district court for Buffalo county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

N. P. McDonald, for appellants.

Miller & Randall, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

GOSS, C. J.

This is a suit in equity commenced by the trustee in bankruptcy of the estate of Junius S. Donnell to cancel a real estate mortgage executed by Donnell and his wife, Una W. Donnell, within four months of the filing of separate petitions in bankruptcy against these mortgagors. It is a companion case to *Herring v. Whitford,* No. 27045, *ante,* p. 725, and reference is made to our opinion therein for a statement of the case and for our conclusions thereon. The pleadings were identical except that the trustee sued on behalf of the bankrupt husband here and for the estate of the wife in the other case. In both cases it was sought to cancel the same mortgage. The bills of exceptions are identical, one being a copy of the other. The decrees of the district court, however, were quite different.

In the suit brought on behalf of the wife's bankrupt

estate, the mortgage to Whitford was canceled and the title to the property quieted in the trustee by the decree of the district court. In the present case, the findings of the decree, as shown in the record, are rather confusing; and the order of the court directs a foreclosure in favor of E. C. Whitford as to the east 50 feet of lots 1, 2, and 3, in block 10, of Ashland addition, but omits any reference to the remainder of those lots and to six other lots referred to in the findings and the evidence. These discrepancies evidently arise out of a misunderstanding as to what constituted the homestead, and out of the failure, in drawing the order, to make any reference to the property involved other than the homestead lots. On the argument both parties agreed that the judgment of the district court would have to be reversed.

The facts in the two actions are the same; the parties are in the identical position in this case they were in the one just preceding it; the only difference is that in that case the trustee in bankruptcy represented the estate of the wife and in this he represents the estate of the husband. The decisions in the two suits should be the same and our opinion in No. 27045 is incorporated herein in this case, No. 27046.

For the reasons there given, the judgment appealed from in this cause should be reversed and the cause remanded, with instructions to render a decree allowing Whitford's mortgage as a first lien to the extent of $2,000 on the same real estate as in No. 27045, found to be the homestead, and to allow a foreclosure thereof; and the decree should quiet the title in the trustee as to all the rest of the real estate and as to the excess over the $2,000 homestead interest.

REVERSED.

The following opinion on motion for rehearing was filed October 10, 1930. *Rehearing denied.*

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

GOSS, C. J.

This is a companion case to *Herring v. Whitford, ante*, p. 725. Oral argument on the motion for rehearing was ordered and had. The printed motions and briefs for rehearing were identical and the ruling in this case must naturally follow that in the other.

It is unnecessary to repeat the contents of the opinion in the other case, but it is by reference incorporated herein and made a part hereof. For the reasons there given, the motion for rehearing is denied.

REHEARING DENIED.

STATE, EX REL. CENTRAL REALTY & INVESTMENT COMPANY, APPELLANT, V. ADAM MCMULLEN, GOVERNOR, ET AL., APPELLEES.

FILED MAY 9, 1930. No. 27187.

1. **Mines and Minerals**: SALT SPRINGS: ALIENATION. The object in the adoption of section 20, art. III, of the Nebraska Constitution, is to prevent the alienation by the state of all salt springs of commercial value. But where the brine yield of such salt springs, as in the present case, is not of sufficient salt content to warrant the extraction and manufacture of salt of merchantable quality, a deed may be executed and delivered to the purchaser of such saline lands, but with the reservation plainly stated in such deed that, if salt springs of commercial value should at any time after the execution and delivery of such deed or deeds develop in such lands, such salt springs shall belong to the state.
2. ———: ———: RESERVATION. "Congress, by reserving salt springs, could only have intended to include those that were valuable, for the purpose of making salt. This is evident from the reservation of as many contiguous sections as the president should deem necessary." *State of Indiana v. Miller*, 3 McLean (U. S. C. C.) 151.
3. **Constitution**: CONSTRUCTION. "The language of the Constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption." *In re Hammond*, 83 Neb. 636.

APPEAL from the district court for Lancaster county:

JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Hall, Cline & Williams, for appellant.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

DEAN, J.

The Central Realty & Investment Company, relator, began this action to obtain a writ of mandamus requiring the Honorables, Adam McMullen, then governor, Charles W. Pool, then secretary of state, and Dan Swanson, then and now commissioner of public lands and buildings, to execute and deliver to the relator a deed to a tract of 120 acres of saline lands located in Lancaster county. It is alleged that the tract was purchased from the state in 1904 by J. A. Buckstaff and "assigned to, and completed by," the relator. From a judgment denying the writ an appeal has been prosecuted to this court.

The relator alleges the following in respect of the lands involved herein, namely: That on June 15, 1904, the state of Nebraska entered into a contract by the terms of which the state of Nebraska agreed to sell and J. A. Buckstaff agreed to buy the northeast quarter of the southwest quarter and the north half of southeast quarter of section 21, township 10, range 6, Lancaster county. And the relator also alleges that the lands in suit consisted of a part of the saline lands received from the federal government by the state under an enabling act, and that assignments of the contract were filed and recorded in the office of the land commissioner and approved by him. It appears that the relator, as assignee thereof, paid to the Lancaster county treasurer the balance due on the above contract and a duplicate receipt was filed in the office of the land commissioner and approved as correct. The relator pleads that the contract was fully performed, and demanded that a deed be executed by the respondents and delivered to the realty company, but alleges that the respondents then, and

at all times thereafter, have refused to execute such deed.

Answers were filed by the secretary of state and by the land commissioner, wherein they severally allege, and plead as a defense, that the refusal to execute a deed to the above described lands was based on the fact that section 21 of the land contained salt springs. And the answer filed by the Honorable Governor McMullen was to the same effect, except that he stated that he was willing to execute a deed, but with the provision that all of the salt springs involved herein should be reserved in their entirety to the state. Before the present case was reached for trial in the district court the Honorable Arthur J. Weaver was elected governor and the Honorable Frank Marsh was elected secretary of state, and these state officers, as successors to the former officers named above, were substituted as respondents in the present suit.

Section 11 of the enabling act, in respect of saline lands in Nebraska, was passed and adopted April 19, 1864, by the congress, and reads:

"And be it further enacted, that all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the governor thereof, within one year after the admission of the state, and when so selected to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct." 13 U. S. St. at Large, ch. 59, p. 47.

And section 20, art. III, of the Nebraska Constitution, contains this language:

"The salt springs, coal, oil, minerals or other natural resources on or contained in the land belonging to the state shall never be alienated, but provision may be made by law for the leasing or development of the same."

The land in suit is contiguous to the twelve salt springs to which reference is herein made and they were selected under the above cited enabling act. Large sums of money were expended by the state, when the land was first ac-

quired, in the development of the saline lands, and wells were sunk to a great depth. From the evidence of certain resident witnesses, and also from certain field notes of the surveyor, it appears that the land in suit was then described as being "mostly low barren flat unfit for cultivation with a great many fine salt springs." And it appears that the body of water that is located on or near the land in controversy contains some salt. But the mere presence on the land of salt springs, with but a limited salt content, does not of course necessarily lead to the conclusion that such springs, or any part of the lands in question, are sufficiently charged with salt to make them of commercial value. Clearly the object in the adoption of section 20, art. III, of the Nebraska Constitution, was to prevent the alienation by the state of salt springs of commercial value. But where the brine yield of such salt springs, as shown by the report of the state geologist at the time in the present case, was not of sufficient salt content to warrant the extraction and manufacture of salt of merchantable quality, a deed may be executed and delivered to the purchaser of such saline lands, but with the reservation plainly stated in such deed that, if salt springs of commercial value should at any time after the execution and delivery of such deed or deeds develop in such lands, such salt springs shall belong to the state.

In *Davis' Admr. v. Weibbold,* 139 U. S. 507, the court said: "The exceptions of mineral lands from preemption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term

mineral in the sense of this statute is applicable. On this subject there has been great uniformity of decision by those courts of the states and of the United States which have had the most frequent occasion to consider the subject, and by the land department."

The following recital appears in 35 Land Decisions, 1, in respect of a grant to the territory of New Mexico for the benefit of its university, and is a part of section 3 of the act of June 21, 1898: " 'All saline lands in said territory' includes only such lands as contain common salt (sodium chloride), in its various forms of existence or deposit, and in commercially valuable quantities." And this observation appears in the body of the same decision: "Apparently, the slightest trace of sodium chloride in the soil or water is depended upon as determining the fact that the land which contains it is 'saline' in the legal sense of the term. If this extended use were permitted there is hardly a square mile in the United States west of the 100th meridian which could not with some justice be claimed as a 'saline.' "

In *Deffeback v. Hawke,* 115 U. S. 392, 404, Mr. Justice Field said: "It is plain * * * that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable."

In *State of Indiana v. Miller,* 3 McLean (U. S. C. C.) 151, the court said: "Congress, by reserving salt springs, could only have intended to include those that were valuable, for the purpose of making salt. This is evident from

the reservation of as many contiguous sections as the president should deem necessary."

In *State v. McKelvie,* 111 Neb. 224, the action was there begun to require the execution of a deed in fee simple to certain common-school lands held by the relator under a sale certificate. We held that the relator was entitled to a deed to the land. And in *In re Hammond,* 83 Neb. 636, we said: "The language of the Constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption."

In *Hinz v. Musselshell Co.,* 82 Mont. 502, the Montana court said: "Our state Constitution must be construed in the light of the history of the commonwealth, the surrounding circumstances, the subject-matter under consideration, the object sought to be attained, as well as the system of laws which were in force in the territory at time of its adoption."

It is evident in the present case that, at the time the salt springs were selected, the belief persisted that the salt springs contained salt of much value and that they might be a source of great wealth to the state. And, as above mentioned, large sums of money were expended in the development of the manufacture of salt, but without corresponding results. In view of the conceded worth of salt springs to the people of any commonwealth, however, it behooves the state to reserve the title to such salt springs for the prospective needs of the present and future generations, should the salt springs be of commercial value later.

We conclude that the judgment of the district court must be and it hereby is reversed, with directions that the writ be allowed requiring respondents to issue a deed to the 120 acres of saline lands involved herein, with the reservation of salt springs, however, which may in the future be of commercial value, to the state, all as hereinbefore pointed out.

REVERSED.

FRED GEISS ET AL., APPELLANTS, V. TRINITY LUTHERAN CHURCH CONGREGATION ET AL., APPELLEES.

FILED MAY 9, 1930. No. 27248.

1. **Courts:** SUITORS: INCONSISTENCY. A litigant may not invoke the aid of a court of equity and at the same time deny that it has jurisdiction to administer the character of relief for which he prays.
2. **Religious Societies:** ECCLESIASTICAL COURTS: JURISDICTION. Where two church societies, each affiliated with and owing allegiance to a separate and distinct religious organization, claim and assert title and right of possession to a church building and the lots on which it is situated, the ecclesiastical courts of neither organization has jurisdiction to determine the legal rights of the respective societies. Such a situation presents a case for determination by the civil courts.
3. ———: PROPERTY RIGHTS: JURISDICTION. Civil courts will exercise their jurisdiction to protect the property rights of religious societies, even though the one invading such rights may be a rival religious organization.
4. ———: GOVERNMENT. A religious society may, for its government, adopt a constitution, and its provisions will be binding upon the members of the society if not in conflict with law or contrary to public policy.
5. ———: TRANSFER OF PROPERTY. Where a religious society has acquired real estate for church purposes and adopted a constitution, which provides that the church property shall not be alienated so long as there remain three male members holding to the name of the congregation and recognizing the church government, it is not within the power of a bare majority of the congregation to alienate or transfer title to the church property to any other church society, when there are three or more male members who do not consent thereto, but who, in the language of the constitution, hold to the name of the congregation and recognize the church government.
6. ———: ———. Where individuals, who are members of a religious society, but not officers thereof, take title to real estate and hold it for the church society, they are mere naked trustees, and a conveyance made by them, without the consent of the society, conveys no title to the grantee, who had knowledge that the church society was the equitable owner thereof.
7. **Laches.** "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon

some change in the condition or relations of the property or the parties." *Galliher v. Cadwell*, 145 U. S. 368.

8. **Quieting Title:** LACHES. Mere delay, not exceeding the time limited by the statute, in bringing an action to cancel a deed and quiet title to real estate will not bar plaintiff from the relief sought, where defendant has not been prejudiced by such delay.

APPEAL from the district court for Cheyenne county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

Kepler & Kratz, for appellants.

Radcliffe & Wehmiller, contra.

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

GOOD, J.

This is an action in equity, the primary object of which is to determine which of two religious societies has title and right of possession to a church edifice and the lots on which it stands, in the village of Dalton, Cheyenne county, Nebraska. There are other parties and other issues, to which reference will be made in the course of this opinion.

The action was brought by Evangelical Lutheran Trinity Congregation of Dalton and by certain individuals as members of said church organization, on behalf of themselves and all other members of the said society, and against Trinity Lutheran Church Congregation and the trustees of the latter organization, and also against certain individuals who had formerly held title to the lots in question. For convenience, the two church societies will be referred to as plaintiff and defendant, and the other parties to the action will be separately designated.

Plaintiff asks to have a certain deed of conveyance canceled and title to the church property quieted in it. For a defense defendant challenges the jurisdiction of the court, claims title by virtue of certain actions of the congregation, hereinafter referred to, and also alleges that plaintiff has been guilty of such laches as will prevent it from main-

taining this action. Trial resulted in a decree quieting title to the property in the defendant and foreclosure of mortgages held by cross-petitioner. Plaintiffs have appealed.

There is but little conflict in the evidence, and it may be remarked at the outset that all of the witnesses who have testified on either side of the case have shown the utmost consideration and forbearance, each for the other, and have refrained from any show of bitterness or personal animosity that usually characterizes this kind of litigation. The fine spirit of fairness displayed by each party and its adherents is to be commended.

The record discloses that in 1913 a small number of individuals organized the plaintiff church society, adopted a name, and affiliated with the Nebraska Synod, which is a subordinate, affiliated organization of the General Synod of Evangelical Lutheran Church in America. Three of the members, J. Frerichs Mintkin, Adolf Kunzie, and O. J. Willms, as a donation to the church organization, purchased three lots for a church site. Title was taken in their individual names for the benefit of the church. The members of the organization subscribed and raised funds, which, together with funds advanced by cross-petitioner Board of Church Extension of the General Synod of Evangelical Lutheran Church, were used to construct the church edifice. The building was completed in 1914. The constitution adopted by the plaintiff provided for the election of three trustees to have charge of the church property and administer its business affairs. Through neglect the title to the lots was never conveyed to plaintiff's official trustees. The congregation was small and undoubtedly unable to pay for and maintain a pastor to minister to it regularly. A pastor, of the same denomination, at another location, some 20 miles distant, was assigned to and held services in the new church ordinarily each alternate Sunday. It appears that sometimes this minister was unable to fill his regular appointments.

On January 2, 1920, at an annual meeting of the church congregation, the following proposition was voted upon:

"Shall we leave this Synod and go to the Missouri Synod?" The Missouri Synod is an entirely distinct religious organization from that of the Nebraska Synod, operating under the General Synod. At this meeting four persons voted to go to the Missouri Synod; two, and perhaps three, voted against the proposition. There were other members of the church society not present, and some who were present but did not vote.

The constitution adopted by the plaintiff contained, among other things, the following: "All property in possession of this Congregation shall belong to it, and shall not be taken away nor craftily alienated so long as there remain three male members holding to the name of the Congregation and recognize this Church Government." The evidence discloses that at the time of the meeting in January, 1920, and ever since, there were and are more than three male members of the plaintiff, holding to the name of the congregation and who recognize its church government. The original members of the plaintiff who were not in favor of transferring their allegiance to the Missouri Synod apparently believed, at the time, that the vote taken was conclusive and had the effect of transferring plaintiff's church property to the defendant. Of the three individuals who had taken title to the church property for the plaintiff, two had removed from the vicinity and the third had died. In 1924 the defendant procured the signatures to a deed of the two surviving individuals and of the widow of the third individual who had formerly held title to the church property for the plaintiff. Later, the members of the plaintiff church who had remained loyal to its name and church government were informed that they had not lost title to the church property, but were entitled to its possession. They sought, without avail, to obtain, by peaceable means, possession and to regain title. In 1929 this action was instituted.

The defendant's objection that the court was without jurisdiction has little or no merit. Defendant in its answer asks affirmative relief. It prays to have the title to

the church property quieted in it. It seeks the same character of relief as does the plaintiff. A litigant may not invoke the aid of a court and at the same time deny that it has jurisdiction to administer the character of relief for which he prays.

We think it is quite clear that the ecclesiastical courts could not have administered the relief desired. The Missouri Synod and the defendant church affiliated therewith were not subject to the jurisdiction of the Nebraska Synod or of the General Synod, with which the plaintiff church was affiliated. It is also apparent that the ecclesiastical courts could not determine the title to the real estate and compel a conveyance from one to the other. Where two different church societies are entirely separate in their allegiance to higher church organizations, and each claims title to real estate constituting church property, the ecclesiastical courts of neither organization has jurisdiction to determine title or right of possession. Such a situation presents a case for determination by the civil courts. Civil courts will exercise their jurisdiction to protect the property rights of religious societies, even though the one invading such rights may be a rival religious organization. *Rottmann v. Bartling,* 22 Neb. 375; *Avery v. Baker,* 27 Neb. 388; *Bonacum v. Harrington,* 65 Neb. 831; *Parish of the Immaculate Conception v. Murphy,* 89 Neb. 524; *Kenesaw Free Baptist Church v. Lattimer,* 103 Neb. 755; *Reichert v. Saremba,* 115 Neb. 404; *Schlichter v. Keiter,* 156 Pa. 119, 22 L. R. A. 161.

We next inquire as to what, if any, title to the church property the defendant acquired by the vote taken in January, 1920, and the deed executed by the individuals who had formerly held title for the plaintiff church. The above quoted provision of plaintiff's constitution seems to clearly limit the power of the church society to alienate its property so long as there remain three male members holding to the name of the congregation and recognizing its church government.

It is a well-recognized principle of law that a church society may adopt for its government a constitution, and

that, unless its provisions are in conflict with the statute or contrary to public policy, it will be binding upon the members of the church. As already observed, there are more than three male members who were, at the time of the attempted alienation, and ever since have been, holding to the name of the congregation and recognizing its church government. Its constitution, under existing conditions, was a bar to the transfer of the church property.

The constitution of plaintiff also contained the following provisions:

"Our Congregation is an organization of Evangelical Christians and shall be known as the Evangelical Lutheran Trinity Church.

"This Congregation is called Evangelical because built on the faith of the Apostles and Prophets, Jesus Christ himself being the Chief Corner Stone. Lutheran because it acknowledges the faith and doctrines of our fathers in the Church which holds this name. * * *

"Since our Congregation holds the faith of the General Synod of the Evangelical Lutheran Church in America, and since it desires to maintain that position, therefore it shall be affiliated with a District Synod which represents that General Body."

The Nebraska Synod above mentioned is a district synod representing the General Synod referred to.

We are forced to the conclusion that the vote of the congregation, taken in January, 1920, did not operate to transfer the title or right of possession of the church property to the defendant.

So far as the execution of the deed by the individuals who took title in trust for the plaintiff is concerned, it may be noted that they were not officers of the church; they had no authority to act for the church; they were naked trustees, merely holding title for the church, and any action on their part, in attempting to transfer the title to any other society than the one for which they were holding it in trust, was without authority. Defendant, having knowledge of the situation, could thereby acquire

no title or valid claim to the church property. Moreover, no attempt was made to comply with the provisions of section 571, Comp. St. 1922, which purports to regulate the manner in which church property may be alienated.

Has the plaintiff been guilty of such laches as will deprive it of the right to recover in this action?

In *Galliher v. Cadwell,* 145 U. S. 368, 36 L. Ed. 738, it was held: "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In a note to *Felix v. Patrick,* 36 L. Ed. (145 U. S. 317) 719, 720, we find the following: "The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position, or in the subject-matter of the action, caused by plaintiff's delay; or where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action"—citing *Blennerhassett v. Day,* 2 Ball & B. (Ir. Ch.) 104, and other cases.

"Mere delay in bringing an action to set aside a judgment and sale in foreclosure, not exceeding the time limited by the statute, and where defendant is not prejudiced, will not bar relief. *McMurray v. McMurray,* 66 N. Y. 175." At page 721, it was said: "Where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain it, the mere laches of the party seeking redress, unaccompanied by circumstances amounting to an estoppel, constitutes no defense."

In *Garden Cemetery Corporation v. Baker,* 218 Mass. 339, it was said, in effect, that, where no one has been misled to his harm in any legal sense by the delay and the situation has not materially changed, the delay is not fatal. And in *Kentucky Block Cannel Coal Co. v. Sewell,* 249 Fed. 840, it was held that, the defense being an equitable one, the lapse of time and the relations of the defendants to the

rights must be such that it would be inequitable to permit plaintiffs to maintain their rights.

In *Kimberly-Clark Co. v. Patten Paper Co.* (153 Wis. 69) 140 N. W. 1066, it was held: "Where each of the parties to an action seeks affirmative relief against the other, arising out of the same state of facts, one cannot claim that the other is guilty of laches."

This court has held in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463: "Mere lapse of time, unaffected by other circumstances, will not bar the right to rescind a voidable transaction."

In *Hawley v. Von Lanken*, 75 Neb. 597, it was held: "In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay." The ruling therein was reaffirmed in *Hawley v. Pound*, 76 Neb. 130, and *Hawley v. Barry*, 76 Neb. 131.

In *Harrison v. Rice*, 78 Neb. 654, it was held: "Mere forbearance to begin an action for specific performance, not extending beyond the period of the statute of limitations, and not accompanied by any conduct misleading or tending to mislead the defendant to his damage, or to lull him into a belief that his repudiation of the contract has been acquiesced in, will not bar the plaintiff of his right."

The rule in *Hawley v. Von Lanken, supra*, was reaffirmed in *Harrison v. Rice*, on rehearing, 78 Neb. 659. A similar rule was announced in *Northwest Ready Roofing Co. v. Antes*, 117 Neb. 121.

From the record it does not appear that defendant has been prejudiced by the delay in bringing the action. There is nothing to show that it has expended any sum upon the upkeep or repair of the church building, or has in any wise been placed in a worse plight than if the action had been brought at an earlier period. Applying the rules announced in the foregoing cited authorities to the facts disclosed by the record, we are required to hold that the mere delay in bringing the action did not bar plaintiff of its

right to relief. This disposes of the defenses urged by defendant. Plaintiff was the owner of the church property. It has never been lawfully divested of its title and right of possession. A decree should have been entered in the district court, quieting title in the plaintiff, awarding it possession of the property, and canceling the deed executed by the individuals, who had formerly held title for plaintiff, and whereby an attempt was made to convey the title to the defendant.

A decree of foreclosure was entered in favor of cross-petitioner upon its mortgages. Such decree was sought by cross-petitioner only in the event that title was not quieted in the plaintiff. Since the title should have been quieted in plaintiff, the decree of foreclosure in favor of cross-petitioner should be vacated and set aside.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter a decree, canceling the deed whereby the defendant attempted to acquire title, and quieting title in the plaintiff, or, rather, in its official trustees, and for this purpose further evidence should be taken to determine who are the individuals holding the offices of trustees, and the title should be quieted in the name of the trustees and their successors in office.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment in conformity with this opinion.

REVERSED.

JOE ADAMS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED MAY 9, 1930. No. 27291.

1. Appeal: DIRECTION OF VERDICT. In the trial of a law action to a jury, where, at the close of plaintiff's evidence, each party, without reservation, moves for a directed verdict, each thereby invites the court to discharge the jury, determine the facts, and apply the law thereto. Under such conditions, after the jury have been discharged and the court has announced that it finds for plaintiff, a request by defendant to introduce evidence is

addressed to the discretion of the trial court, and a denial of the request will not be held erroneous in the absence of a showing that defendant has been prejudiced thereby. Error will not be presumed, but must affirmatively appear.

2. **Municipal Corporations**: POWERS. The law confers on cities of the metropolitan class authority, but does not require them, to construct storm sewers.
3. ———: STORM SEWERS: INADEQUACY: LIABILITY. Cities of the metropolitan class are not liable for damages caused by surface water, because its storm sewers are of insufficient capacity to carry all of such water.
4. ———: SURFACE WATERS: DAMAGES: LIABILITY. In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises.

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

John F. Moriarty and *Thomas J. O'Brien*, for appellant.

J. C. Travis, contra.

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

GOOD, J.

Action for damages from surface waters flooding plaintiff's premises, alleged to have been caused by defendant's negligence. Defendant denied any negligence. Plaintiff had the judgment, and defendant has appealed.

At the close of plaintiff's evidence, both parties moved for a directed verdict. Thereupon, the trial court discharged the jury and announced its purpose to render judgment for plaintiff. Defendant then requested, and was denied, permission to introduce evidence. This ruling is assigned as error.

This court has frequently held that, where each party to a jury trial moves for a directed verdict, each consents that the court shall find the facts and apply the law thereto. *Segear v. Westcott*, 83 Neb. 515; *Dorsey v. Wellman*, 85 Neb. 262; *Henton v. Sovereign Camp, W. O. W.*, 87

Neb. 552; *Martin v. Harvey,* 89 Neb. 173; *Prucha v. Coufal,* 91 Neb. 724; *Krecek v. Supreme Lodge of F. U. A.,* 95 Neb. 428; *Fairbanks, Morse & Co. v. Austin,* 96 Neb. 137; *Hamilton v. North American Accident Ins. Co.,* 99 Neb. 579; *Modern Woodmen of America v. Berry,* 100 Neb. 820; *Bank of Benson v. Gordon,* 103 Neb. 508; *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.,* 105 Neb. 321; *Riverton State Bank v. Walker,* 107 Neb. 672; *Waters v. Nebraska Mutual Ins. Co.,* 108 Neb. 1; *Pearlman v. Snitzer,* 112 Neb. 135. It is true that in most, if not all, of these cases the motions were made at the close of all the evidence on both sides.

In *Dunn v. Bozarth,* 59 Neb. 244, it was held: "The reception of evidence tendered by the defendant after a decision against him on a demurrer to plaintiff's evidence is not error." This ruling was followed and approved in *Riley v. Missouri P. R. Co.,* 69 Neb. 82.

In *Davison v. Land,* 89 Neb. 58, it was held: "At the conclusion of the plaintiff's evidence, plaintiff and defendant each moved the court for a directed verdict. Defendant then asked to withdraw his motion and to be allowed to introduce evidence. This request was refused, and a verdict directed for plaintiff. *Held,* that in such case prejudicial error will not be presumed, and the judgment of the district court will be affirmed under section 145 of the Code, where the record does not disclose any facts showing that defendant suffered any prejudice or that he had a substantial defense to the action." In the opinion it was said: "Where parties each request a direction to the jury for a verdict in their favor they submit the case to the court upon an issue of law. *Segear v. Westcott,* 83 Neb. 515; *Dorsey v. Wellman,* 85 Neb. 262. Where a party seasonably desires to withdraw such a request and to introduce evidence, the court should allow it to be done. It is elementary, however, that error will not be presumed, but must affirmatively appear."

In *Knies v. Land,* 116 Neb. 387, at the conclusion of plaintiff's testimony, each party moved for a directed ver-

dict. It was held: "Where both parties to a law action then being tried to a jury ask for a directed verdict, the action of the court in granting one request has the same force and effect as would a verdict of the jury. Neither party can thereafter predicate error on the court's failure to submit the case to the jury."

In the instant case, each party moved for a directed verdict without any reservation, and thereby each party invited the court to discharge the jury and decide the case upon the record then made. Not until after the court had discharged the jury and indicated that its holding would be for the plaintiff did the defendant make a request to introduce evidence. It was then too late for it to demand this as a matter of right. It was within the discretion of the trial court to grant or refuse the request. The record does not indicate what evidence the defendant desired to introduce. No offer was made as to what any witness would testify. The record does not apprise us as to whether defendant was prejudiced by the refusal. Error will not be presumed, but must affirmatively appear.

It is contended that the trial court committed prejudicial error in finding for the plaintiff, and it is asserted that the evidence fails to establish any actionable negligence on the part of defendant. A careful examination of the record convinces us that this contention is sound.

Plaintiff was engaged in the tire-repair business and, as lessee, occupied a building at 2302 Cuming street in the city of Omaha. On June 16, 1928, a heavy rain occurred, more than two inches of water falling in an hour. The water from the street overflowed the curb and filled the basement of plaintiff's premises, causing considerable damage to his merchandise therein kept.

While several grounds of negligence are alleged in the petition, plaintiff frankly admits that he relies upon the fact that the storm sewer was insufficient in capacity to carry off the surface water, and this forms the basis of his right to recover. Plaintiff cites and relies upon a number of cases wherein storm sewers of insufficient capacity were

knowingly maintained by municipalities, and where the sewage backed up through the sewer into the basements of buildings, and thereby caused damage, but those cases are not in point and have no application to the situation presented by the record in this case. In the instant case, the water never reached the sewer. There was no backing up of water through the sewer connections. Plaintiff's injury was sustained solely by surface water that overflowed into his building and basement. There is no evidence that any act of the defendant caused the surface water to accumulate and be thrown upon his premises. For aught that appears, no more water came to or upon plaintiff's premises than would have naturally reached them if no sewer had been constructed. In fact, the inference is that less water was precipitated upon his premises than would have been, had no sewer been constructed. The law authorizes, but does not require, cities of the metropolitan class to construct storm sewers. If no storm sewer had been constructed, plaintiff's damage would not have been less and might have been greater. Plaintiff's plight is no worse because of the insufficiency of the sewer, and it is to be inferred that it is somewhat better.

A somewhat similar question was presented in *City of Atchison v. Challiss*, 9 Kan. 603, 611, where in the opinion it was said: "Now, if a city is not bound to construct a drain of any kind, by what system of reasoning can it be made to appear that if it shall construct a drain it must construct one that shall be sufficient in all cases, and for every emergency? Any drain is better than no drain. Any drain instead of being an injury to a party is, so far as it operates, a positive benefit. If it carries off half the water that falls upon his premises, instead of the whole, how can that be said to be an injury? Is it not an actual benefit to the extent that it operates? And if a benefit, upon what principle can the city be made liable?" If failure to construct storm sewers to carry off any of the surface waters was not negligence, certainly the construction of the sewer that carries away a part of the water would not be actionable.

The evidence fails to establish any actionable negligence on the part of defendant. It follows that the findings and judgment of the district court are erroneous.

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

REVERSED.

LILLIE LONG ET AL., APPELLANTS, V. EMMA V. OSBORN, APPELLEE.

FILED MAY 9, 1930. No. 27230.

Specific Performance: PETITION. In an action for specific performance of a contract for the sale and purchase of real estate, evidenced by written communications, where the petition reflects a contract definite and certain in its terms, and that such contract was entered into with perfect fairness and with common intent, and reveals a sufficient note or memorandum evidencing the contract, signed by the vendor, to satisfy the statute of frauds, and also discloses compliance on the part of plaintiff and refusal to comply on the part of defendant, and where the different communications are each and all set forth in such petition and are properly connected with each other and with the parties and the lands in suit, by necessary innuendoes and amplifications, such petition is invulnerable to a general demurrer.

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

Orville Chatt, J. A. Singhaus and *Howell, Tunison & Joyner,* for appellants.

W. M. Hopewell and *A. N. Corbin, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and JAMES and WRIGHT, District Judges.

THOMPSON, J.

This is an action for specific performance of a claimed contract, evidenced by written communications, for the sale and purchase of real estate in Burt county, instituted by appellants, hereinafter called plaintiffs, against appel-

lee, hereinafter designated defendant. A general demurrer was interposed by defendant to the plaintiffs' second amended petition, which was sustained, and plaintiffs electing not to plead further, judgment of dismissal was entered. Plaintiffs appeal.

Thus, there is submitted for our determination: Did the second amended petition state facts sufficient to constitute a cause of action?

The record reflects the following material facts, among others: William Hayes died testate July 23, 1927, a resident of Burt county, Nebraska, at which time and prior thereto he was the owner of the south half of the northwest quarter of section 22, township 20, range 9, in such county. By his claimed last will and testament, in writing, he devised this land to defendant, one of his nieces, subject to a life estate therein of May L. Valentine. The will was offered for probate, and on August 17, 1927, plaintiffs herein, who were also nieces and nephews of testator, filed objections to the admission of the above purported will to probate, and as ground therefor interposed the challenge that Hayes was not of sufficient mental capacity to make a will. This question coming on to be heard on September 19, 1927, the objections were overruled, and the will admitted to probate. To reverse this judgment the contestants appealed to the district court, where the matter rested until on the 19th day of May, 1928, when such appeal was by them dismissed. This left the judgment of the county court in full force and effect. Due administration of the estate was had. Thus, ever after the entry of the original judgment in the county court, the defendant was the owner in fee of the lands in question (subject to the aforesaid life estate) and owned no other lands in this state. Between the time of the rendition of the judgment in the county court and the dismissal of the appeal in the district court, the defendant and the plaintiffs herein, being each and all desirous of making an amicable and final adjustment of the matters involved, entered into the negotiations reflected by the written communications hereinbefore referred to. To copy such communications (con-

sisting of letters, deeds, drafts, and a telegram) would serve no useful purpose. Hence, it is deemed sufficient to say that, after a careful examination of these communications, we conclude that they evidence a definite offer by defendant to sell the lands hereinbefore described to the plaintiffs, for the sum of $3,000, and a definite acceptance of such offer by them. On this acceptance the contract, as between the parties, became binding and enforceable. However, it is uged by the defendant that such communications show that thereafter, as her husband had strong opposition to a settlement, she decided to withdraw her offer and call the deal off, and had so notified the plaintiffs. As to this, it may be stated that such desired abandonment was neither accepted nor approved by the plaintiffs, and, as there was no consideration for the same, it was without force or effect.

It is our conclusion that the amended petition reflects a contract definite and certain in its terms, and that such contract was entered into with perfect fairness and with common intent; that such petition discloses a sufficient note or memorandum evidencing the contract, signed by the vendor, to satisfy the statute of frauds (Comp. St. 1922, sec. 2453), and shows compliance on the part of plaintiffs and refusal to comply on the part of defendant. Further, the different communications were each and all set forth in the petition, and were also properly connected with each other, and with the parties and the lands in suit, by necessary innuendoes and amplifications. The question here involved coming to us buttressed on a demurrer to the petition, fraud or misunderstanding does not enter therein, unless apparent in the petition itself, which we find it is not.

It follows that the amended petition contains facts sufficient to constitute a cause of action, and therefore the trial court erred in sustaining the demurrer and dismissing the suit.

The judgment is reversed and the cause remanded for further proceedings, with leave to the defendant to answer.

REVERSED.

IN RE APPLICATION OF JOSEPH S. FLANDERS FOR WRIT OF HABEAS CORPUS.

JOSEPH S. FLANDERS, APPELLANT, V. E. C. KAVANAUGH, SHERIFF, APPELLEE.

FILED MAY 9, 1930. No. 27278.

Information: SUFFICIENCY: ASSAULT AND BATTERY. Where, as in this case, the information charges one with an assault with an intent to kill or wound, and that he shot another with a pistol, it includes and charges an unlawful assault and battery with the minuteness necessary to sustain a conviction of the lesser crime.

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

Wagner & Wagner, for appellant.

Emil F. Luckey, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

DAY, J.

Joseph S. Flanders was found guilty of assault and battery. He seeks a writ of habeas corpus and appeals from the order of the trial court denying it. The information upon which Flanders was tried charges that he unlawfully, feloniously and maliciously made an assault upon one with a certain pistol and shot him with intent to kill or wound. Does the information include and charge a simple assault and battery?

To charge a statutory offense, the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute, or its equivalent. *Nichols v. State,* 109 Neb. 335; cited with approval in *Morris v. State,* 109 Neb. 412, and *Barton v. State,* 111 Neb. 673. The general rule is that on an indictment for an offense, where some of its essential elements constitute a lesser crime, the information may include and charge the lesser offense. But the appellant contends that the holding of the court in *Tasich v.*

State, 110 Neb. 709, is controlling here. In that case we said that, under an information charging defendant with shooting another person with intent to kill, such defendant cannot be convicted of an assault with intent to do great bodily harm, because the section of the statute defined several distinct independent offenses of equal rank, no one of which is embraced within the other. This rule is not controlling of the instant case, since assault and battery is not an independent substantive crime of equal rank with shooting with intent to kill or wound. It is a lesser crime, and may be included and charged in the information for the greater offense.

The information in this case charges the essential elements of the crime of assault and battery. "An indictment alleging an assault of such a character as would support a charge of assault with intent to kill with a wooden club, if it described the club as a deadly weapon, will, when those terms are omitted, support a conviction for assault and battery." *Kruger v. State,* 1 Neb. 365. *Mulloy v. State,* 58 Neb. 204, holds that an information charging assault with intent to commit great bodily injury will sustain a conviction for assault and battery.

We are not unmindful that this court has held in *Morgan v. State,* 51 Neb. 672, that a count in an information charging killing in perpetration of a rape upon the person of deceased charges murder in the first degree, and does not include the lesser offenses of second degree murder and manslaughter. In *Rhea v. State,* 63 Neb. 461, we examined *Morgan v. State, supra,* and adhered to it. Likewise, in *Thompson v. State,* 106 Neb. 395, a charge of homicide committed in the perpetration of a robbery charges only murder in the first degree. The rule in these foregoing cases is grounded upon the fact that the turpitude of the act is in these exceptional cases made by statute to supply the place of deliberate and premeditated malice, while a purpose to kill is conclusively presumed from the intention which is the essence of the enumerated felonies. For a full and complete analysis of these cases, see *Davis v.*

State, 116 Neb. 90. In the *Davis* case, defendant was charged with homicide by administration of poison. The trial court in that case refused by its instructions to submit to the jury for their consideration the question of defendant's guilt of the lesser offenses. The general rule given in that case is: "Such an instruction is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense. If the evidence is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give such an instruction."

While there are cases *contra,* notably *State v. Foster,* 150 La. 971, it is generally held that an indictment for assault with intent to kill includes the offense of assault and battery. 31 C. J. 862. Where, as in this case, the information charges one with an assault with an intent to kill or wound, and that he shot another with a pistol, it includes and charges an unlawful assault with the minuteness necessary to sustain a conviction of the lesser crime of assault and battery. It therefore follows that the judgment of the trial court should be, and is,

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK ET AL., APPELLANTS: JOHN T. MEAD, INTERVENER, APPELLEE.

FILED MAY 9, 1930. No. 26942.

Banks and Banking: GUARANTY FUND: DEPOSIT. Where the officers of a bank sell liberty bonds left with it for safe-keeping and convert the proceeds, substituting therefor certificates of deposit without the owner's knowledge or authority; *held,* that where the evidence does not establish that the proceeds of the sale, the money or its equivalent were in intention and effect placed in or at the command of the bank, a deposit is not created within the protection of the depositors' guaranty fund.

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

C. M. Skiles, I. D. Beynon and *Albert S. Johnston,* for appellants.

Thomas E. Dunbar, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and DINEEN, District Judge.

DINEEN, District Judge.

This case arises out of the failure of the Dunbar State Bank of Dunbar, Nebraska. Intervener John T. Mead purchased through the defendant Dunbar State Bank, then solvent, liberty bonds in the principal sum of $1,700. These bonds were left at the bank for safe-keeping; and on July 5, 1928, the bank being then insolvent, intervener immediately called at the defendant bank for his bonds, and was informed by Mr. Eiser, special agent for the guaranty fund commission for the state of Nebraska, that the bonds had been sold some time prior by Mr. Murray, the absconded president of defendant bank, and in lieu thereof there were on deposit in defendant bank certificates of deposit for $1,200 and $500 signed by Thomas Murray, president, and dated January 13, 1927. Being so advised, intervener Mead filed his claim with the receiver for defendant bank, based upon said two certificates of defendant bank. The trial court found that the intervener Mead's claim was preferred and was payable out of the depositor's guaranty fund.

The question to be determined in this case is: Was the deposit a good faith deposit within the meaning of the depositor's guaranty law? The bonds were left at the bank and without the knowledge or consent of the intervener were disposed of by an official of the bank. To presume that under the circumstances it was the intent of the intervener to make a general deposit within the meaning of the depositor's guaranty fund we think is too remote. We said in the case of *State v. Clinton State Bank,* 116 Neb. 482:

"Where certain liberty bonds were purchased by a bank for a customer, but were never delivered to the customer,

being left with the bank for safe-keeping, and were subsequently sold by the bank without the consent of the customer, neither the bonds nor their proceeds constituted a deposit within the protection of the state guaranty fund."

In the case at bar, however, certificates of deposit were issued to intervener but retained by the bank, and intervener had no knowledge of the issuance of the certificates until he called for his bonds, about July 5, 1928, at which time the bank was insolvent. While it may be proper to infer that the said certificates were issued as of the date they bear, January 13, 1927, there is no evidence in the record to show when the intervener's bonds were converted by the bank, nor is there evidence sufficient to establish the fact that, when said certificates were issued, in lieu thereof the money or its equivalent was in effect placed in or at the command of the bank, as was necessary under the holding of this court in *State v. Farmers State Bank*, 111 Neb. 117, as follows: "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law."

It therefore follows that the judgment should be reversed and the cause remanded, with instructions to enter a decree in conformance with this opinion.

REVERSED.

HERBERT LEWIS, JR., APPELLEE, V. LOUIS H. MILLER, APPELLANT.

FILED MAY 16, 1930. No. 27119.

1. **Appeal:** INSTRUCTIONS. The court should submit only such issues to the jury as find some support in the evidence, but where an issue, without support in the evidence, is submitted and it clearly appears that the jury were not misled thereby, to the prejudice of the complaining party, reversible error cannot be predicated thereon.

2. **Instructions** complained of, given and refused, examined, and *held*, the court committed no error in the giving or refusal of same.
3. **Witnesses**: COMPETENCY: SPEED OF AUTOMOBILE. A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same.
4. ———: IMPEACHMENT. Where a party claims to have been misled or surprised by testimony of a witness called by him, it rests in the discretion of the court as to whether such party may be allowed to contradict the testimony of such witness by the introduction of alleged contradictory or variant statements previously made by the witness to such party or his counsel; and, unless it appears from the record that there is an abuse of such discretion, reversible error is not committed. *Held*, under the foregoing rule and the facts and circumstances disclosed in the record, no abuse of discretion appears in the refusal of the trial court to receive in evidence certain written statements made by witnesses for defendant and offered by him, as tending to contradict testimony given by such witnesses when called as his witnesses.
5. **Damages**. The judgment on the verdict of the jury for the amount of plaintiff's damages, as reduced by remittitur ordered by the trial court, sustained.

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

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellant.

Leon & White, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This is an action by Herbert Lewis, Jr., a minor, nineteen years of age, by his father as next friend, to recover damages on account of injuries received in an automobile collision between an automobile in which plaintiff, appellee, was riding as a passenger and an automobile owned and

driven by defendant, appellant, Louis H. Miller. The jury returned a verdict in favor of plaintiff in the sum of $5,500. A remittitur was ordered by the trial court of $1,500. The remittitur was made and judgment was entered for $4,000. Defendant appeals therefrom, and plaintiff prosecutes a cross-appeal to restore the $1,500 ordered remitted.

One of the principal grounds of error urged by counsel for defendant is the giving of instructions Nos. 1 and 4 by the trial court upon its own motion. Instruction No. 1 complained of sets out five acts of negligence alleged by plaintiff in his petition. By instruction No. 4 the jury were instructed that it was necessary for the plaintiff, before he could recover, to establish by a preponderance of the evidence that negligence on the part of the defendant in some one or more of the particulars set forth in plaintiff's petition, or that the negligence on the part of the defendant in some one or more of the particulars set forth in plaintiff's petition concurring with the negligence on the part of the driver of the automobile in which the plaintiff was riding at the time of the collision, was the proximate cause of the collision between said automobiles.

The particular complaint made against these instructions is that the trial court submitted certain alleged acts of negligence on the part of the defendant which found no support in the evidence. The particular acts of negligence complained of, submitted by said instructions, are:

"That the defendant's view of vehicles was obstructed by reason of the fact that there were three other occupants besides himself in his automobile, making it impossible for defendant to see approaching automobiles coming from the south toward the north."

"That the defendant's automobile was equipped with defective brake lining and braking appliances at the time of said collision."

A proper consideration of this question and other alleged errors requires an examination of the evidence. There is little conflict in the evidence. The collision complained of occurred on the 24th day of June, 1928, at about 7:30 p. m., on Pacific street a short distance west of the private drive-

way leading from the grounds of the Highland Country Club in Douglas county. Pacific street, on which the collision occurred, is a graveled highway 34.5 feet in width from shoulder to shoulder and runs east and west. The driveway from the club grounds intersects Pacific street nearly at right angles, and is about 40 feet in width at the intersection. West of the north end of the driveway, on Pacific street, there rises a hill, the top or crest being 300 feet west of the intersection. The hill in question obstructs the view from the east beyond the crest. From the top of the hill there is a decline to the north end of the driveway. From the north end of the driveway, where the same connects with Pacific street, there is a clear view westward to the top of the hill, and also a clear view along said street eastward from the top of the hill to where the driveway connects therewith. There was some shrubbery along the west side of said driveway which extended nearly to the intersection, which, to some extent, obscured the view of said driveway from persons coming east along Pacific street. However, an automobile might be seen, by those traveling eastward along Pacific street, as it emerged from the driveway and before entering upon Pacific street. The automobile in which plaintiff was riding was a Chevrolet coach occupied by five persons. The plaintiff occupied the front seat with one Boyer, the driver of the car; the other three persons occupied the back seat. The defendant, at the time of the collision, was driving an Oldsmobile coupé, occupied by three persons other than defendant; one of the persons being seated upon the lap of another. The car in which plaintiff was a passenger traveled north from the club house and, at a point where a clear view might be had of Pacific street to the east and to the west, the car was stopped and the driver of the car and a passenger, Linwood Hall, looked both to the east and west to ascertain if there was any vehicle upon the street that might interfere with entering upon said street. Seeing none the driver of the car put the car in first gear and proceeded to enter upon said street, driving the car to the north at a speed of about five or six miles an hour. When in about the mid-

dle of the street, the driver and one Hall, an occupant of the car, looked to the westward and saw the automobile of defendant coming over the top of the hill. The plaintiff did not see the car driven by defendant until it was about 150 feet from them. The car in which plaintiff was riding proceeded very slowly from that point in a northwesterly direction on the north side of the center of the street, and at the time of the collision was almost stopped. When the car driven by defendant was first observed it was north of the center of the street and it remained upon the wrong side of said street until a very short distance from the other automobile, when it swerved further to the left and then back to the right, striking the car in which plaintiff was riding upon the left side near the door and shoving it about 35 feet to the east and a little to the north into the ditch on the north side of the street. The evidence on behalf of plaintiff is that defendant's car was being driven at an estimated speed of from 50 to 60 miles an hour at and just prior to the collision. Defendant estimated the speed of his car at the top of the hill as from 35 to 40 miles an hour, and says that he did not slacken his speed or retard his motor up to the point of the collision, although he was going down grade and his speed must have increased on account thereof. He also testified that, from the top of the hill to a point about 50 or 75 feet west of where the collision took place, he traveled partly to the north of the center of the street and at that point his attention was called to the other car, which, he says, he had not seen before on account of his looking down at the road. He says that when his attention was called to the other car it was about in the middle of the street and moving slowly; that he attempted to apply his brakes and go around in front of the car by going further north and, realizing he could not do so, he turned his car to the right and the collision took place; that when the collision took place the other car was headed in a northwesterly direction and the left front part of his car struck the other about the middle of the left side. The evidence further discloses that immediately following the collision the defendant told a man that his

"brakes would not hold," and that some five months after the accident the defendant told another "if his brakes had been in good condition the accident would never have happened." The defendant does not deny he made such statements. The foregoing admissions of defendant, coupled with the fact that when he applied his brakes the speed of his car was not slackened or retarded thereby, warranted the jury in finding the braking appliances on his car must have been defective.

The case of *Yarbrough v. Carlson,* 102 Or. 422, is directly in point upon the question presented. In that case plaintiff introduced evidence to show the speed at which defendant was driving both before and at the time of the collision; the manner of his operation of the car at the time; the distance that plaintiff was dragged or propelled along the street before defendant stopped, also that after the collision defendant stated that he had defective brakes and could not avoid the collision. The defendant in that case requested the court to direct the jury that the plaintiff failed to introduce any competent evidence to prove that the brakes on his automobile were defective. This was refused and the court held:

"In an action for injury from a collision with an automobile, in which plaintiff alleged that defendant's automobile was equipped with weak and defective brakes, evidence held sufficient for the jury."

The evidence in this case justified the submission of the allegation of negligence that the brakes on the defendant's car were defective.

There is no evidence from which it might be inferred that defendant's view was obstructed by reason of there being three other occupants beside himself in his automobile so that in driving east he could not see cars coming from the south out of the private driveway. This particular claim of negligence on the part of the defendant should not have been submitted to the jury. The rule is:

"In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and

which find some support in the evidence." *Koehn v. City of Hastings,* 114 Neb. 106.

The submission of this act of alleged negligence could not operate to the prejudice of the defendant, unless it can be said, from a consideration of all the evidence, it might have misled the jury, and induced them to return a verdict that, otherwise, they would not have returned. The evidence is ample to warrant the finding that defendant was guilty of the other negligent acts alleged in the petition and submitted to the jury for its consideration, and that one or more of such negligent acts which, alone or concurring with negligence of the driver of the car in which plaintiff was riding, was the proximate cause of the collision and consequent injury to plaintiff. Under the evidence the jury would not have been justified in finding otherwise. Plaintiff was a passenger in the car in which he was riding. He had nothing to do with its operation or control, and there is no evidence upon which the jury could find that he was guilty of contributory negligence. Under the evidence in this case, the submission of the act of alleged negligence complained of could not have misled the jury to the prejudice of the defendant.

The refusal to give instructions Nos. 1 and 3 requested by defendant is assigned as error. Instruction No. 1 relates to the duty of a driver of an automobile entering a public highway from a private driveway. The requested instruction was fully covered by instructions given by the court upon its own motion.

Instruction No. 3, requested and refused, was to the effect that, if the jury believed from the evidence that the accident in question and the resulting damage to plaintiff was caused solely by the negligence of the driver of the car in which plaintiff was riding, he could not recover. The requested instruction was not supported by the evidence. The evidence would not have warranted the jury in finding that the accident in question was caused solely by the negligence of the driver of the car in which plaintiff was riding. Error was not committed in the refusal to give the instructions requested by defendant.

It is urged by counsel for the defendant that it was error to permit two witnesses for the plaintiff to testify as to the speed of defendant's automobile just prior to the time of the collision, as it was coming directly toward them, and they had no opportunity to compare its speed with objects which it was passing. Counsel cite no authority in support of their contention. The witnesses were the driver of the car in which plaintiff was riding at the time of the collision and Linwood Hall, a passenger in the car at that time. Both testified that they had driven cars for several years, had occasion to note the speed of different cars, either passing or coming toward them, and that they were able to estimate the speed of the automobile driven by the defendant. It further appears from the evidence that the two witnesses were familiar with the street in question and had driven over it in going to and from their work at the country club; that they first saw defendant's automobile as it came over the top of the hill, and observed its speed from then until the collision. They were permitted to give their opinion as to the speed of the automobile when about 100 feet away from them, and they testified that its speed was, at that time, between 50 and 60 miles an hour, and that it did not slacken its speed up to the time of the collision. It is the rule in this state that:

"A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving." *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *Pierce v. Lincoln Traction Co.*, 92 Neb. 797; *Andersen v. Omaha & C. B. Street R. Co.*, 116 Neb. 487.

The witnesses were qualified to give their opinion or estimate as to the speed at which defendant's automobile was driven just prior to the collision. The fact that the automobile driven by defendant was coming toward them affected the weight rather than the competency of their testimony. The weight to be given their testimony upon this subject, under all the circumstances proved, was for the jury. *Pierce v. Lincoln Traction Co.*, 92 Neb. 797. See 42 C. J. 1225, sec. 1026; *Owens v. Iowa County*, 186 Ia. 408.

Complaint is made that defendant was not permitted, on cross-examination, to ask the plaintiff in reference to a certain unsigned written statement claimed to have been made to Mr. English, one of the attorneys for the defendant, some 19 days after the accident. A certain part of said statement was read to the witness on cross-examination and the inquiry made as to whether or not he had made such a statement to Mr. English. The trial court suggested the better way would be to show the witness the statement and ask him whether he made the statement and, possibly, offer the statement itself. The defendant then proceeded with the cross-examination of the witness and cross-examined him at length as to whether or not he made certain statements to Mr. English in regard to the accident. The witness was permitted to answer all of such questions and this line of cross-examination was pursued as far as seemed to be desired by counsel for the defendant. An examination of the record shows that the claim of error in this respect is without merit.

Error is claimed on account of a ruling made by the trial court sustaining an objection to the offer of a certain written statement signed by Mrs. Mary Ziskovsky, a passenger in the car of the defendant Miller at the time of the accident. It seems that five days after the accident and while Mrs. Ziskovsky was still in the hospital, in pain, with face cut and her tongue almost severed, Mr. English, one of the attorneys for the defendant and the insurance company, in which defendant carried liability insurance, called on her at the hospital and asked her about the accident. He wrote the statement in his own language. After he had written the statement it was not read by the witness nor does she remember that he read all of it to her. The defendant called her as a witness in his own behalf, inquired of her as to her knowledge of the speed of the defendant's car at the time and tried to qualify her so that she might give an estimate of its speed just before the collision. She was unable to qualify, and was not asked to give her estimate of such speed. It also appears that at the time Mrs. Ziskovsky had a suit pending against the

defendant growing out of the same accident. In the statement offered, Mrs. Ziskovsky is made to say that she judges that the defendant's car was going at 25 miles an hour. There is nothing in the statement that shows that she was qualified to give an estimate of the speed at which the car was traveling. The statement is also replete with conclusions, such as: "Mr. Miller (the defendant) was driving in a careful manner." Also, in speaking of the time that the car of plaintiff came out of the private driveway: "We were so close to it at the time that it was impossible for Mr. Miller to avoid hitting it." Also: "I think that the cause of this accident was the sudden appearance of the Chevrolet car in our path at a time when it was impossible to avoid running into it." Counsel contends that, since the witness was hostile, the defendant was entitled to have her statement admitted in evidence as contradictory of some of her testimony given when called as a witness on behalf of the defendant, and cites *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, in support of his contention. In that case this court held:

"Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial."

Under the rule announced in that case, when a party calls a witness and is surprised or misled by the testimony of the witness on a material point, it rests in the discretion of the court as to whether he will be permitted to show the contradictory statements made before the trial. As we have pointed out, aside from the conclusions contained in the statement, there is very little in the statement that might be deemed contradictory of the testimony given by the witness when testifying in behalf of the defendant. The conclusions contained in the statement would not have been

admissible in behalf of the defendant had she been a friendly and willing witness and attempted to testify thereto when called as a witness by him. No offer was made of the parts of the statement that purport to state facts and not conclusions. Taking into consideration the time and the circumstances under which the alleged contradictory statements were made, that it was entirely written by the attorney for the defendant and the insurance company, and consisted largely of conclusions and not statements of fact, there was no abuse of discretion on the part of the trial court in sustaining an objection to its admission in evidence.

Counsel for defendant also claim error in the sustaining of objections to the admission of a written statement made by Joe Ziskovsky a short time after the happening of the accident. The statement was taken by the same attorney who took Mrs. Ziskovsky's statement. It appears that Mr. Ziskovsky was a passenger in the car of the defendant at the time of the accident; that he had assigned his claim for damages to his wife, who brought suit against the defendant to recover damages for herself and for damages alleged to have been sustained by him. The defendant called Mr. Ziskovsky as a witness in his own behalf. He was examined at length and he was unable to qualify so as to testify to the speed of defendant's car at or about the time of the accident, nor was he asked to give his opinion as to such speed. The statement offered in evidence contains very little that is contradictory of the testimony of the witness when testifying in behalf of defendant. The only part of such statement that seems to be in any way contradictory of his testimony upon a material point is where he says that before the collision the defendant was driving "on the right-hand side of the road." The record shows that, after the court excluded the entire statement, a portion of the statement was offered and received in evidence. The part of the statement received in evidence was: "Joe Ziskovsky. July 1, 1928, we were returning home on the Pacific street road past the Highland Country Club grounds. We were going east on the right-

hand side of the road." There was no abuse of discretion on the part of the trial court in excluding the remainder of the statement.

It is contended by counsel for defendant that the verdict of $5,500 is so excessive it indicates that it was the result of passion and prejudice. The evidence shows that the plaintiff received severe and permanent injuries to his right hand. He had six tendons cut on the front and inner side of his wrist, also the ulnar nerve and four tendons cut on the back side of the wrist. Plaintiff was on the operating table for two and a half hours while the tendons and the ulnar nerve were sutured. The evidence of the doctor who treated him is that, due to both the severence of the ligaments and the nerve, there is no doubt but that there will be a permanent disability of the hand and wrist. The plaintiff also suffered contusions and bruises over his face and left ear and arm. Plaintiff at the time of the trial was suffering from a paralysis of two fingers of the right hand and had no sensation or feeling in the ulnar side of the ring finger. There is no doubt but what plaintiff suffered considerable pain from his injuries.

The plaintiff, on his cross-appeal, claims that the amount found by the jury should be restored and judgment given him for that amount. From a careful consideration of the evidence in relation to his injuries we do not believe that the verdict of the jury was so excessive as to indicate that it was the result of passion and prejudice. It is not contended by defendant that the amount as fixed by the trial court of $4,000 is excessive and we believe that the judgment for that amount as entered by the trial court should not be interfered with.

The judgment of the trial court should be and is hereby

AFFIRMED.

O. E. LOWELL, APPELLANT, V. BUFFALO COUNTY, APPELLEE.

FILED MAY 23, 1930. No. 27057.

1. **Eminent Domain:** DAMAGE TO PROPERTY. The constitutional provision forbidding the taking or damaging of private property

for public use without just compensation applies to special damages to land by the vacating of a public highway.

2. ———: ———. The words "or damaged" as used in the constitutional provision forbidding the damaging of private property for public use without just compensation include all damages thus causing a diminution in the value of such property.

3. ———: ———. The law provides for the ascertainment and payment of special damages to private property by the vacating of a public highway.

4. ———: ———: APPEAL. An appeal to the district court from an award of special damages to private property, caused by the vacating of a public highway, is authorized by law.

5. Highways: VACATING: DAMAGES. Upon appeal from an award of damages caused by the vacating of a public highway, the compensation to which claimant is entitled must be ascertained "in the same manner as in actions by ordinary proceedings." Comp. St. 1922, sec. 2603.

6. Eminent Domain: DAMAGE TO PROPERTY. Neither Constitution nor statute excepts from just compensation for special damages to private property by the vacating of a public highway any loss or injury that reduces its value, special benefits considered.

7. ———: ———. A landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree, but this rule does not prevent the recovery of special damages.

8. ———: ———: MEASURE OF DAMAGES. Where private property has been taken or damaged by the vacating of a public highway, the owner, if suffering special damages, is entitled to recover the difference between its value immediately before and immediately after the change.

9. ———:———. Where a public highway, intersecting an improved farm and extending to markets in both directions, is vacated, leaving the landowner with only one outlet from a *cul-de-sac*, he may thus suffer special damages not common to the community at large.

10. ———: ———: MEASURE OF DAMAGES. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled, where he suffers damages not common to the public generally.

11. ———: ———. Where the owner of real estate is entitled to recover special damages, on the ground that it was depreciated in value by the vacating of a public highway intersecting it, the jury, in determining his just compensation, may consider resulting diversion of travel and removal of a mail box and a

schoolhouse, not as independent items of damage, but for the purpose of determining the market value of the property before and after the vacating of the highway.

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

Nye & Nye, for appellant.

E. G. Reed, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

ROSE, J.

This is a proceeding to recover from Buffalo county $5,000 in damages alleged to have been caused by the vacating of a public highway running north and south through a 200-acre island farm owned by plaintiff. Extending northeast and southwest, his land is an irregular tract approximately half a mile wide between two channels of the Platte river. A modern house occupied by him and his family is situated near the east end of his farm. In front of his residence the county maintained for many years a public highway running north and south, on which there was a bridge across the north channel a short distance north of his house and a bridge across the south channel 1,335 feet therefrom. By the old route it was approximately five miles to Gibbon on the north and about the same distance to Lowell on the south, towns thus formerly accessible to plaintiff for marketing and for other purposes. The county vacated this highway north and south of his land, abandoned both bridges and left him with a single outlet extending north 660 feet from his residence to a road running southwest along the south bank of the north channel of the Platte river a mile or more to a new graveled highway.

Plaintiff filed his claim with the county board, was awarded $125, and appealed to the district court.

The petition states a cause of action and contains in detail pleas that plaintiff's dwelling house and other farm

buildings are now on a blind road or *cul-de-sac;* that the distance to his public markets at Gibbon and Lowell is materially increased; that the former general traffic which created a market at his home for some of his farm products is diverted to other highways; that a former mail box and schoolhouse a few rods from his residence are more than a mile away; that these changes were caused by the changing of the highway; that the vacating of the old road decreased the value of his real estate to the extent of $5,000, for which he demands judgment.

The answer contains allegations to the effect that defendant opened, approximately three-fourths of a mile west of the property of plaintiff, between his markets at Gibbon and Lowell, a new highway which has been improved and graveled by the state; that the new highway is connected with his premises by a suitable, shorter road to his markets at Gibbon and Lowell; that the portion of his farm formerly occupied by the old road has been restored to him as a special benefit; that he has not been damaged by the change to any extent beyond $125, which defendant offers to pay. The answer contains also a general denial. Allegations of new matter in the answer were put in issue by a reply.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $125 only. From a judgment for that sum he has appealed.

By rulings on evidence and by instructions the trial court required the jury to disregard testimony tending to prove that the value of the farm was depreciated by the removal of the mail box and the schoolhouse and by the diversion of traffic. These rulings and instructions were properly challenged as erroneous and prejudicial. In respect to all damages recoverable the entire record is presented for review. The evidence shows without dispute that for many years a public highway extended north and south through plaintiff's farm and across both channels of the Platte river; that the action of the county board left his dwelling house on a blind road or *cul-de-sac;* that he has only one outlet; that by the present route it is more than

a mile from his farm buildings to the new traveled highway; that the distance to his markets is increased. There is also testimony tending to prove that, by the vacating of the old road and the creating of the *cul-de-sac,* plaintiff suffered damages not shared in common with the community at large; that the removal of the mail box and the schoolhouse and the diversion of traffic were necessary results of the changes and materially depreciated the market value of the farm.

The Constitution forbids the taking or damaging of private property for public use without just compensation. Const. art. I, sec. 21. The words "or damaged" as used in the section of the Constitution cited include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property. *City of Omaha v. Kramer,* 25 Neb. 489. The legislature made provision for the ascertainment and payment of damages to private property by the vacating of a public highway. Comp. St. 1922, sec. 2586. An appeal to the district court from an award of special damages to private property, caused by vacating of a public highway, is authorized by law. Comp. St. 1922, sec. 2600. Upon appeal from such an award the amount to which a landowner is entitled as a result of vacating a public highway through his premises must be ascertained "in the same manner as in actions by ordinary proceedings." Comp. St. 1922, sec. 2603. Neither Constitution nor statute excepts from just compensation for special damages to private property by the vacating of a public highway any loss or injury that reduces its value, special benefits considered. According to a familiar doctrine, a landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree. *Enders v. Friday,* 78 Neb. 510; *Lee v. City of McCook,* 82 Neb. 26; *Van Valkenberg v. Rutherford,* 92 Neb. 803; *Burkley v. City of Omaha,* 102 Neb. 308. The opinions in these cases, however, do not justify the conclusion that special damages, not suffered by the community at large, cannot be recovered. *Lindsay*

v. Omaha, 30 Neb. 512; *Mason City & Ft. D. R. Co. v. Kennedy,* 113 C. C. A. 412; *Gillespie v. City of South Omaha,* 79 Neb. 441; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343; *Jones v. City of Aurora,* 97 Neb. 825. In Nebraska compensation for private property taken or damaged for public use is measured by the following rule:

"Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239.

In a recent case the supreme court of Minnesota ruled:

"The owner of property abutting on a public highway has a special interest in the highway different from that of the general public. To recover damages for the obstruction or vacation of the highway, it is not essential that access to his property has been entirely cut off, but he cannot recover if his only complaint is that he is compelled to travel farther or over a poorer road in going to and from his property. The owner of land to which a public highway extends and one whose land does not come in contact with the highway occupy different positions. If, by the discontinuance of a highway running across, along or to the land in question it is left abutting upon a *cul-de-sac,* the owner is deemed to have suffered an injury not common to the public." *In re Hull,* 163 Minn. 439, 49 A. L. R. 320, 325; followed in *Jones v. City of Aurora,* 97 Neb. 825.

A careful annotator who had collected the cases on the same point said:

"The weight of authority supports the proposition that if, by the vacation or closing of a street, access to property from the general system of streets in that direction (is cut off), and the property is left fronting on a *cul-de-sac,* the owner may recover damages." 49 A. L. R. 351, and cases cited in note. See 5 R. C. L. Perm. Supp. p. 3311; *Park City Yacht Club v. Bridgeport,* 85 Conn. 366, 39 L. R. A. n. s. 478; *City of Chicago v. Burcky,* 158 Ill. 103, 29 L. R. A. 568; *Bannon v. Rohmeiser,* 90 Ky. 48; *Vander-*

burgh v. City of Minneapolis, 98 Minn. 329, 6 L. R. A. n. s. 741; *Neudoefer Silcox Co. v. Marting Bros. Co.,* 17 Ohio App. 286.

In harmony with the weight of authority, the view recently taken by the supreme court of Nebraska is indicated by the following expression of opinion:

"In the instant case, the three lots are used as one tract, having common improvements, and, in assessing damages, must be treated as a single piece of property, abutting on the vacated portion of the streets. In closing these streets and placing plaintiff's property at the end of a pocket street, her damage is different from that of the general traveling public, and she suffered damage special and peculiar to this property, and different from that of the general public." *Jones v. City of Aurora,* 97 Neb. 825.

Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the compensation to which the property owner is entitled, where he suffers damages not common to the public generally. Authority for this view is found in former opinions:

"The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343.

Where the owner of real estate is entitled to recover special damages, on the ground that it was depreciated in value by the vacating of a public highway intersecting it, he is entitled to the benefit of the following doctrine in connection with the general rule that the measure of damages is the difference between the value of the property immediately before and immediately after the making of the improvement:

"In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access,

and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement." *Gillespie v. City of South Omaha*, 79 Neb. 441.

It follows that the rulings of the trial court in requiring the jury, on the issue of value immediately before and immediately after the vacating of the highway, to disregard evidence relating to the diversion of traffic and to the removal of the mail box and the schoolhouse were erroneous to the prejudice of plaintiff.

The trial court also erred in omitting all material statements of the petition except one and in emphasizing every allegation of the answer, while instructing the jury; in reading to the jury from the answer of defendant an allegation of which there was no proof, without cautioning them that it should not be considered as evidence; in stating to the jury that the land of plaintiff is only three-fourths of a mile from the new highway, though the distance from his farm buildings is more than a mile by his only outlet; in giving credence to witnesses for defendant while examining them at length from the bench; in examining witnesses from the bench on elements of a defense not pleaded. It is not necessary to discuss these errors in detail since a new trial without the recurrence of them must be granted for the errors relating to evidence and instructions.

The judgment of the district court is therefore reversed and the cause is remanded for the purpose of ascertaining the amount of compensation to which plaintiff is entitled according to the statutory method—"the same manner as in actions by ordinary proceedings."

REVERSED.

VERUS SULLEY V. STATE OF NEBRASKA.

FILED MAY 23, 1930. No. 27293.

1. **Witnesses: EXAMINATION.** The statute providing that "a witness may be interrogated as to his previous conviction for a

felony" does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions.

2. ———: ———. Where a witness testifies in answer to a question on cross-examination that he had previously been convicted of a felony, the sustaining of an exception to another inquiry as to how many times he had been convicted of felonies is erroneous and reversible if shown to be prejudicial.

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

R. T. Coffee and *Allen & Requartte,* for plaintiff in error.

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

HEARD before ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Verus Sulley, defendant, was convicted of robbery, and for that felony was sentenced to serve a term of seven years in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

The principal assignment of error is directed to the sustaining of an exception to a question propounded to the state's witness, Lee Flowers, on cross-examination. He was asked: "Have you ever been convicted of a felony?" His answer was: "I have." He was then asked: "How many times?" To this latter question an exception was sustained by the trial court. Whereupon defendant offered to prove that the witness was convicted of burglary in 1924; of burglary in 1925; of carrying concealed weapons in 1926; of the sale of narcotics in 1928. Did the law require an answer to the question calling for the number of times the witness had been convicted of felonies, after testifying he had once been convicted?

The information charged that, on August 4, 1929, Verus Sulley, defendant herein, and Harlan A. Schlagel violently, intentionally and feloniously assaulted Lee Flowers, put him in fear and robbed him of $85. Lee Flowers and his

wife testified that the robbery charged was committed in their home in Omaha at night and they identified Harlan A. Schlagel and Verus Sulley as the robbers.

Lee Flowers, the victim of the robbery as charged, was the state's witness who, after stating he had himself been convicted of a felony, was asked on cross-examination: "How many times?" In sustaining the objection thereto, did the trial court err? The purpose of defendant in asking the question was to discredit the witness, either by eliciting an affirmative answer or by record proof that he had been convicted of other felonies. In this connection it is argued by defendant that the right to make the initial inquiry as to a conviction for a single felony, if answered in the affirmative, includes similar inquiries about other convictions for felonies. It has long been recognized that a conviction for a felony may have a tendency to discredit the convict as a witness and it may fairly be inferred that additional convictions may affect his credibility still further. On the other hand, it is suggested by the state that the Nebraska statute relating to this subject, as construed by the supreme court, limits the inquiry to a conviction for a single felony. The statute is in this language:

"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. 1922, sec. 8848.

Referring to the section quoted, the following rule was announced in a recent case:

"Where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry on the subject or to permit the record of the conviction to be introduced." *Bosteder v. Duling*, 115 Neb. 557, following *Vanderpool v. State*, 115 Neb. 94.

In the latter case cited, the language is different, but the import is the same, as indicated by the following excerpt from the syllabus:

"A defendant in a criminal prosecution becoming a witness in his own behalf may be asked on cross-examination whether he has previously been convicted of a felony, and

if he answers in the affirmative further examination along that line should cease."

The expressions, "it is error to allow further inquiry on the subject," and "further examination along that line should cease," refer to the single conviction disclosed by the testimony of the witness and, in the connection used, those rulings do not preclude an inquiry as to the number of convictions for felonies. The statute quoted does not terminate the right of inquiry after the disclosure of one conviction. The legislative intention to permit one inquiry disclosing a conviction implies, for the same purpose, the right to ask if there were others. In a former opinion delivered by Judge Root the following view was expressed:

"The defendant complains because he was asked on cross-examination whether he had not been twice convicted of a felony. The witness admitted he had been convicted once, but evaded the question with respect to the second conviction, and finally said the second time he pleaded guilty. It then became necessary for the state to show that a judgment had been entered on that plea, else the prosecutor could not lawfully ask the jury to consider the defendant's testimony in the light of the fact that he had twice been convicted of a felony. *Marion v. State,* 16 Neb. 349, 360. But nine questions were asked upon this subject, and seven of them were made necessary by the defendant's equivocation. We find nothing in the record to indicate a departure from a correct rule of practice with respect to these questions." *Johns v. State,* 88 Neb. 145.

This is in harmony with opinions of other courts. *Dively v. People,* 74 Colo. 268; *State v. Newlin,* 84 Or. 323; *People v. Eldridge,* 147 Cal. 782. In the latter case the court said:

"Section 2051 of the Code of Civil Procedure, which permits proof of the fact that a witness has been convicted of a felony to be given for the purpose of impeaching him, places no limitation upon the number of felonies of which it may be shown he has been convicted, and considering the purpose of allowing the proof at all, it is obvious that no such limitation could have been intended."

Upon mature deliberation it seems clear that the trial court erred in preventing the witness Flowers from stating

how many times he had been convicted of felonies. Whether such an error requires a reversal of the sentence pronounced by the trial court, however, depends upon the peculiar condition of the record. Four witnesses only testified directly to facts relating to the charge that defendant committed the robbery, two on each side of the issue raised by the plea of not guilty. One witness, the principal one for the state, was the alleged victim of the robbery, who admitted he had himself been convicted of a felony, and the other was his wife. Both testified to details of the robbery and identified defendant as one of the robbers. Defendant testified in his own behalf that, at the time of the robbery, he was at the home of his mother in a different place and did not commit the robbery or participate in it. There was no evidence that defendant had ever before been convicted of a felony and there was additional proof of his alibi. The other witness who testified directly was Schlagel, who admitted he had been convicted of the identical felony charged and testified that defendant was not present at the robbery and had nothing to do with it and that another fellow whom he called "Bud" was with him. The conviction depended largely on the state's witness who admitted he had been convicted of a felony and who was prevented from stating how many times he had been convicted of felonies. Without holding that an error of this kind is prejudicial as a general rule, the conclusion is that a reversal herein is required under the peculiar conditions disclosed by the present record. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

EDWIN B. HELLER, APPELLEE, V. HERMAN SPEIER, APPELLANT.

FILED MAY 23, 1930. No. 27085.

1. **Affirmance.** The evidence examined, discussed in the opinion, and *held* sufficient to sustain the verdict of the jury.
2. **Contracts: RESCISSION: BURDEN OF PROOF.** Rescission is an affirmative defense and a question of fact for the jury, the

burden of proving it by a preponderance of the evidence being upon the party pleading it.

3. ———: BREACH: MEASURE OF DAMAGES. The measure of damages for a breach of contract to repurchase corporate stock is the amount the seller has agreed to pay the buyer as the repurchase price.

4. Evidence: CORPORATE STOCK: MARKET VALUE. Where corporate stock is held almost entirely by the president of the corporation, members of his family and employees of the corporation, and not listed on any stock exchange or market and not freely bought and sold in the open market, financial statements of the corporation, prepared by an accountant employed by the corporation and forming part of the records of the same, showing the assets and liabilities of the corporation and acted upon by the corporation as correct statements of its financial condition, are receivable in evidence to show the market value of such stock.

5. ———: ———: ———. Testimony of witnesses familiar with the values of stocks and bonds generally and with their market values, knowing the reputation of the corporation, the nature of its business and the reputation the corporation bore to the stock buying community, and also testifying to the assets and liabilities of the corporation as shown by a financial statement of the corporation forming part of its records and acted upon by it as a correct statement of its financial condition, is competent as to their opinion of the market value of such stock.

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

Frank A. Peterson, Charles F. Adams, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg,* for appellant.

Sanden, Anderson, Laughlin & Gradwohl, contra.

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

MESSMORE, District Judge.

This action for damages was brought by appellee against appellant, president of Speier's, incorporated, upon a certain contract in writing which provided for the repurchase of stock in said company by appellant from appellee should appellee leave the company's employ. Appellee's employment, by mutual agreement of the parties,

terminated on April 28, 1928, and this suit was brought to recover the value of the stock as of such date under the provisions of said contract.

Appellee's petition alleges that on or about July 1, 1922, he purchased 40 shares of the common stock of the Speier & Simon corporation, of Lincoln, Nebraska, for $125 a share, at which time appellee and appellant entered into a written contract; that subsequently they agreed to a modification thereof, appellee to return to appellant 20 shares of said stock and appellant to cancel a promissory note of $2,500 referred to in said contract, which was done; that in all other respects the contract remained in full force and effect; that appellee's contract of employment was by mutual consent terminated on April 28, 1928, and at that time appellee demanded of appellant the market value of the remaining 20 shares of stock and tendered to appellant said shares; that appellant refused and failed to pay appellee the market value of said stock, which at that time was worth $1,000, and for which amount, with interest, appellee prays judgment.

Appellant's answer admits the purchase of 40 shares of common stock in said company from appellant by appellee for the sum of $125 a share and that said contract was made and entered into as alleged; alleges that the repurchase contract was rescinded by the parties when the dividend note was canceled and the corresponding 20 shares returned to appellant in January, 1928.

Appellee's reply is a general denial.

The evidence adduced at the trial shows that appellee entered the employ of the Speir & Simon Company in 1916. Mr. Simon subsequently left the company and appellee remained in the employ of Speier's, incorporated. On July 1, 1922, appellee and appellant entered into a written agreement whereby appellee was to purchase from appellant 40 shares of common stock in Speier's, incorporated, at $125 a share.

Appellee testified that appellant stated that he would have to have the books of the company gone over by a man at the First National Bank to determine what he should

sell the stock for to appellee. Appellee purchased 20 shares outright for $2,500, giving his note for the balance for $2,500, the entire 40 shares to be held by appellant as collateral security. The stock was issued in two certificates of 20 shares each. The $2,500 note was to be paid for out of dividends on the stock, appellant to receive 6 per cent. interest on the note. There were no dividends paid. In January, 1928, the parties orally agreed that appellant should cancel the $2,500 note and retain the stock for which the note was given. This was done. Appellee terminated his employment with appellant on April 28, 1928, and tendered appellant the 20 shares of stock in question in this case. The contract provided that appellant agreed to repurchase the stock at the termination of appellee's employment at the market value of the stock at that time.

Appellee further testified to the balance sheet prepared by Mr. Buckley, an accountant for Speier's, incorporated; also to the nature, condition, volume and expansion of the business and its losses; further, that appellant refused to buy the stock, asserting it had no market value; and that its market value, in appellee's opinion, on said April 28, 1928, was $45 a share.

Alfred Exley, appellant's bookkeeper and office manager from June, 1918, until appellee left the company's employ, testified that he had complete control of the books of the company, that his duties made him familiar with the business, that the company had made a good deal of money until recently, having built its capital of $18,000 up to a net worth of $131,713 in April, 1928; that later it had operated at a loss and, had all the losses been paid off at the time appellee's employment was terminated, the company then would have had assets of $131,713 more than its liabilities; the good-will of the company in addition to this was worth at least $4,000 to $5,000; the company had a very good reputation; he knew of the sale of 10 shares of stock of the company to a Mr. Davison in the latter part of 1927 at $100 a share; that the trial balance book received in evidence was prepared under his direction to the approval of Mr. Speier showing assets and liabilities of the

company, and the market value of the stock, as shown by such trial balance book as of April 30, 1928, was between $42 and $43 a share; that he bought and sold stock and was familiar with the conditions of transfers of stock in Speier's, incorporated, during the past 8 or 10 years, giving his opinion as to the market value of the stock on April 28, 1928, as being between $42 and $43 a share, having testified to a hypothetical question asked of him of the various facts concerning the assets, liabilities, reputation and general financial condition of the company as well as the 10 shares of stock sold to Mr. Davison by Mr. Speier.

Merlin L. Springer, secretary and treasurer of the Commerce Trust Company for more than five years, testified that he dealt in stocks and bonds and was familiar with such values and with the general reputation of Speier's, incorporated, and with the stock buying community on April 28, 1928; that his company had handled $50,000 of the preferred stock of one of Mr. Speier's competitors, Ben Simon & Sons, and in answer to a hypothetical question which included the reputation of the store, the poor merchandising years for the past few years, the increase in volume of business of the company for the past few months, the cut in overhead, his experience in the stock and bond market, the assets of the corporation, as shown by the trial balance book and financial statement of the company on April 30, 1928, said assets amounting to $463,861.03, and after deducting all liabilities from these assets, there would be left $131,713.85; further, that the preferred stock outstanding was $70,000 and common stock outstanding $145,000, gave it as his opinion that the market value of the common stock was $30 to $32 a share.

Appellant testified that he did not consider the common stock worth anything on April 28, 1928; in his opinion the corporation was insolvent at the time appellee's employment terminated; the company had lost money, a great deal of its loss being due to its expansion and the general conditions existing in the merchandising business following the depression; that he owned $58,000 of the preferred stock of the company and $130,000 of the common stock;

that appellee's note was canceled in January, 1928, appellant retaining the 20 shares of stock evidenced by appellee's note and returning to appellee the 20 shares for which he had paid cash; admitted the filing of an answer in bankruptcy which denied that his company was insolvent as late as May 10, 1928.

Mr. Waugh, vice-president of the First Trust Company of Lincoln, testified he was familiar with the stock and bond market; had examined the April, 1928, statement and was familiar with the general condition of business on April 28, 1928; testified in answer to a hypothetical question similar to that asked Mr. Exley and Mr. Springer and gave as his opinion that the common stock had no market value at that time; testified to an option procured by his company to purchase all of Mr. Speier's stock for $5,500 and that this option was never exercised.

Mr. Buckley testified that he had been an accountant for Speier's, incorporated, for a number of years; had made monthly reports of the business continuously and prepared the trial balance sheet heretofore referred to; that the business had suffered enormous losses and there was no improvement generally; creditors were pressing for payments of obligations; that his monthly reports did not take into account the market value of any of the assets of the corporation and the value of the real estate was fixed in arriving at his reports and that the stock had no market value.

The first assignment of error of importance claimed by appellant is that the contract was rescinded in January, 1928, at the time appellant canceled appellee's note and delivered to appellee the 20 shares for which appellee had paid cash.

There is nothing in the evidence to show that either party, or both, concluded that this action on their part was a rescission of the contract. At most it was modified by the parties to it in January, 1928, by canceling the note which was to have been paid out of dividends on the stock and indorsing the corresponding stock certificate to Speier. This was done. The contract provided that appellant was

to repurchase all the stock at its market value when appellee terminated his employment with appellant. There remained essential elements of the contract to be performed by the parties to it. There is no inconsistency. The evidence will not support rescission. The parties by the agreement of January, 1928, did not cancel, annul or revoke the contract, no new contract existed, but the original contract was reduced, qualified and limited and the jury passed upon this question.

Rescission is an affirmative defense. *Herpolsheimer v. Christopher,* 76 Neb. 355, where the court stated in the opinion that whether rescission and abandonment of the contract by the plaintiff took place at the time the notes were delivered to him is a question which should have been submitted to the jury. *Bartlett v. Scott,* 55 Neb. 477. In the latter case the court declined to weigh conflicting evidence, stating the evidence bearing on rescission to be conflicting and hopelessly irreconcilable. The question of rescission was submitted to the jury in that case as a question of fact. In 13 C. J. 789, sec. 1010, it is stated that it is for the jury to determine whether facts relied on as constituting a breach justifying a rescission have been established.

Appellant did not plead rescission in the municipal court, but did plead it in the district court. Appellee moved to strike this defense from appellant's answer in the district court upon the ground that it changed the issues that were tried in the lower court. This motion was overruled. Appellee's motion was proper. The municipal court and the county court having the same jurisdiction in so far as this case is concerned, the rule as set forth in *Sloan Commission Co. v. Fry & Co.,* 4 Neb. (Unof.) 647, and in *Bankers Union of the World v. Favalora,* 73 Neb. 427, would apply. Appellant received the benefit of this affirmative defense, the same being a question of fact for the jury, and, failing to prove the defense of rescission by a preponderance of the evidence, he cannot now complain.

Appellant cited as error that the trial court did not submit to the jury the proper measure of damages, his contention being that the measure of damages is the difference

between the contract price and the market value, and since, in the contract, the contract price was the market value, there can be no difference between these two amounts.

The contract, as we construe it, provides that the original seller agreed to repurchase the stock from the original purchaser at the market value of the stock at the time the original purchaser terminated his employment with the original seller. Appellee terminated his employment with appellant April 28, 1928. The market value of the stock as of that date is the basis of recovery and made so by the parties to the agreement. The court instructed the jury accordingly. The contract is clear and conclusive as to the basis of recovery.

We are inclined to follow the rule heretofore laid down in this class of cases that the measure of damages for a breach of contract to repurchase stock or other property is the amount which the original seller has agreed to pay the original buyer as the repurchase price rather than the difference between the contract price and the market value. *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370; *Stratbucker v. Bankers Realty Investment Co.,* 107 Neb. 194; *Grotte v. Rachman,* 114 Neb. 284; *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419. Appellee's damages, if any, were the market value of the stock on April 28, 1928, and were a matter of proof and a question of fact for the jury.

The next assignment of error advanced by appellant is that the verdict is not sustained by the evidence and that the assessment of the amount of recovery was too large under the evidence. Most of the evidence relating to market value of the stock has heretofore been set out. The stock was not quoted or listed on any exchange or market and was held almost exclusively by appellant and his family. Appellee resorted to the books of the company and sought by expert testimony to determine the market value of the stock from said books. The evidence discloses that the purchase of the stock in the first instance was made by appellee after appellant had arrived at the figures the stock should sell for from the books of the company.

Where corporate stock is not listed or freely bought and sold in the open market, the assets and liabilities are ad-

missible to show the market value of the stock. In *Rewick v. Dierks Lumber & Coal Co.*, 109 Neb. 300, this court held: "On the question of the value of corporate stock, statements prepared by expert accountants employed by the corporation, forming part of the records of the same and acted upon by the corporation as correct statements of its financial condition, are receivable in evidence as admissions against interest."

From the evidence the jury could very properly return a verdict for the amount returned in this case. The verdict is sustained by the evidence and is not contrary to law.

A number of other errors are assigned; but, while we have carefully considered them all and have read the record and appellant's brief, we do not deem it necessary to refer to them further. We find no prejudicial error in the record and the judgment is

AFFIRMED.

BANK OF COMMERCE OF LOUISVILLE, APPELLANT, V. TILLIE MCCARTY, APPELLEE.

FILED MAY 29, 1930. No. 27211.

1. **Bills and Notes:** NOTE BY WIDOW FOR DEBT OF DECEASED HUSBAND: WANT OF CONSIDERATION. A note given by a widow for the payment of a debt due from her deceased husband's estate, which estate is insolvent, is voidable in law, without a new consideration; and such consideration will not be raised by an agreement on the part of the creditor that the note will be renewed from time to time after maturity.
2. **Evidence:** FORGERY: OPINION OF WITNESSES. The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.
3. ———: COMPARISON OF WRITINGS BY EXPERTS. The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action.
4. ———: FORGERY: WEIGHT OF EVIDENCE. Testimony of handwriting experts that a promissory note offered in evidence is a forgery and does not bear the genuine signatures of the makers

thereof, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of witnesses that they saw the note executed.

5. **Bills and Notes:** FORGED NOTE: RIGHT OF ACTION. A forged instrument may not, in absence of a new and adequate consideration, or of elements of estoppel, be ratified by the purported makers thereof so as to confer on the forger himself a right of action thereon.

6. ———: RENEWALS: DEFENSES. As between original parties, and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note.

7. **Evidence** examined, and *held* sufficient to support the judgment.

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

Jesse L. Root and *C. A. Rawls*, for appellant.

W. R. Patrick and *D. O. Dwyer, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

EBERLY, J.

Suit by plaintiff upon two causes of action consisting of two promissory notes each dated June 30, 1927, due "on demand," payable to plaintiff, and each bearing the signature of defendant as the sole maker thereof, one of which was for $5,000 and one for $1,000.

The issues presented by the record in this cause include: (1) Whether the defendant was induced to sign the instruments in suit by alleged fraudulent representations of the plaintiff; (2) whether the notes in suit were based upon adequate consideration; (3) whether the notes which plaintiff claims constituted the consideration for the notes in suit were forgeries; (4) and whether the defendant, who at all material times prior to March 12, 1926, was a married woman, ever charged her separate estate with the payment of any of the obligations to the bank.

There was a trial to a jury in the district court which resulted in a general verdict and finding for the defendant

as to both causes of action. From a judgment entered thereon, and an order denying a new trial, plaintiff appeals.

The transaction under investigation here opens with the evidence on behalf of the plaintiff of a promissory note payable to the plaintiff bank or order, dated August 22, 1924. The original of this note was not produced, but by secondary evidence the plaintiff seeks to establish it as an instrument executed by Robert McCarty and Tillie McCarty which was carried on the records of the bank as note number 5640. The execution of this note is positively denied by the defendant. Plaintiff sought to introduce in evidence a purported copy of note number 5640, which is identified in the record as exhibit B. This copy had been prepared by the witness on the Friday or Saturday preceding the trial in the district court without having the original in his possession and without making a comparison therewith. On objection, this purported copy was excluded and this ruling of the trial court is challenged as prejudicially erroneous. Without any determination of the technical correctness of the ruling challenged, we are of the opinion that the plaintiff was in no manner prejudiced thereby. Exhibit B contained no words charging "the sole and separate property" of Tillie McCarty as a *feme covert,* save and except: "I, Tillie McCarty, do hereby charge my *personal* estate with the payment of this note." (Italics ours.) At the time of entering into this obligation, according to the evidence of the plaintiff, the sole and separate estate of the defendant consisted of real estate only.

" 'Personal estate,' while a term of wide signification, is not ambiguous or uncertain, its common and legal meaning being entirely clear. In its ordinary legal signification it is understood to embrace every species of property not of a freehold nature, including intangible personal property as well as tangible. It may appear, however, from the surrounding circumstances that the term is used in a more restricted sense, as in the sense of personal effects, or tangible personal property." 48 C. J. 1046, citing *Maxwell v. Maxwell,* 106 Neb. 689; *Stearns v. Stearns,* 103 Conn. 213.

It may be conceded that the wife may pledge certain of her separate estate to the payment of this indebtedness of her husband (for which she is surety), and to the extent of the proceeds of such property her separate estate will be bound. But the right of the creditors to recover against her separate estate extends no further the limitations imposed by the terms of her contract. *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Northwall Co. v. Osgood,* 80 Neb. 764. In the instant case, the terms of exhibit B, above quoted, apparently limit the payee to recover against the "personal" estate of the wife only. And, though carrying the burden of proof, the plaintiff, so far as disclosed by this record, wholly failed to establish that the defendant possessed any personal estate at the time that this engagement was assumed by her, in view of the rule that the contract of a married woman as surety can only be enforced against the separate estate she possessed at the date of the contract referred to or described therein. *Kocher v. Cornell,* 59 Neb. 315; *Giltner State Bank v. Talich,* 115 Neb. 236. It would seem that the ruling of the trial judge in excluding exhibit B, if erroneous, would be error without prejudice. Certainly this conclusion is inescapable in view of the fact that oral evidence as to the exact terms of note 5640 was subsequently received, which was indeed more favorable to the plaintiff's contention than the terms of the rejected copy.

Proceeding now to the merits of the case, it may be said that the evidence in the record is conflicting. It is not claimed on behalf of the bank that prior to the execution of the notes in suit the defendant was obligated to the bank in any other capacity, save as surety on her husband's obligations. For this purpose it is insisted on the part of the bank that the defendant expressly bound her separate estate. The testimony on behalf of the bank tends to establish that about August 22, 1924, the defendant and her husband executed and delivered to the bank a joint note number 5640 in the sum of $5,000 which, according to the oral evidence introduced on behalf of the plaintiff, contained a clause binding the separate estate of

the wife; that subsequently note number 6367 was taken by the bank in renewal of 5640. This note, number 6367, bore date August 22, 1925, was for the sum of $5,000, due "on demand," and purported to bear signatures of "Robt. McCarty" and "Tillie McCarty," his wife. Robert McCarty died March 12, 1926. Subsequently, on July 6, 1926, a claim was filed in behalf of the bank in the probate court and in the estate of Robert McCarty based upon the promissory note number 6367, and also one of $200 and one of $300, the latter two notes being executed by Robert McCarty only. These claims were duly allowed. The estate of Robert McCarty proved insolvent, and on May 21, 1927, a dividend amounting to $242.42 was received by the bank, "being the first and final dividend." After this sum had been received by the bank it secured from the defendant the two notes now in suit, which are renewals of note number 6367 and the two notes aggregating $500 and interest, less the dividend received and which had been allowed as a claim against the estate of Robert McCarty. So far as disclosed by the probate records before us, Mrs. McCarty received nothing from her husband's estate, save and except the widow's allowance of $1,200 and certain uncollected accounts of doubtful value "in lieu of deceased's exemptions." We do not understand that the allowance of this claim by the county court was in legal effect to charge the defendant with a personal liability for its payment. Indeed, very respectable authority has determined that "A note given by a widow for the payment of a debt due from her deceased husband's estate, which estate is insolvent, is void in law without a new consideration; and such consideration will not be raised by an agreement on the part of the creditor that the note will be renewed from time to time after maturity." *Paxson v. Nields*, 137 Pa. St. 385. It would seem beyond question that the defendant's liability on the notes in suit must be sustained, if at all, upon her own acts in assuming her engagements.

Before entering into a discussion of the conflicting evidence, it may be noted that it is conceded by all parties to

this litigation that the name of Tillie McCarty, appearing in and as subscribed to the promissory note number 6367 of $5,000 which constituted the major portion of the consideration of the notes in suit, was never written by Tillie McCarty, and it is not contended by the bank that the defendant received any of the money represented by this note, or any of the notes of which this note last referred to constituted a renewal, and that none of such moneys entered into or became a part of or in any manner increased or enhanced her separate estate.

It is claimed on the part of the bank that Mrs. McCarty orally adopted the signature affixed to note number 6367 as her own; that the bank thereupon accepted this note in reliance on this fact and canceled and delivered note number 5640 to McCarty. On this point the testimony of the vice-president, one of the active officers of the bank, is that note number 6367 of $5,000 was first handed to him by Robert McCarty. At this time it bore the signature of Robert McCarty only, and that witness thereupon told McCarty: "We had his wife's name on a previous note and had been carrying her as one of the joint makers of the note and that we would not accept this note until she signed it;" that McCarty took the note "and later on, either that day or the next, I can't remember now, returned the note to the bank in the condition that you now see it;" that thereupon it was accepted by the bank, and that later Mr. Cleghorn and Mr. Larson, the cashier, called witness' attention to the signatures and to the fact "that the signature of Mrs. McCarty did not resemble her signature," that the matter was discussed by witness with Mr. Larson, and as the result of the conversation Mr. McCarty was called up and invited to come down to the bank. After he appeared and after a conversation with him, Cleghorn was sent by the bank officers to see Mrs. McCarty to have the signature authenticated. Witness Cleghorn qualifies and testifies that the signature "Robt. McCarty" attached to note number 6367 he knows to be the signature of Robert McCarty. Mr. Cleghorn testifies that he performed certain duties in the bank, and that Mr. Hastain,

the vice-president, requested him to put some notes he had in the note file, or "note case," as he called it. One of these was note number 6367. On examining the signatures on this note this witness states that he noticed the two signatures on this note "Robt. McCarty" and "Tillie McCarty," and he "called Mr. Larson's attention to it, that they looked so much like they were written by the same person," and that afterwards he called Mr. Hastain's attention to it. And this witness also testifies that he personally later presented this note to Mrs. Tillie McCarty, that when he arrived at the McCarty home he told Mrs. McCarty what it was and that it was a note Mr. McCarty had handed to the bank with her name to it, and that "I wanted her to verify her signature," and that Mrs. McCarty thereupon said: "That is all right, Mr. Cleghorn. Whatever Bob does is all right with me."

The defendant in her testimony expressly denies that she signed notes 5640 and 6367, contradicts the evidence of bank's witness Cleghorn, and expressly denies that she "admitted" or ever acknowledged the signature purported to be her own subscribed to note 6367, and wholly denies that she employed the language testified to by witness Cleghorn.

Wallace O. Shane, whose method as a handwriting expert was before this court in the case of *In re Estate of O'Connor,* 105 Neb. 88, testified on behalf of the defendant as an expert that he had examined the signatures attached to note 6367, the handwriting of the decedent Robert McCarty and also of the defendant Tillie McCarty as disclosed by specimens thereof admitted to be genuine, and also a certain exhibit admittedly written by the vice-president of the plaintiff bank. The method of the examinations followed and the reasons for the conclusions of the witness as testified by him in this case were substantially the results of the methods identical with those set forth and described in the case of *In re Estate of O'Connor, supra.* Shane's testimony was to the effect that the signatures attached to note 6367 were not written by either Robert McCarty, the deceased, or Tillie McCarty, the defendant,

but were written by the vice-president, one of the acting officers of the plaintiff bank. The jury's verdict in this instant case was consistent with his testimony which, if sufficient, establishes the facts to be that the signatures in question were forged. In the *O'Connor* case, *supra,* which was a civil action involving the alleged forging of a will, this court reversed the trial court and denied probate to the instrument offered, and in so doing announced the following principles:

"The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writings has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.

"The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action.

"Testimony of handwriting experts that a will offered for probate is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will executed."

The verdict of the jury in the instant case being a general finding in favor of the defendant, it would seem to follow that the evidence is such as supports the contention of the defendant that the signatures to note 6367 are in truth and in fact forgeries. If this forgery occurred, it must be regarded in law as the forgery of the plaintiff bank of paper by its terms payable to the bank, purporting to arise out of a transaction with the bank, and with no innocent parties involved, save and except the defendant. Such being the case, the bank is responsible for it. In this view of the situation the questions of ratification and estoppel claimed in favor of the plaintiff must be considered as arising in an action or transaction seeking to enforce an instrument forged by plaintiff against the defendant as the purported maker thereof, who in truth under the facts in this case received no part of the consideration involved in the transaction.

The terms of our negotiable instruments act applicable are: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority." Comp. St. 1922, sec. 4634.

Is the defendant here "precluded" from asserting the invalidity of note number 6367? Certain cases hold that irrespective of estoppel or new consideration a forgery may be ratified. *Ofenstein v. Bryan,* 20 App. D. C. 1; *Hefner v. Vandolah,* 62 Ill. 483; *Goodspeed v. Cutler,* 75 Ill. 534; *Paul v. Berry,* 78 Ill. 158; *Murtaugh v. Colligan,* 28 Ill. App. 433; *Casco Bank v. Keene,* 53 Me. 103; *Greenfield Bank v. Crafts,* 4 Allen (Mass.) 447; *Bartlett v. Tucker,* 104 Mass. 336; *Wellington v. Jackson,* 121 Mass. 157; *Central Nat. Bank v. Copp,* 184 Mass. 328; *Corser v. Paul,* 41 N. H. 24; *Howard v. Duncan,* 3 Lans. (N. Y.) 174; *Shroyer v. Smeltzer,* 38 Pa. Super. Ct. 400; *Shannon v. Castner,* 21 Pa. Super. Ct. 294; *Crout v. DeWolf,* 1 R. I. 393. An examination of these cases discloses that a controlling element therein is "The promissor had full knowledge of the facts affecting his rights."

Assuming the testimony of the defendant to be true, she did not possess this knowledge at the time of the transaction pertaining to note number 6367 at the time she signed the notes in suit, and in addition thereto certain misrepresentations were made by the bank's representatives. But, aside from the misrepresentations made by plaintiff testified to by defendant, it would seem that the doctrine announced by the Minnesota case is in point. In *Wilson v. Hayes,* 40 Minn. 531, where alteration had been made in a promissory note, the court, after referring to the conflict of authority, said:

"Where the ratification is made to a third party—the holder of the instrument, who was not a party to the forgery

—we are not called upon to decide whether or not such ratification would create a valid liability on the instrument. All the authorities cited by appellant to the effect that a forgery may be ratified are of this class. But we have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally impossible in such a case that the relation of principal and agent could exist between the parties, for one man cannot be the agent of another to make a contract with himself. Hence, it would seem that the doctrine of ratification can have no application to such a case. * * * But where there has been a fraudulent alteration of a written contract, which not only destroys the instrument but extinguishes the debt, it seems to us clear on principle that a subsequent assent to the alteration, given to the party who made it, without any new consideration, is, in any view of the case, a mere naked promise."

Indeed, a line of well-considered cases evidence the doctrine that without estoppel or a new consideration a forgery cannot be ratified. *Owsley v. Philips*, 78 Ky. 517; *Warren v. Fant's Trustee*, 79 Ky. 1; *Garrott v. Ratliff*, 83 Ky. 384; *Young's Admr. v. Hildreth*, 1 Ky. Law Rep. 401; *Workman v. Wright*, 33 Ohio St. 405; *Hood v. Nichols*, 7 Ohio Dec. 157; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; *Shisler v. Vandike*, 92 Pa. St. 447; *Second Nat. Bank v. Wentzel*, 151 Pa. St. 142; *Henry Christian Building & Loan Ass'n v. Walton*, 181 Pa. St. 201; *Bucher v. Meixell*, 5 Pa. Dist. Rep. 375; *Boone v. Citizens Bank & Trust Co.*, 154 Tenn. 241.

It is to be remembered in the present case that defendant's evidence in the record tends to establish that, in the absence of knowledge on the part of the defendant as to the real nature of note 6367, the plaintiff bank secured its due allowance as a valid claim against the estate of Robert McCarty. Thereafter, while defendant was still in ignorance of the forgery, it also secured her signatures to the notes in suit ostensibly in part as renewal of note 6367. To do this, pressure was exerted, misrepresentations made,

and while defendant was in ill health, and in ignorance of the true facts as to note number 6367, she signed the instruments in suit which are payable "on demand." During these transactions, if witness Shane's evidence is true, the plaintiff bank was at all times chargeable with knowledge that note number 6367 was in truth a forgery which had never been executed either by McCarty or by the defendant. Therefore what the defendant did could in no manner have misled or deceived the plaintiff in this action. If this be true, it could not have been prejudiced in any manner or degree by the acts of the defendant. This court is committed to the doctrine that as between the original parties a renewal note is subject to the same defenses as the original. *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *Nebraska State Bank v. Walker,* 111 Neb. 203. We are also committed to the view that, where material and fraudulent alterations are made in a bond evidencing an indebtedness, the bond and debt evidenced thereby are canceled and neither may be enforced against the promissor. *David City Building & Loan Ass'n v. Fast,* 114 Neb. 621. In this case, there being an absence of the elements of estoppel, a new and adequate consideration is required to support the notes in suit, which evidence of the defendant tends to establish did not exist. *Kansas Mfg. Co. v. Gandy,* 11 Neb. 448; *Linton v. Cooper,* 53 Neb. 400.

It is true that the evidence as to note number 6367 being a forgery is sharply conflicting, and the same is true as to the other material points of dispute between the plaintiff and defendant, but a careful examination of all the instructions in the light of the record has convinced us that these disputed questions of fact were properly submitted to the determination of the trial jury and that the evidence before us sustains the verdict which they have returned.

It follows therefore that the judgment thereon is correct and is

AFFIRMED.

WILLIAM B. PRICE, APPELLANT, V. WILLIAM A. FRASER ET AL., APPELLEES.

FILED MAY 29, 1930. No. 27004.

1. **Beneficial Associations.** The Woodmen of the World Life Insurance Association, a fraternal beneficiary society, erected a building in Omaha, a part of which it rented to tenants. Under the law of the state of Nebraska, and its articles of incorporation, it had the power to sell said building.
2. **Quaere.** The question as to whether the Woodmen of the World, a fraternal beneficiary society, had the power under the law to purchase or erect a building, a major part of which is not used by it but rented to tenants, is not presented to the court in this case, and is expressly not determined herein.
3. **Corporations: POWERS: DISPOSAL OF PROPERTY.** All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except as they are restrained by statute, or are prohibited by their articles of incorporation or outstanding contracts; and under this general power a corporation may dispose of the whole of its property for any lawful purpose. *Tash v. Ludden*, 88 Neb. 292.
4. ———: ———: ———. If such an association has not the power to acquire such property, then it has no power to hold it and would be required to dispose of it.
5. **Record** examined and no direct evidence of fraud or lack of good faith on the part of the officers of the Woodmen of the World found therein.
6. **Corporations: FRAUD: PRESUMPTION.** Transactions between corporations having common officers and directors are presumptively fraudulent and the burden is upon the defendants to sustain the transactions by clear and convincing evidence that they were fair.
7. ———: **SALE OF PROPERTY: VALIDITY.** While the court will closely examine for possibility of fraud transactions where the director of a corporation which purchases property is also a director in the corporation which sells the same, such sale, however, is not unlawful and not void, but voidable only, and will be set aside only after a finding that the financial interest of such director is such that he could not have honestly performed his duties as director of the selling corporation. Such a sale will not then be set aside if made in good faith and for an adequate consideration.
8. **Contracts: SETTING ASIDE: INADEQUACY OF CONSIDERATION.** Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside

for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.

9. **Evidence** examined as to adequacy and fairness of consideration, and *held* that defendants have established by clear and convincing evidence that the consideration in this case for the leases and sale of the property in question is fair and adequate.

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

W. B. Price, C. J. Campbell, John M. Stewart, Don W. Stewart, John P. Breen and *G. E. Hager,* for appellant.

Mullen & Morrissey, Morsman & Maxwell, Brogan, Ellick & Raymond, De E. Bradshaw, J. M. Sturdevant, Calfee, Fogg & White and *Chapman, Cutler & Parker, contra.*

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

DAY, J.

This is an action in equity brought by the plaintiff, on behalf of himself and other members of the Sovereign Camp of the Woodmen of the World, to set aside certain leases and conveyances relating to its home office building, and to quiet title in the association in the same, for that they were fraudulently made by defendants. Plaintiff appeals from a decree in favor of defendants.

The defendant Sovereign Camp of the Woodmen of the World is an incorporated fraternal beneficiary association of Nebraska, and the defendants William A. Fraser, John T. Yates, and De E. Bradshaw are, respectively, its Sovereign Commander, Sovereign Clerk, and general counsel. The defendant Woodmen Building Corporation is a Nebraska corporation which was organized by defendant Byllesby & Company as a holding company and which secured by a circuitous route through defendant William H. Short a 99-year lease upon the property in question from the Woodmen of the World Life Insurance Association for $1,000,000 cash and an annual rental of $44,000 a year. This lease was made to defendant Short as trustee and

assigned by him to the building company. Shortly thereafter the building company secured an option to purchase the fee to said real estate. Simultaneously with the execution of the 99-year lease, another lease was executed by the building company to the life insurance association, leasing for a period of 8 years at an annual rental of $112,668 the quarters occupied by them in said building. This lease was coincident with, and a part of, the 99-year lease. The defendant Continental and Commercial Trust and Savings Bank and William P. Kopf are trustees by mortgage deed from the building company upon its 99-year leasehold. One million, one hundred and twenty-five dollars in bonds were issued, which are secured by this mortgage deed. The defendant Guardian Trust Company is trustee of the fee title by virtue of a deed to it from defendant Albert J. Twerell, who took the title to the fee from the life insurance association. A declaration of trust was issued by the Guardian Trust Company by which it declared that it had issued land trust certificates in the nature of mortgage bonds, totaling $700,000. The plaintiff alleges in his petition that the transfers and lease were fraudulent, *ultra vires*, and void, as against the plaintiff and other members of the association. He asks the court to set aside and cancel the deed from the life insurance association to Twerell as trustee, the deed from Twerell to the Guardian Trust Company, the declaration of trust of the Guardian Trust Company, the option of the building company to purchase, the 99-year lease by the life insurance association to Short as trustee, and its assignment by him to the building company, and the 8-year lease from the building company to the life insurance association.

The trial court found for the defendants upon all the issues. It found that the various leases and conveyances of said property were each and all made upon adequate consideration, and in good faith and without fraud; that they were made in conformance to the statutes of the state of Nebraska, and the articles of incorporation of the Sovereign Camp of the Woodmen of the World; that the charges of fraud and wrongdoing made by plaintiff relative to these

transactions were not sustained by the evidence, and that his petition should therefore be dismissed.

This skeleton outline of the case will enable us to better understand the issues. We purpose to consider this transaction step by step; to analyze the testimony relative to each transaction; to determine with deliberation the effect of each detail upon our ultimate conclusion and thus to arrive at our judgment by a trial *de novo* from the record in this case.

Let us first consider and discuss whether the various leases and conveyances were made in conformance to the statutes of the state of Nebraska and the articles of incorporation of the Sovereign Camp of the Woodmen of the World. Mr. Fraser negotiated the 99-year lease on the property with Byllesby & Company, investment bankers of Chicago. It would perhaps be helpful to follow through the history of this transaction. It indicates a prolonged and persistent effort on the part of Mr. Fraser to dispose of this property. At a special session of the executive council, held at San Antonio, Texas, April 5, 1926, he reported as follows:

"Our Building In Omaha.

"For some considerable time I have been convinced that if we could dispose of our Woodmen of the World building in Omaha, at a reasonable price, it would be to the interests of the organization in general. During all of 1925 I had been investigating the prospects of a sale to some of the institutions in Chicago which promote large real estate transactions, but I found it difficult to interest any of them when the discussion came to selling buildings outside of Chicago."

While there is no record that the executive council directed such activity on the part of the Sovereign Commander, there is also no record of any opposition to it. Coupled with the subsequent approval of the various transactions involved in the leasing and sale of the property, we are driven to the conclusion that it had at least the tacit approval of the council. First, Fraser negotiated a sale of the property for $1,610,000 to a representative of A. C. Allyn

& Company of Chicago. This sale was not consummated because Allyn & Company after an inspection and examination refused. Thereupon Fraser negotiated the controversial lease. The lease was made and delivered to one Short, who took it as agent and trustee for Byllesby & Company. This tentative lease was presented to a called meeting of the executive council in Chicago, Illinois, on February 23, 1926. The minutes of the meeting show that Sovereign Commander Fraser presented a proposition from William H. Short, offering to lease the Woodmen of The World building at Omaha, Nebraska, for a period of 99 years, and to pay for said lease $1,000,000 in cash and $44,000 each year for 99 years, payable semiannually. Then follows a resolution authorizing Fraser and Yates "to make any lease, sale, or other disposition of the real estate and buildings thereon belonging to the society," and providing: "We hereby ratify and confirm the action of said officers in such sale or lease or other disposition thereof." Then followed another resolution of similar purport, by which Fraser and Yates were "authorized, empowered and directed" to execute and deliver, for and on behalf of the Sovereign Camp of the Woodmen of the World, a lease to said land and buildings to William H. Short. Pursuant to this authorization, the officers of the Woodmen of the World executed and delivered the 99-year lease to Short. The Woodmen of the World is incorporated under the laws of the state of Nebraska as a fraternal beneficiary society. Therefore, the power of the Woodmen of the World to dispose of this property must depend upon the statutes of the state of Nebraska and its articles of incorporation. Its articles of incorporation, as last amended, October 2, 1917, and in this particular are substantially identical with the original, provide: "It shall have the power to purchase and hold such real and personal property as shall be necessary for its convenience and use, and may sell, transfer or dispose of the same, as it may deem necessary." It seems that the ordinary meaning of this language is to authorize the society to dispose of its property when it may deem necessary through its regular and legally constituted ma-

chinery for the management of its affairs. The constitution and by-laws of the society, filed in the office of the secretary of trade and commerce, pursuant to the provisions of section 7927, Comp. St. 1922, and in effect in 1926, provide, in section 2, that the Sovereign Camp, among its enumerated powers and duties, "shall have generally such powers and may perform such duties as it may deem wise for the welfare of the association." Section 26 provides that all power and authority of the Sovereign Camp, when not in session, shall be vested in the Sovereign Executive Council. Section 27 provides that the Sovereign Executive Council shall have general supervision and control of all buildings and real estate of the association. Tested by the articles of incorporation and the constitution and by-laws of the association, the executive council would seem to have the power and the authority to execute the 99-year lease.

It is further urged by the officers of the Woodmen of the World that the act of the executive council was ratified by the Sovereign Camp at its meeting at Los Angeles in June, 1927. This, they say, ought to end the controversy. We are not of that opinion. Under the powers conferred upon the executive council by the articles of incorporation and the constitution and by-laws of this fraternal society, this ratification was unnecessary. A failure or refusal to ratify would not of itself have invalidated the lease. Likewise, such a ratification would not validate a lease fraudulently executed, but would only draw the Sovereign Camp itself into the fraudulent transaction. The power and authority of the Sovereign Camp is the same and only exceeded, or rather superseded, that of the executive council, while the former is in session, which is only for short and infrequent intervals. It is also true that the ratification of said Sovereign Camp would not improve nor transform an *ultra vires* act of the association. If such a transaction was *ultra vires* if ratified by the Sovereign Camp, or even if executed at the direction of the Sovereign Camp itself, it would still be *ultra vires* even if executed by the executive council. Further, it may be noted in passing that the findings of fact made by the Sovereign Camp, at the time of

the so-called ratification, are not impressive. It might be said that it resolved itself into a popularity contest between William A. Fraser, Sovereign Commander, and William B. Price, the member who brought this action, with the former exercising an unusually unfair advantage in that he was personally present and directing the proceeding. It might be said that it is apparent from the record that the investigation was superficial and that its action was taken without a full knowledge of the facts. The minutes of the meeting raise a suspicion that perhaps there was too much fraternal back-slapping, and not that serious businesslike consideration the magnitude of the affairs of this great fraternal beneficiary society deserves. Without pointing out in detail the fallacies and weaknesses of the judgment of the Sovereign Camp, suffice it to say that, as far as this court is concerned, the transaction must stand or fall independently of, and without reference to, that ratification.

But, argues the plaintiff, "the limited scope of the business of such an association is definitely fixed by statute." Chapter 120, Laws 1925, provides that a fraternal beneficiary society is "organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit." It is then argued that the leasing of this the largest office building in the state of Nebraska for a period of 99 years is not within the objects and purposes of the association; that it is in fact a commercial transaction that transcends its objects and purposes. It occurs to us that this might with equal force be applied to the leasing of the building, only a relatively small part of which was occupied for its own use, to many tenants, as has been its custom from the date of its erection. It is also suggested that, in view of the decision of this court in *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, there is serious question whether the Woodmen of the World did not exceed its authority in erecting a building, the larger part of which was rented to tenants. Necessity not requiring us to pass upon that question here, we refrain from so doing. We must consider the situation as presented to us. If the Woodmen of the World had the power to own this property, it also had

the power to dispose of it. In *Tash v. Ludden,* 88 Neb. 292, this court stated the law of this state to be as follows:

"All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except so far as they are restrained by statute, or are prohibited by their articles of incorporation or outstanding contracts; and under this general power a corporation may dispose of the whole of its property for any lawful purpose."

On the other hand, if the association had not the power to acquire the property, then it has no power to hold it, and it would be required to dispose of it. If the Woodmen of the World was about to engage in the erection of such a building, we might consider these arguments; but, since it is the disposition of the property, the plaintiff is caught on the horns of the dilemma of his own argument, for the 99-year lease was a portion of the whole transaction, the object of which was the ultimate disposal of all the right, title and interest of the Woodmen of the World in the property. The lease for 8 years by the insurance society of its quarters was coincident with, and a part of, the transaction. There can be no question about the right and power of the society to lease quarters for its necessary uses and conveniences. The only other conveyance involved is that of the fee title which was subsequently executed. By the 99-year lease and the sale of the fee, the Woodmen of the World divested itself of all title and interest in this property. It was, in truth and in fact, a sale of the property. We conclude that the trial court very properly found that the various leases and conveyances of said property were each and all made in conformance to the statutes of the state of Nebraska and the articles of incorporation of the Sovereign Camp of the Woodmen of the World.

We now come to a consideration of the plaintiff's contention that the lease and sale of the property were fraudulently made by the officers of the life insurance association. An examination of the petition filed herein reveals that the plaintiff charges therein that the acts of defendants Fraser, Yates, and Bradshaw were with intent to cheat and defraud the Woodmen of the World, and its members, and with the

unlawful and fraudulent purpose of procuring for their own benefit and profit the possession, control, and ownership of said real estate, for a grossly inadequate consideration, and of procuring for their own benefit and profit control of the defendant's assets and business in violation of their duties and the trust reposed in them by the Woodmen of the World. The further charge is made that the different transactions involved herein were negotiated for the benefit of the financial interest of these parties to the suit. We have carefully scanned the voluminous record in this case with a single eye to the discovery of direct evidence of the personal, beneficial, financial interest of the parties. We are sure that the record justifies the statement that it contains no such direct unequivocal evidence of personal interest or fraud on the part of the officers. The brief of the plaintiff was disappointing in that under the heading of facts and circumstance showing fraud it does not direct our attention to such evidence. In fact, the evidence is quite the contrary. Under oath, in the trial of this case, Fraser, Yates, and Bradshaw all testified that they had no such interest in the transaction, and acted only for, and on behalf of, the Woodmen of the World Life Insurance Association. In the same manner, every man connected in any way with these transactions testified as to his personal financial lack of interest. Consequently, this charge in the petition is not sustained by any direct evidence in the record which would justify the finding of fact by the court that the sale and leases of this property were fraudulently made by the officers because of their personal interest.

But they urge that these defendants caused to be organized the defendant Woodmen Building Corporation which became in the first instance the owner of the 99-year lease on said property. They charge that a majority of the stock of said corporation is, and has been at all times, owned and controlled by the defendants Fraser, Yates, and Bradshaw, and that it was organized to conceal their interest and participation in the transactions under consideration. The testimony in the record relative to this phase is that Mr. Fraser negotiated with Byllesby & Company, investment

bankers, through one Mather for the 99-year lease. When this transaction was consummated, they took the lease in the name of one Short, who held as trustee, and Byllesby & Company caused the Woodmen Building Company to be organized as a holding company for the Woodmen of the World building. When organized, the leasehold interest was assigned to it. Fraser and Bradshaw became at least nominal directors and officers in the new-born corporation. So also did one Crawford, who had been manager of the building for the Woodmen of the World, and who was continued in this position by the new owner and ceased to be an employee of the Woodmen of the World. Crawford was an employee and not an officer of the Woodmen of the World. Crawford was given 500 shares of stock in the new company. The only asset of the company was this leasehold interest subject to a mortgage to secure the bonds issued by the company. The stock was therefore of doubtful value, or at least of remote value. The testimony is that the stock was given him to stimulate his interest for that careful and energetic management might give it some value in the far distant future. Since there is no evidence that Crawford's interest is in any way connected with that of Fraser and Bradshaw, and since he was not an officer of the Woodmen of the World and did not have any connection with the lease and sale of the property, it is unnecessary to consider him further.

We will now direct our attention to Bradshaw, who was not an officer of the Woodmen of the World, but was its general attorney. The relationship existing between Bradshaw and the Woodmen of the World was therefore that of attorney and client. He took no part in the negotiations for the 99-year lease. He was present at the meeting of the executive council, when the lease was authorized, and prepared the resolution empowering the officers to execute the same. However, most of the instruments necessary were prepared by attorneys for Byllesby & Company. Later he became at least a nominal director and an officer of the building company, although he had no obvious and direct part in the organization. There is testimony, which is not

disputed, that he became such director and officer reluctantly and performed few, if any, duties as such. He did not pay for the one share of stock issued to him and he immediately assigned it back. The purpose of having him an officer, as explained by the defendants, was to furnish the proper "sales scenery" for the bonds which had been issued. It was thought that it would establish public confidence to have as officers men known to have been connected with the Woodmen of the World and thus facilitate the sale of the bonds. The Woodmen of the World was to a certain extent interested in the sale of these bonds. It had the desire to dispose of all its right, title and interest in this property. It still owned the fee title and through the lease was to receive $44,000 a year rental. It seemed important to have these bonds successfully marketed before it proceeded to sell the fee title. There is neither direct nor circumstantial record evidence tending to prove that Bradshaw negotiated the deal, or that he conspired with others to defraud the Woodmen of the World, or that he personally derived any financial profit from it, or that he, as attorney for the Woodmen of the World, acted fraudulently.

The other member of the trio charged by plaintiff with defrauding the Woodmen of the World is Fraser, the Sovereign Commander or chief executive officer of the life insurance association. As chief executive officer, he negotiated the leases, as well as the sale of the fee title. He called the meeting of executive council, recommended, asked and secured its approval and authorization of the deal. Stripped of the polite language of the parties, he is charged with having conspired to sell the building for an inadequate consideration that he might profit personally thereby. The record discloses that the sale of this building had become an obsession with him. The plaintiff assigns various reasons for this. Fraser gives others, which are plausible, if true. The reasons given by him to justify the sale of the property are that it is now unsuitable as a home for the order, in that the vault is insufficient and cannot be enlarged except at an exhorbitant expense; that the present income and future earning prospects are insufficient to

make a good investment; that although when built the location was a retail district with most of the leading financial institutions of the city, the business district has now moved to the west, with its retail stores and banks; that it has been impossible to rent the store rooms in the building to profitable tenants. These reasons are also supported by the testimony of witnesses as to the value of the property. While we have detailed these transactions almost to the extent of boredom, let us again examine them relative to Fraser's connection. He negotiated the 99-year lease; he secured the approval of the executive council; he executed the 8-year lease for quarters for the life insurance association, which we will discuss in detail in connection with the adequacy of the consideration; and later negotiated and secured the approval of the executive council and the ratification of the Sovereign Camp. In order to find for plaintiff upon this allegation in his petition, the evidence must be found in the record proving that Fraser entered into a conspiracy to sell the property for an inadequate consideration and as a result he received a financial consideration either of money or its equivalent. There is no direct evidence in the record to support the charge that Fraser was guilty of fraud and wrongdoing in these transactions.

But the plaintiff contends that, since Fraser was a member of the board of directors of the building company and an officer and director of the Woodmen of the World, these transactions between corporations having common officers and directors are presumptively fraudulent, and the burden is on the defendants to sustain the transaction by clear and convincing evidence that it was fair. We find no fault with the authorities cited and recognize the rule contended for as the law of this state reflected by an unbroken line of decisions, including *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463; *McLeod v. Lincoln Medical College*, 69 Neb. 550; *Grand Island Gas Co. v. West*, 28 Neb. 852; *City Trust Co. v. Bankers Mortgage Loan Co.*, 102 Neb. 532. See, also, *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 599; 4 Fletcher, Cyclopedia, Corporations, sec. 2377.

But, again, when we examine the evidence in this case, we find that it falls far short of establishing the facts in this connection upon which the plaintiff relies. In the first place, the proof establishes that this 99-year lease was negotiated and consummated with Byllesby & Company, and that at all times thereafter they exercised domination and control over it. At that time the building corporation was not born and the title was held by Short as trustee for Byllesby & Company. The 8-year lease by the Woodmen of the World for the quarters occupied by it was executed coincident with, and as a part of, the 99-year lease. Therefore, as to these two transactions the rule is not applicable, since these two transactions were not negotiated by and between two corporations having common directors and officers. It is undisputed that Byllesby & Company, the investment bankers who disposed of the bonds, zealously guarded their control and management of the property for the purpose, as given by them, that they might protect the purchasers of the bonds, toward whom they recognized their responsibility. To this end, they retained a majority of the stock in the building company. It appears that Fraser was issued one share of stock, which he immediately reassigned. Upon this share of stock, which was reassigned, he was elected a director and officer of the corporation. He never participated in any meeting of the Woodmen Building Corporation, and particularly did not participate in any meeting which considered the acquisition of the option to purchase the fee to said building. He was never a regular stockholder, having a financial interest in the corporation. The only transaction that could be questioned because Fraser was a director of the Woodmen of the World and the building corporation was the sale of the fee. But this deal was between Woodmen of the World and Byllesby & Company. Fraser was not a director of Byllesby & Company. After their purchase the fee ran to the building corporation. They organized the Woodmen Building Corporation as a holding company for this property and all their interest in it was centered and controlled by it as a subsidiary. The foregoing facts

are testified to by all the witnesses who testify as to the circumstances involved in and surrounding these transactions. The conclusion is amply justified by the evidence that Fraser, as an officer and director of the Woodmen Building Corporation, was just another "set up" used by Byllesby & Company to properly set the stage for the sale of bonds, and that as such an officer he served no other useful purpose. To conclude, these transactions between the Woodmen of the World and the Woodmen Building Corporation were not between two corporations controlled and directed by the same officers and directors. Even if they were, the court would not set them aside if they were fair, and fairness in this case depends upon the adequacy of the consideration. While the court will closely examine for possibility of fraud transactions where the directors of a corporation which purchases property are also directors in the corporation which sells the same, such sale, however, is not unlawful and not void, but voidable only, and will be set aside only after a finding that the financial interest of such directors are such that they could not have honestly performed their duties as directors of the selling corporation. Such a sale will not, then, be set aside if made in good faith and for an adequate consideration. *City Trust Co. v. Bankers Mortgage Loan Co.*, 102 Neb. 532; 14 C. J. 125; 7 R. C. L. 461, sec. 444.

We have concluded that there is no direct evidence tending to prove the charges of fraud contained in the plaintiff's petition, but he argues strenuously and with apparent conviction that there are facts and circumstances which justify the inference of fraud. We have already discussed Fraser's connection with the deal, his negotiation of the 99-year lease and subsequent approval of the executive council; his connection with the Woodmen Building Corporation. We will now discuss the adequacy of the consideration for the sale of the building. In this connection we will consider the 99-year lease, the 8-year lease, and the sale of the fee as a single transaction for the disposition of the property. The defendants contend that all these transactions involved the Woodmen of the World

only to the extent that it executed a 99-year lease to one Short, and then sold the fee to Byllesby & Company, and at their direction conveyed title to one Twerell, and that all other and succeeding transactions were means employed by the lessee and grantee respectively to finance their investment. The elaborate and complicated machinery set up and employed to accomplish this simple transaction may well be expected to cause at least temporary misunderstanding and confusion. For the 99-year lease the Woodmen of the World received $1,000,000 and $44,000 a year rental. As heretofore stated, this lease was negotiated with Byllesby & Company, taken by Short in trust for them, and finally assigned to the Woodmen Building Corporation, which issued bonds to the extent of $1,125,000 to pay for said lease and promotion expenses. Examining the 8-year lease which the Woodmen of the World gave to the building corporation, we find that the Woodmen of the World had maintained a system of accounting while owning the building, in which they charged themselves a certain rental for the quarters occupied by them, which was in excess of the rental paid by other tenants for similar space. This fact was known or could have been ascertained by every member of the executive council, Sovereign Camp, and of the order. This went into the annual report of the building and the statement of the net income derived from the building. The tendency of this method of accounting made the building look more attractive as an investment than actual facts justify. It was the statement exhibited to Byllesby & Company at the time of the negotiation of the 99-year lease. When Byllesby & Company discovered this, they insisted that the Woodmen of the World should enter into a lease at that rental for a term of years or they would not go through with the deal. It probably amounted to an unintentional misrepresentation of a material fact as to the income of the building. Finally, as a part of the 99-year lease transaction, the Woodman of the World executed the said lease for a period of 8 years at what is conceded to be an excessive rental. This, of course, reduced the amount received by the Wood-

men of the World for the 99-year lease by the amount the rental under the 8-year lease was excessive. As soon as these transactions had been completed and the bonds secured by the 99-year lease had been sold, Fraser began negotiations for the sale of the fee with Byllesby & Company. As a result of these negotiations the fee was sold for $600,000 and transferred to Twerell as trustee. Land trust certificates were issued and sold to finance this transaction. It was at this time that Byllesby & Company secured the option to purchase the fee to the Woodmen Building Corporation controlled by them. It appears, then, that reduced to its final analysis the Woodmen of the World in fact sold the building to the Woodmen Building Corporation for the sum of $1,600,000, less, of course, the amount of excess rental paid by it under the 8-year lease for its quarters, and the question for our determination is whether that is an adequate consideration.

The plaintiff asserts that the consideration was inadequate for the reason that it was less than the cost of the building. We can save many words by including the following tabulation which shows the investment of funds by the Woodmen of the World, and the dates thereof:

1911	Cost of land	$ 240,000.00
	Total investment	240,000.00
1912	Cost of building (including machinery and equipment)	1,114,302.24
	Total investment	1,354,302.24
1920	Cost of additional floor	93,846.27
	Total investment	1,448,148.51
1920	Improvements and additions to machinery and equipment	83,714.63
	Total investment	1,531,863.14
1920	Cost of Annex land	73,876.40
	Total investment	1,605,739.54
1921	Cost of Annex building	360,778.16
	Total investment	1,966,517.70
1925	Cost of additional equipment	4,435.52
	Total investment	1,970,953.22

There is testimony in the record that 3 per cent. is a reasonable annual depreciation, and at that rate the depreciated cost value of the building was $1,462,000. While the cost of a building is not contended to be an absolute criterion of its value, it is some evidence to be considered in connection therewith. The same thing is true as to testimony of the cost of reproduction of the building. The reconstruction cost of said building, according to a member of the firm of original architects, was $2,600,000, after deducting reasonable depreciation. According to this same witness, there was little evidence of so-called wear and tear; its upkeep was excellent, and particularly the mechanical features of the building seemed to be in wonderful condition; its life was practically unlimited with proper upkeep. However, we think this witness himself evaluated testimony of this character in reply to a question as to whether the cost of reproduction would not be as much out on the desert; he said it would be more. It might also be true that a building so located would not be salable, and would have no market value.

Fraser also testified as to the value of the building at the time of the sale, "that it was a good sale and the price a good one." At this same time, in order to assist Bylles-by & Company to market the bonds on leasehold, he writes and signs a letter, many copies of which were circulated. In that letter he expresses an opinion as to the value of the building in the following paragraphs:

"The land has been appraised by A. L. Reed, of Omaha, at $410,000, and by H. A. Wolf, of Omaha, at $408,000. Holabird & Roche, architects, Chicago, who supervised the construction of the main building, have appraised the buildings as of January 18, 1926, at a sound depreciated or fair market value of $2,600,240. The total fair market value of land and buildings, as thus depreciated, is in excess of $3,000,000, making this issue a 37½ mortgage."

"Total gross income for the two calendar years ended December 31, 1925, averaged $327,983. Operating expenses, including all taxes, except federal taxes and maintenance, and adding thereto the leasehold rental of $44,000 per annum for the same periods, averaged $206,500.74."

We may well digress here to state that neither A. L. Reed nor H. A. Wolf, mentioned in the letter, testified in this case, hence we cannot attribute any force and effect to the appraisal that they are claimed to have made as competent evidence of value. These statements would violate the rule as against hearsay evidence. Mr. Foy, an associate of Holabird & Roche, architects mentioned, did testify. He testified to the reconstruction cost of the building and his testimony makes this plain. He expressly states that he is not making an estimate of the market value of the building. The evidence in the record that Myers and Auerback, two Omaha real estate men, made affidavits as to the value of the property falls into this same classification of incompetent testimony.

Returning to Mr. Fraser, in July, 1925, in a report to the Sovereign Camp, he stated that the building and its annex were carried in our statement of assets at $1,966,-517.70, actual cost, while undoubtedly the property is worth considerably more, not only due to the increase in value of ground, but the increase of material and labor. Of course, we must again point out that this is not competent evidence of value. These statements, as well as the other statements made by him herein, are not under oath, and for the purposes of this case can only be considered as impeaching the witness upon the question of value. The fact is that the record discloses so many widely divergent and contradicting statements by him at various times that, in view of his special interest in this litigation, we deem it necessary to determine this phase from other testimony. Particularly is this true, because from the record it is so apparent that he does not at any time base his judgment of market value upon sound premises. His judgment in this particular seems to be based upon the reproduction cost as well as the income as shown by the account set up by the Woodmen of the World relating to the building. This account indicated an income far in excess of actuality. This was true on account of the fact that an item of rent was carried as income for space occupied by the Woodmen of the World itself in excess of its real value

and because the account did not include all items of expense properly chargeable to the upkeep and maintenance and operation of the building.

The plaintiff relies, not only upon the foregoing statements of value which we have determined are not competent evidence of value, but also upon the fact that the purchasers of the building sold bonds secured by it in excess of the purchase price. The total amount received by the Woodmen of the World for the building was $1,600,000, while the amount of the bonds and land trust certificates secured by the building sold was $1,825,000, some of which were sold at a discount. Does this establish that the building had a market value greater than the selling price? We doubt whether there is any real indication of value of the building from the amount of bonds sold upon its security. The bonds issued upon the leasehold sold for $1,057,500. The purchasers of the bonds never saw the building and bought it upon the representations and reputation of the investment house that sold them.

We come now to a consideration of the most convincing evidence in the record relative to value. In fact, it is the only competent evidence as to value in the record. Even if we were to consider the foregoing statements as competent testimony, it is overcome by competent tsetimony that the property was not worth in 1927 the price received of $1,600,000. The testimony of Charles C. George shows that he possesses a thorough knowledge of real estate values, of business locations, of office buildings, and of the trend of the movement of desirable business locations in Omaha. He values the property at $1,550,000 to $1,600,000. Mr. Harry A. Tukey, who had been in the real estate business in Omaha since 1886, and specialized in business properties, buying, selling, and leasing, including what is known as long time leases, such as 99-year leases, who has had vast experience as an appraiser, fixes the market value of the property at $1,300,000 to $1,500,000. He sold the ground to the Woodmen of the World at the time they erected the building. Mr. L. P. Campbell who had been with the Byron Reed Company, one of the largest real

estate offices in Omaha and in Nebraska, in charge of sales since 1905, and of rentals, property management, and insurance, and who also has had an extensive experience as an appraiser of city property, places the market value on this property as $1,500,000 to $1,600,000. These three witnesses, George, Tukey, and Campbell, show an unquestioned knowledge of real estate values in Omaha. They testified that there is and has been for years a westward movement of the business district, which has made the location of the Woodmen of the World less desirable than when it was built; that since then many of the banks which were east of it have moved two or more blocks west; and other business has moved away from it to such an extent that the building will not return an income which will justify a higher valuation; that income, present and prospective, determines along with other considerations the market value of a building of such a nature. Their testimony is not impeached and it is not contradicted by any other competent testimony. They had no apparent interest in the litigation. Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself a convincing evidence of fraud. 9 C. J. 1174. However, from the competent evidence in the record, we conclude that the consideration of $1,600,000 for the sale of the building, even depreciated by the excessive rental of the 8-year lease, was an adequate and fair consideration for the sale of the property. Upon this question, the defendants have sustained the burden of proof to establish by clear and convincing testimony the fairness of the contract even to the degree required of them, even if, as a matter of fact, these transactions were between corporations with common directors.

This case involves almost entirely a question of fact. Its importance, from the magnitude of the value of the property and the great number of people interested, including all the members of the great fraternal beneficiary society, who are as much interested as the plaintiff, as well as the

numerous purchasers of the bonds, justifies the exhaustive consideration we have given it. We have been greatly aided by comprehensive and elucidating briefs, and oral arguments by able counsel. In view of our conclusions, it is not necessary to consider either the rights of the purchasers of the bonds secured by the 99-year leasehold, or the purchaser of the land trust certificates, since they are not affected by this opinion. The briefs filed by the representatives of these interests have been exceedingly helpful in so far as they discussed the questions covered by this opinion.

In conclusion, we substantially adopt the language of the distinguished trial judge who heard the case, and find that the 99-year lease from the Woodmen of the World to William H. Short, and the lease from the Woodmen Building Corporation to the Woodmen of the World, leasing a portion of the building for 8 years, and the sale and conveyance of the fee by the Woodmen of the World to Albert J. Twerell were each and all made upon adequate consideration and in good faith and without fraud, and were made by the officers of the Woodmen of the World in accordance with the statutes of the state of Nebraska, and the court further finds that the charges of fraud and wrongdoing alleged in the plaintiff's petition are not sustained by the evidence. The judgment of the trial court is accordingly affirmed.

AFFIRMED.

ROSE, J., dissents.

STATE, EX REL. WILLIAM M. MALTMAN, APPELLEE, V. ADAMS COUNTY, APPELLEE: M. FRED RUHTER, APPELLANT.

FILED MAY 29, 1930. No. 27218.

1. **Counties: COUNTY COMMISSIONERS: COMPENSATION.** Section 2389, Comp. St. 1922, does not limit the total maximum amount of compensation, including mileage and *per diem*, to be paid or drawn by any member of the county board of Adams county to $950, but he may be paid, in addition to said $950, $5 for each day he is actually employed in directing road work in his district.

2. ———: ———: ———. Neither section 2389, Comp. St. 1922, nor section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923, permits a member of the county board to be paid mileage in addition to said $5 a day for directing road work.
3. ———: ———: ———. Said additional amount over and above the $950, in fact anything paid to him for directing road work in his district, must be paid out of the road fund of his district, and under section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923, the road fund of his district cannot include any money paid as automobile or motor vehicle registration or license fees.
4. Highways: ROAD DRAGGING FUND: TRANSFER. Section 8339, Comp. St. 1922, as amended by section 4, ch. 158, Laws 1925, so as to provide "any unexpended balance in the road dragging fund may be used for road construction," does not enlarge the provisions of section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923, so as to permit an unexpended balance in the road dragging fund composed exclusively of money paid as automobile and motor vehicle registration and license fees to be transferred to a fund set aside for the use of the separate supervisor districts.
5. *Held*, under the stipulation of facts and the law in this case, that the appellant, Ruhter, is not entitled to recover.

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

Charles E. Bruckman, for appellant.

Stiner & Boslaugh and *Edmund Nuss, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

LIGHTNER, District Judge.

This case originated as a claim for $138.90 filed by M. Fred Ruhter before the county board of Adams county. The county board allowed the claim, but on appeal by a taxpayer to the district court it was disallowed, and the claimant has appealed to this court.

It appears from the statement of the case by appellant's counsel, which counsel for appellee agrees is correct, that Adams county, Nebraska, is under township organization and is divided into seven supervisor districts, Nos. 1, 2, 3,

and 4 in the country, and Nos. 5, 6, and 7 in the city of Hastings; that for a number of years last past Adams county has been divided into highway or road improvement districts, and for such purposes supervisor districts Nos. 1, 2, 3, and 4, being the supervisor districts outside of the city of Hastings, have been adopted, and that each of the supervisor districts is equipped with machinery necessary and in use for the purpose of repairing, maintaining and constructing roads and highways; that in the time and manner provided by law the county board of supervisors appointed, for the year 1928, John H. Furry, a member of said board, as highway commissioner; that M. Fred Ruhter is the duly elected, qualified and acting supervisor of district No. 3, comprising the townships of Roseland, Cottonwood, Silver Lake, and Logan; that for the year 1928, and for a number of years previously, funds used for county highway and general road purposes have not been provided for by levy and taxation; that the only funds needed and used for such purposes have come from automobile licenses or registrations and in the manner provided by law; that at a regular meeting of the board of supervisors held on the 5th day of April, 1928, the board of supervisors appropriated $20,000 from the road dragging fund to the county highway budget for the year 1928, and divided this amount equally among said supervisor districts Nos. 1, 2, 3, and 4, and this amount was adopted and treated as the budget to cover all costs of construction and maintenance of the county highway system for the year 1928, and at this same session of the board instructed the county treasurer to transfer $16,800.71 in his possession from the road dragging fund to the highway fund, which was done by the treasurer, and this amount was to be used in equal portions in said supervisor districts Nos. 1, 2, 3, and 4; that on the 11th day of September, 1928, there remained in said county highway fund $1,600.22 of said portion distributed to said supervisor district of M. Fred Ruhter; that immediately previous to said date the said supervisor, M. Fred Ruhter, prepared and filed his duly itemized, certified claim against said county for $138.90, $105 of which was

for 21 days superintending road work in the various townships of his district, and $33.90 for mileage at the rate of 10 cents a mile, and all of which labor was performed and miles driven under the appointment, order and direction of the said John H. Furry, highway commissioner; that on said date, September 11, 1928, at a regular session of said board of supervisors, the above claim was duly audited and allowed and a warrant ordered issued for its payment; that the claimant, M. Fred Ruhter, had received as a member of the county board of Adams county, Nebraska, during the year 1928, up to the 11th day of September, 1928, from the funds of Adams county, Nebraska, the sum of $1,134.60, of which amount $561.90 was paid from the county highway road fund, $473.90 from the county general fund, and $98.80 from the county road dragging fund, being for both *per diem* and mileage as a member of the county board in attending the meetings and business of the board, and for necessary services in maintaining and supervising the roads and bridges in his district, together with mileage.

Section 2389, Comp. St. 1922, fixes the compensation for members of the county board. Each party to this controversy insists that said section supports his claim. Said section is as follows:

"Members of county boards shall each be allowed for the time they shall be necessarily employed in the duties of that office the sum of five dollars per day and ten cents per mile to be paid out of the general county fund: Provided, however, in counties having over one hundred thousand inhabitants, members of the county board shall devote each and every day to the duties of the office and shall be allowed a salary of twenty-five hundred dollars per annum as compensation in full for their services: Provided, further, in counties having over sixty thousand inhabitants and less than one hundred thousand inhabitants, members of the county boards shall be allowed a salary of twenty-one hundred dollars per annum as compensation in full for their services: Provided, further, the total maximum amount of compensation, including mileage and *per diem*

to be paid or drawn by any member of the board, *except as hereinafter provided,* shall not exceed the following amounts per annum; in counties under township organization having twenty-five thousand inhabitants and less than sixty thousand inhabitants, nine hundred fifty dollars; in similar counties not under township organization, fifteen hundred dollars; in counties under township organization, and having over thirteen thousand and less than twenty-five thousand inhabitants, eight hundred dollars; in similar counties not under township organization thirteen hundred dollars: *Provided, however, that in counties not under township organization where said county contains an area of not less than two thousand square miles of territory and also contains a population of over fifteen thousand inhabitants and less than twenty-five thousand inhabitants the total maximum amount of compensation, including mileage and per diem to be paid or drawn by any member of such board, shall not exceed the sum of fifteen hundred dollars per annum;* in counties under township organization having less than thirteen thousand inhabitants, six hundred dollars; in similar counties not under township organization, nine hundred fifty dollars: Provided, further, that for each day actually employed in directing road work in his district each member of the county board shall be paid the sum of five dollars per day to be paid out of the road fund of his district."

Appellee contends that the words "except as hereinafter provided" refer to the portion of the section which we have italicized, and that therefore the $950 per annum limitation for salary to each member of the board in counties having the population of Adams county is an absolute limitation and is the total maximum which members of the board in such counties may draw as compensation and mileage. Appellant on the other hand contends that the words "except as hereinafter provided" refer to the final proviso of section 2389, and that therefore, in addition to the $950, each member of the board is entitled to $5 a day, and mileage, to be paid out of the road fund of his district for each day he is actually employed in directing the road work of his district.

The history of this section throws very little light on its present meaning. It was originally enacted in 1866. Rev. St. 1866, ch. 19, sec. 22. It has been amended a number of times since that date, but the words "except as hereinafter provided" and the two provisions we are dealing with were both introduced at the same time, in the year 1915. Laws 1915, ch. 40. The amendment immediately preceding was in 1913. Laws 1913, ch. 196. However, the 1913 amendment did not contain the words "except as hereinafter provided," nor the italicized provision, nor the final provision. All of these were introduced in the 1915 amendment. The section was afterwards amended to its present form in 1919 (Laws 1919, ch. 68) but the changes were not such as to throw any light upon the present meaning of that section.

Turning then to an examination of the section, it will be noted that the words "except as hereinafter provided" are placed in the opening part of that part of section 2389 which provides the total maximum amount of compensation including mileage and *per diem* to be paid or drawn by any member of the board. It would seem therefore that the legislature intended to refer to an exception or proviso which permitted the member to draw more than the total maximum referred to. It will also be noted that the proviso above italicized does not have reference to all of the counties wherein the total maximum amount of compensation is fixed, but only to counties under township organization where said county contains an area of not less than 2,000 square miles of territory and also contains a population of over 15,000 inhabitants and not less than 25,000 inhabitants. Apparently then said italicized proviso has reference only and is an exception to the second class of counties referred to; that is, counties having over 13,000 and less than 25,000 inhabitants, or counties not under township organization having an area of not less than 2,000 square miles and also a population of over 15,000 and less than 25,000 inhabitants. It would not have been necessary to use the introductory exception, "except as hereinafter provided," with regard to this italicized proviso, and if said

words were intended to refer to the italicized proviso they would have been used in the part of the section which refers to the second class of counties having over 13,000 and less than 25,000 inhabitants. The words "except as hereinafter provided" may refer to both provisos which follow in the same section, but it would be giving them a very strained and unnatural interpretation to hold that they refer to the italicized part of the section only and not to the final proviso. Furthermore, the wording of the whole section indicates that the final proviso refers to additional compensation over and above the $950 limitation. It is in fixing the total maximum that the words "except as hereinafter provided" are used. And the final proviso does not refer to the work of the member while employed in the duties of that office, but refers to separate individual work of the member; that is, work while actually employed in directing road work in his district. And this is also a class of work where it would be difficult to make a reasonable limitation because there might be instances such as unusual floods in a district containing a great many creeks, draws and so forth where a much greater amount of work than ordinary would be required.

We conclude, therefore, and hold that, in addition to the $950 per annum that each supervisor is entitled to, he is also entitled to $5 a day for each day actually employed in directing road work in his district, to be paid out of the road fund of his district.

Appellant claims that he is entitled to mileage in addition to said $5 a day for directing road work under the provisions of section 2389 and section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923. The only reference to mileage in section 951 is the last sentence of the section which is as follows: "The supervisors shall receive the same compensation for their services, and mileage as now provided for, for county commissioners, except in counties over seventy thousand inhabitants, where their salaries shall be fixed by law." Section 951 provides for the expenditure of district road money by the county supervisors. The sentence just quoted makes the same provision for the

compensation and mileage of supervisors as is made for county commissioners. The only section that fixes the compensation and mileage of both supervisors and commissioners is section 2389. Section 951, as amended, makes no specific provision, but refers to compensation and mileage "now provided for," and evidently refers to section 2389, since it is the only provision of law fixing compensation and mileage. But section 2389 does not allow mileage while either the commissioner or supervisor is directing road work. Section 951, in our judgment, adds nothing to appellant's claim for mileage for the reasons just stated. There is then in the statute no specific provision for mileage and therefore none can be allowed. *Gosso v. Riddell,* 123 Or. 57; *State v. Haner,* 123 Or. 301. The court cannot amend the statute by construction (*Chicago, B. & Q. R. Co. v. Amack,* 112 Neb. 437); nor alter it on the theory that the legislature made a mistake (*State v. Marsh,* 108 Neb. 267); nor ingraft an exception on a statute by construction (*Schmidt v. City of Fremont,* 70 Neb. 557).

Appellee further contends that, even though appellant might be allowed compensation under section 2389 in addition to the $950, it must be from the road fund of his district, and that there is in Adams county no fund of that description out of which appellant can be paid. We think that this contention is good.

The case was tried on a stipulation of facts, and the stipulation provides that at no time in 1928 did Adams county set aside, create or maintain any separate district road fund for any particular district in Adams county, but that the road fund is maintained as one fund, known as the county highway fund, and said county highway fund is not and has not been during the year 1928 the proceeds of taxes levied upon the property of the county from the various districts within the county, but that said fund has been provided from money collected for automobile licenses within said county, and at the regular meeting of the board, held on April 5, 1928, a motion was made to appropriate $20,000 from the road dragging fund to the county highway budget to be divided equally among su-

pervisor districts Nos. 1, 2, 3, and 4, respectively, in the amount of $5,000 to each named district, and that later a resolution was passed directing the county treasurer to transfer $16,800.71 from the road dragging fund to the county highway fund, and that said transfer was so made. We think the appellant is right in claiming that the fund from which appellant may be paid need not bear any particular designation and that he may be paid out of the road fund of his district whether it be called a road fund or a highway fund or any other name. It is sufficient if it is a fund legally set aside to be used under his direction for the improvement of roads within his supervisor district. Nevertheless an analysis of section 8339, as amended by section 4, ch. 158, Laws 1925, and section 951, as amended by chapter 44, Laws 1923, indicates that the fund in question, derived as stated in the stipulation from automobile licenses and registration fees, cannot be assigned to the different supervisor's districts for the purpose in question, and since there is no other fund for such purpose provided in Adams county there is no fund out of which the appellant can be paid. Let us now proceed to an analysis of the sections in question.

Section 8339, as amended, provides that "any unexpended balance in the road dragging fund may be used for road construction." Road construction would, we think, include the directing referred to in the final proviso of section 2389. However, section 951, as amended, provides as follows:

"The board shall meet at such times and in such manner as provided by law. Each supervisor shall have special charge of the expenditure of money appropriated out of the county treasury by the board for roads, bridges and culverts within his district, except in city districts, when the board shall direct as to which one of the supervisors shall supervise the expenditure of the money appropriated as aforesaid. Said money so appropriated shall not include any money paid as automobile or motor vehicle registration or license fees and shall not be distributed by said board to the individual members thereof to be by them

personally paid out upon their own private account nor in any manner whatever; but shall remain in the county treasury until a claim or claims for labor performed shall be properly verified, approved by said supervisor, filed with the county clerk, allowed by the county board, and a warrant drawn therefor. The supervisors shall receive the same compensation for their services, and mileage as now provided for, for county commissioners, except in counties over seventy thousand inhabitants, where their salaries shall be fixed by law."

The stipulation states in one place that the fund in Adams county in 1928 which is now sought to be used to pay appellant's claim has been provided from money collected for automobile licenses within said county, and in another place it says that said fund has "not been provided for by levy and taxation; that the only funds needed and used for such purposes have come from automobile licenses or registrations and in the manner provided by law." Appellant in his brief also refers to this money as having been derived exclusively from motor vehicle registrations, and therefore we would not be justified in construing the words of the stipulation "and in the manner provided by law" as referring to the gasoline tax or other sources from which this fund might have come. There is nothing inconsistent between the provisions of section 951, as amended, and section 8339, as amended. In other words, the unexpended balance referred to in section 8339 may be used for road construction, which would undoubtedly include directing and supervising, but it cannot be apportioned to the different supervisor districts under section 951, as amended. The fund referred to in section 2389 as "the road fund of his district" could be used in payment of appellant's claim, if it came from sources which are not prohibited by section 951, as amended. But, inasmuch as the only money set aside as a road fund of appellant's district came from automobile and motor vehicle registration and license fees, there is no road fund in his district out of which his claim can be paid. It is not necessary to decide in this state of the record whether or not

"the road fund of his district" may come from the road tax referred to in section 2630, Comp. St. 1922, because the stipulation is that no such tax was levied in Adams county either in 1928 or for several years prior thereto. Other sections of the statute also permit a levy for road purposes. See section 5979, Comp. St. 1922, and section 5979, as amended by chapter 176, Laws 1927. It is unnecessary to analyze these sections, but it is sufficient to say that under one or the other of them the county board of Adams county could probably have levied a tax and the money so raised could probably have legally been appropriated as to the supervisor district Mr. Ruhter represented and could have been applied in payment of his claim. However, the board did not see fit to provide any money which can be properly appropriated to his district and legitimately applied to the payment of Mr. Ruhter's claim.

In addition to moneys from automobile licenses and registrations, certain moneys collected from the gasoline tax are appropriated to the road dragging fund, and there is no prohibition against such moneys being used by the supervisors under the provisions of section 951 as amended. However, it appears from the stipulation that none of the fund in question came from such source.

For the reasons above stated, the judgment of the district court is right and it is hereby

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1929.

PETER J. ROONEY, APPELLANT, V. EDWARD J. FLANAGAN, APPELLEE.

FILED OCTOBER 11, 1929. No. 26772.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Gray, Brumbaugh & McNeil, for appellant.

Monsky, Katleman & Grodinsky and *A. F. Brungardt, contra.*

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

PER CURIAM.

This is an appeal by plaintiff from a judgment of the district court for Douglas county in an action brought to recover money alleged to have been paid out by plaintiff for the use and benefit of defendant.

We have carefully considered the record and find that the same is without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

MINNIE G. HIMES, APPELLEE, V. RONALD F. LEWIS ET AL., APPELLANTS.

FILED OCTOBER 11, 1929. No. 26773.

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

C. E. Sanden and *Bernard S. Gradwohl*, for appellants.

T. F. A. Williams, Homer L. Kyle and *Rolla C. Van Kirk, contra.*

Heard before ROSE, DEAN, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action brought by plaintiff in the district court for Lancaster county by which she seeks to rescind a sale of stock to her by Lewis', a corporation, and a sale of stock by defendant Ronald F. Lewis individually. Defendant Lewis', a corporation, by cross-petition sought to recover from Ronald F. Lewis and Louise Menzendorf Lewis a sum alleged to have been embezzled by them. From an adverse judgment Ronald F. Lewis and Louise Menzendorf Lewis have appealed.

We have carefully considered the record and find that the same is without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

THOMAS H. BARNES ET AL., APPELLEES, V. EARL C. BARKER, APPELLANT.

FILED OCTOBER 11, 1929. No. 26781.

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

R. O. Reddish and *Kinsinger & Ogden*, for appellant.

Lee Basye and *T. F. Neighbors, contra.*

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

PER CURIAM.

This is an action upon a contract for the sale of real estate whereby plaintiffs seek a foreclosure of the contract as a mortgage. Defendant prayed for specific performance and for damages occasioned by the breach thereof. From

the judgment of the district court of Box Butte county defendant Earl C. Barker has appealed and plaintiffs have prosecuted a cross-appeal.

We have carefully considered the alleged errors assigned both on the appeal and the cross-appeal. We find the record to be free from prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

MABEL COOLMAN, APPELLANT, V. THEODORE L. AMICK ET AL., APPELLEES.

FILED OCTOBER 11, 1929. No. 26782.

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

Benjamin S. Baker and *Lower & Sheehan,* for appellant.

William R. Patrick, A. P. Moran and *D. O. Dwyer, contra.*

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

PER CURIAM.

This is an action begun by plaintiff in the district court for Cass county by which she sought specific performance of an alleged oral contract between herself and her grandmother, now deceased. Plaintiff alleges that she was to receive certain real estate situated in Cass county as consideration for her services in caring for her grandmother. The district court denied the petition of plaintiff and sustained the cross-petition of defendant Theodore L. Amick. Plaintiff has appealed.

We have carefully considered the record and find the same is without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

IN RE ESTATE OF GUSTAF CARLSON.
ERIC A. NELSON, APPELLEE, V. AUGUSTA VICTORIA CARLSON, APPELLANT.

FILED OCTOBER 25, 1929. No. 26802.

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

F. J. Byrd and *Cook & Cook*, for appellant.

Milton C. Murphy, William A. Stewart and *Halligan, Beatty & Halligan, contra.*

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

PER CURIAM.

This is an appeal by Augusta Victoria Carlson, residuary legatee under the will of Gustaf Carlson, deceased, from a decree of the district court for Dawson county construing the will.

We have carefully considered the record and all briefs filed, and find that the record is free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. WIRT SEDGLEY ET AL., APPELLEES: ANTHONY J. STEPHENS, APPELLANT.

FILED OCTOBER 25, 1929. No. 26803.

APPEAL from the district court for Douglas county: IRVIN A. STALMASTER, JUDGE. *Affirmed.*

Charles W. Haller, for appellant.

T. B. Dysart, Stanley W. Cheff and *Brogan, Ellick & Raymond, contra.*

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

PER CURIAM.

This is an appeal by Anthony J. Stephens from a decree

of foreclosure of a real estate mortgage by which appellee, Prudential Insurance Company of America, was given a first lien upon the property. The interest of Anthony J. Stephens and Bessie Stephens arises out of a contract of purchase.

We have carefully considered the record and find it to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALICE MUSSACK, APPELLANT, V. ESTATE OF PEARL B. GORDON, APPELLEE.

FILED OCTOBER 25, 1929. No. 26805.

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

W. M. Hopewell and *J. A. Singhaus,* for appellant.

George B. Thummel and *Orville L. Chatt, contra.*

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

PER CURIAM.

This is an action by Alice Mussack against the estate of Pearl B. Gordon, based on an alleged oral promise of the deceased to pay her for living in the Gordon home "as a member of his family during his lifetime." The county court rejected the claims as barred by the statute of limitations. On appeal to the district court for Burt county the action was dismissed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment is therefore

AFFIRMED.

OKEY SHINAFELT V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1929. No. 27019.

ERROR to the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. D. Ritchie, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Okey Shinafelt for a review of the judgment of the district court for Hayes county, wherein he was convicted of the crime of rape.

We have carefully considered the record and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

WALTER W. SHINAFELT V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1929. No. 27020.

ERROR to the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. D. Ritchie, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Walter W. Shinafelt for a review of the judgment of the district court for Hayes county, wherein he was convicted of the crime of rape.

We have carefully considered the record and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELMER BODEMAN V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1929. No. 27021.

ERROR to the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. D. Ritchie, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Elmer Bodeman for a review of the judgment of the district court for Hayes county, wherein he was convicted of an assault with intent to commit rape.

We have carefully considered the record and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF NANCY JANE MCCABE.
IDA C. JONES, APPELLANT, V. GRANT MCCABE ET AL., APPELLEES.

FILED NOVEMBER 8, 1929. No. 26663.

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

J. P. Baldwin and *J. L. Richards,* for appellant.

W. E. Goodhue, Heasty, Barnes & Rain, Hoagland & Carr and *Harvey W. Hess, contra.*

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

PER CURIAM.

This is an appeal by Ida C. Jones, proponent of the will of Nancy Jane McCabe, from a judgment of the district court for Thayer county denying admission of the will to probate.

We have carefully considered the record and briefs filed and find that the record is without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROSE E. KIRBY, APPELLEE, V. J. B. THOMES, APPELLANT.

FILED NOVEMBER 8, 1929. No. 26906.

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

Slama & Donato and *J. F. Berggren,* for appellant.

Cook & Gumb and *J. H. Barry, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and DAY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an action to recover damages for injuries sustained as the result of an automobile collision. From a judgment of the district court for Saunders county in favor of plaintiff, defendant has appealed.

We have carefully considered the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HERBERT R. SPARKS ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1929. No. 26992.

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

George Losey and *Bernard McNeny*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Leon Samuelson, contra.*

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

PER CURIAM.

This is a proceeding in error brought to this court by Dan Reams for a review of the judgment of the district court for Franklin county wherein he and one Herbert R. Sparks were convicted of the crime of hog stealing.

We have carefully considered all alleged errors assigned by plaintiff in error and find no prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

A. P. BRESSLER, APPELLEE, V. BOARD OF EDUCATION OF SCHOOL DISTRICT OF SCOTTSBLUFF, APPELLANT.

FILED NOVEMBER 14, 1929. No. 26688.

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

Mothersead & York, for appellant.

Raymond & Fitzgerald, contra.

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

PER CURIAM.

This is an action to recover a balance alleged to be due on a contract for the erection of a school building. From a judgment in favor of plaintiff, rendered by the district court for Scotts Bluff county, defendant has appealed.

Oral argument was had before the supreme court commission on March 18, 1929, but no opinion was adopted. Later, on the court's own motion, the cause was reargued before the court.

We have carefully considered the record and find the

same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JAMES E. RAIL, APPELLANT, V. UNION STOCK-YARDS COMPANY OF OMAHA, APPELLEE.

FILED NOVEMBER 14, 1929. No. 26798.

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

Rose, Wells, Martin & Lane and *Lawrence W. Rice,* for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before GOSS, C. J., DEAN, GOOD, and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This action was begun in the district court for Douglas county to recover damages for personal injuries sustained by plaintiff while in the defendant's stock-yards at Omaha, Nebraska. At the close of all the testimony the trial court, upon motion, directed a verdict for defendant. Plaintiff has appealed.

We have carefully considered the record and find it to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

N. M. SOMMERVILLE, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, APPELLEE.

FILED NOVEMBER 14, 1929. No. 26869.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

N. M. Sommerville, pro se.

Max Towle and *Farley Young, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an appeal by N. M. Sommerville from a judgment of the district court for Lancaster county sustaining a demurrer to his petition. By this action petitioner complained of the assessments made by the taxing authorities of Lancaster county against banks and trust companies.

We have carefully considered the record herein and find the trial court did not err in sustaining the demurrer. The judgment of the district court is therefore

AFFIRMED.

ELLEN S. ROWE, APPELLEE, V. WILLIAM RICE ET AL., APPELLANTS.

FILED NOVEMBER 14, 1929. No. 26905.

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

Mitchell & Gantz and *T. F. Neighbors*, for appellants.

R. O. Canaday, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an action in ejectment begun in the district court for Morrill county. The jury returned a verdict in favor of plaintiff, and from a judgment entered thereon, defendants have appealed.

We have carefully considered the record and briefs filed herein and find that the record is without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARTFORD D. REED V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1929. No. 26861.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

J. A. Hayward and *H. C. Lowe,* for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

Hartford D. Reed, plaintiff in error in this proceeding, was charged by the county attorney of Lancaster county with having committed an assault. Upon a plea of guilty Reed was sentenced on the 5th of December, 1927, to a term of five years in the state penitentiary. On the 9th of November, 1928, Reed commenced this action by filing a motion for a writ of error *coram nobis,* alleging that his plea of guilty had been procured by fraud and duress. The district court for Lancaster county dismissed the proceeding and the case is brought to this court on error.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

R. O. BROWNELL, RECEIVER, APPELLEE, V. ROSCOE E. SCHINDEL, APPELLANT.

FILED NOVEMBER 22, 1929. No. 26878.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

A. H. Murdock, J. E. Bednar and *Perry Wheeler,* for appellant.

Gaines, McGilton, Van Orsdel and *Gaines, contra.*

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

PER CURIAM.

This is an action brought by plaintiff as receiver of the Security State Bank of Omaha to recover on the alleged double liability of defendant as a stockholder in the insolvent bank. The trial court directed a verdict in favor of plaintiff. Defendant has appealed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. IDA BROTHERTON, APPELLEE, V. ERNEST GIESE, APPELLANT.

FILED NOVEMBER 22, 1929. No. 26934.

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

William P. Warner, for appellant.

James J. McCarthy and *Malcolm R. Smith, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in bastardy. The district court for Dakota county rendered judgment in favor of plaintiff for $1,000 and costs. Defendant has appealed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MIKE S. ABDALLA, APPELLEE and CROSS-APPELLANT, V. MERCHANTS MUTUAL BURGLARY INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.

FILED NOVEMBER 22, 1929. No. 26938.

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

Howell, Tunison & Joyner and *Julius D. Cronin,* for appellant.

J. A. Donohoe, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action on a burglary insurance policy issued to plaintiff by the defendant company. From a judgment of the district court for Holt county in favor of plaintiff, defendant has appealed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

EDNA P. NEELY, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED DECEMBER 10, 1929. No. 26737.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Frank A. Peterson and *Lloyd Chapman,* for appellants.

Allen & Requartte, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and REDICK and STEWART, District Judges.

PER CURIAM.

This is an appeal by the city of Lincoln from an order of the district court for Lancaster county reducing the amount

of paving assessment on the appellee's property.

The record has been carefully examined and is found to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY B. BRYAN, EXECUTRIX, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED DECEMBER 10, 1929. No. 26738.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Frank A. Peterson and *Lloyd Chapman*, for appellants.

Allen & Requartte, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and REDICK and STEWART, District Judges.

PER CURIAM.

This is an appeal by the city of Lincoln from an order of the district court for Lancaster county reducing the amount of paving assessment on the appellee's property.

The record has been carefully examined and is found to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RIVETT LUMBER & COAL COMPANY, APPELLANT, V. ANTON P. LINDER ET AL., APPELLEES.

FILED DECEMBER 12, 1929. No. 26946.

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

Brome, Thomas, Ramsey & McGuire, for appellant.

A. H. Bigelow and *Sidney W. Smith, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in equity to foreclose a mechanics' lien. This case has heretofore been before this court; the first opinion being *Rivett Lumber & Coal Co. v. Linder*, 113 Neb. 567, and the second, bearing the same title, is reported in 116 Neb. 463. In the instant case plaintiff has appealed from an order of the district court for Douglas county directing distribution of the proceeds of sheriff's sale.

We have carefully considered the record and find the same free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JACK PALMER V. STATE OF NEBRASKA.

FILED DECEMBER 12, 1929. No. 26956.

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

F. L. Carrico, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Jack Palmer for a review of the judgment of the district court for Adams county wherein he was convicted of the crime of chicken stealing.

We have carefully considered all alleged errors assigned by plaintiff in error and find that the record is free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELSIE BENNER, APPELLEE, V. EVANS LAUNDRY COMPANY, APPELLANT.

FILED DECEMBER 12, 1929. No. 27059.

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

James Kinsinger, Warren Ogden and *H. W. Baird,* for appellant.

Wilmer B. Comstock and *John H. Comstock, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This action was commenced in the district court for Lancaster county by Elsie Benner, a minor, to recover for injuries sustained while in the employ of defendant company. The jury found for plaintiff in the sum of $12,000, and from a judgment entered thereon defendant has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1930.

IN RE ESTATE OF LOUIS BOURK.
CONDIT & COMPANY ET AL., APPELLEES, V. L. J. ROCHFORD, ADMINISTRATOR, APPELLANT.

FILED JANUARY 8, 1930. No. 26952.

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

J. H. Barry and *J. M. Galloway,* for appellant.

Hendricks & Kokjer, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

This is an appeal by L. J. Rochford from an order of the district court for Saunders county directing him, as administrator with the will annexed, of the estate of Louis Bourk, deceased, to pay a balance claimed to be due creditors.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GERTRUDE GATES, APPELLEE, V. HOSTETLER AMUSEMENT COMPANY ET AL., APPELLANTS.

FILED JANUARY 8, 1930. No. 26957.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Horth, Cleary & Suhr and *Eugene N. Blazer*, for appellants.

William P. Mullen, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

Plaintiff, a negress, brought this action in the district court for Hall county to recover damages for humiliation caused her by reason of being forced to leave the theater operated by defendants in the city of Grand Island. The jury returned a verdict for plaintiff in the sum of $200.50. From a judgment entered thereon defendants have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMPSON, J., not participating.

CARL CARLSON, APPELLEE, V. MILAN S. MOORE, APPELLANT.

FILED JANUARY 8, 1930. No. 26963.

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

H. A. Bryant and *Stewart & Stewart*, for appellant.

Halligan, Beatty & Halligan, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

This is an action to recover damages for malpractice, in which plaintiff alleged that defendant was careless and negligent in the operation of an X-ray used in treatment for the cure of eczema. The jury found for plaintiff in the sum of $4,175, and from a judgment entered thereon by the district court for Dawson county, defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN GABARRON, APPELLEE, V. SULLIVAN TRANSFER & STORAGE COMPANY, APPELLANT.

FILED JANUARY 8, 1930. No. 26966.

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

L. R. Doyle, Claude S. Wilson, R. F. Gilkeson, Hymen Rosenberg and *Baylor & Tou Velle,* for appellant.

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

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

This is an action for damages for personal injuries sustained by plaintiff as the result of an automobile accident. From a verdict and judgment for $7,500 in favor of plaintiff, defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LEWIS LINEBAUGH, ADMINISTRATOR, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED JANUARY 8, 1930. No. 26976.

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

Slama & Donato, E. S. Schiefelbein and *A. J. Rhodes,* for appellant.

C. A. Magaw, Thomas W. Bockes, J. H. Barry and *Thomas F. Hamer, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

PER CURIAM.

This action is brought by plaintiff, as administrator of the estate of Orval R. Wagner, deceased, the driver of a truck, who was struck by an oil train operated by defendant company. At the conclusion of plaintiff's evidence, the district court for Saunders county sustained defendants' motion for a directed verdict. Plaintiff appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS BANK OF CRAWFORD, APPELLANT: FRED R. LEITHOFF, APPELLEE.

FILED JANUARY 8, 1930. No. 26980.

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

C. M. Skiles, I. D. Beynon, Albert S. Johnston and *Allen G. Fisher,* for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

PER CURIAM.

This is an appeal from an order of the district court for Dawes county allowing the deposit of Fred R. Leithoff as a claim against the guaranty fund.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DANNEBROG STATE BANK, APPELLANT: H. P. PETERSEN, APPELLEE.

FILED JANUARY 8, 1930. No. 26981.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

C. M. Skiles, Taylor & Spikes and *Beller & James*, for appellant.

Haggart & Haggart, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

H. P. Petersen, appellee herein, filed a claim in the receivership proceedings brought to wind up the affairs of the Dannebrog State bank, based on two certificates of deposit in the amounts of $1,666.67 and $2,500, respectively. The district court for Howard county found the $1,666.67 item to be a general claim and the $2,500 item to be a preferred claim and allowed both as an off-set against a $7,000 note of Petersen and entered judgment in favor of the receiver of the Dannebrog State Bank and against Petersen for $4,384.66. The receiver has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GEORGE J. ADAMS ET AL., APPELLANTS, V. JOHN ARMOUR, COUNTY CLERK, ET AL., APPELLEES.

FILED JANUARY 8, 1930. No. 27220.

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

W. E. Hill, N. P. McDonald and *Beeler, Crosby & Baskins*, for appellants.

Hoagland & Carr, H. E. Dress and *D. A. Russell, contra.*

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

PER CURIAM.

This action was brought by a group of electors of Logan county to contest an election at which it was voted to remove the county seat of said county from the village of Gandy to the village of Stapleton. The trial court found generally in favor of the validity of the election and dismissed the contest. Complainants have appealed.

We have carefully considered the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARVEY KUNSELMAN V. STATE OF NEBRASKA.

FILED JANUARY 15, 1930. No. 26948.

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

J. E. Willits, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Harvey Kunselman for a review of the judgment of the district court for Adams county wherein he was convicted of the crime of burglary.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RAYMOND BOHLKE V. STATE OF NEBRASKA.

FILED JANUARY 15, 1930. No. 26949.

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

J. E. Willits, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Raymond Bohlke for a review of the judgment of the district court for Adams county wherein he was convicted of the crime of burglary.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NENA A. SCOTT, APPELLANT, V. FRED F. SCOTT, APPELLEE.

FILED JANUARY 15, 1930. No. 27005.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Anson H. Bigelow, for appellant.

Abbott, Dunlap & Corbett, contra.

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

PER CURIAM.

This is an action to recover money damages for the alleged fraud of defendant in procuring a decree of divorce from plaintiff. The district court for Douglas county sustained a special appearance of defendant and plaintiff has appealed.

We have carefully examined the record and find the same

to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF ANE MARIE NIELSEN.
DEWEY NIELSEN, APPELLANT, V. MARIE GUTZMER ET AL., APPELLEES.

FILED JANUARY 15, 1930. No. 27012.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Gaines, McGilton, Van Orsdel & Gaines for appellant.

John A. McKenzie and *Lawrence Fredericksen, contra.*

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

PER CURIAM.

This is an action brought by three children of Ane Marie Nielsen, deceased, to set aside the will of their mother on the ground that at the time of the execution of the instrument testatrix was mentally incompetent and because of the alleged undue influence of another son, Dewey Nielsen. The county court admitted the will to probate and an appeal was taken. Upon a trial in the district court for Douglas county the jury returned a verdict in favor of contestants, and from a judgment entered thereon proponent has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RUTH HANEY V. STATE OF NEBRASKA.

FILED JANUARY 15, 1930. No. 27084.

ERROR to the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed as modified.*

Cranny & Moore, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Ruth Haney for a review of the judgment of the district court for Platte county wherein she was convicted of the crime of burglary and sentenced to serve a period of one year in the state penitentiary.

We have carefully considered the record and find no ground for reversal. We believe, however, that this is an instance where the judgment of the district court may properly be modified.

Under the provisions of section 10186, Comp. St. 1922, the judgment of the district court is modified to the extent that the penalty imposed is changed from one year in the state penitentiary to five months in the county jail of Platte county. As thus modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

DELL JARMIN ET AL., APPELLEES, V. CHARLES A. BESSIE, APPELLANT.

FILED JANUARY 30, 1930. No. 26902.

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

Drake & Drake, for appellant.

Harvey M. Wilson, contra.

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

PER CURIAM.

This is an action to recover for a quantity of hay alleged to have been sold and delivered by plaintiffs to defendant. Upon a trial in the district court for Buffalo county a verdict was rendered in favor of plaintiffs, and from a judgment entered thereon defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CITIZENS STATE BANK OF GENEVA, APPELLANT, V. WALTER V. HUSTON ET AL., APPELLEES.
CITIZENS STATE BANK OF GENEVA, APPELLANT, V. BERT A. LYNN, GUARDIAN, ET AL., APPELLEES.

FILED JANUARY 30, 1930. No. 26986.

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

Tibbets, Lambe & Hewitt, for appellant.

Waring & Waring, Sloans, Keenan & Corbitt and *Montgomery, Hall, Young & Johnsen, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an appeal from a decree of the district court for Fillmore county dismissing two suits brought by plaintiff to recover certain notes alleged to have been wrongfully transferred by the managing officer of plaintiff bank to two estates which he represented. The two suits were consolidated in the district court.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ERVIN LACOMA, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED JANUARY 30, 1930. No. 27244.

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

Brogan, Ellick & Raymond and *James J. Fitzgerald, Jr.*, for appellant.

E. R. Leigh, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an action under the workmen's compensation act to recover for an injury to plaintiff's knee suffered while employed as a "route clerk". The trial court found that the injury arose out of and in the course of plaintiff's employment and was compensable. Plaintiff was awarded the sum of $124.57 together with medical and hospital bills and an attorney fee. Defendant has appealed.

We have carefully examined the record and find the same free from prejudicial error. The judgment of the district court is therefore affirmed and plaintiff allowed the sum of $100 as attorney fee for services in this court; same to be taxed as costs.

AFFIRMED.

JOHN W. GETCHELL, ADMINISTRATOR, APPELLANT, V. WINFIELD S. RODMAN ET AL., APPELLEES.

FILED FEBRUARY 7, 1930. No. 27024.

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

Allen G. Fisher, Charles A. Fisher and *F. S. Baker*, for appellant.

Roland V. Rodman, Harvey M. Johnsen and *Brown, Fitch & West, contra.*

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

PER CURIAM.

This is an action based upon a promissory note executed by defendant Rodman and delivered to John W. Getchell,

Sr. The district court for Kimball county found in favor of defendants and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN W. GETCHELL, ADMINISTRATOR, APPELLANT, V. WINFIELD S. RODMAN, APPELLEE.

FILED FEBRUARY 7, 1930. No. 27025.

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

Allen G. Fisher, Charles A. Fisher and *F. S. Baker*, for appellant.

Roland V. Rodman and *Harvey M. Johnsen, contra.*

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

PER CURIAM.

This is an action based upon a promissory note executed by defendant Rodman and delivered to John W. Getchell, Sr. The district court for Kimball county found in favor of defendant and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

SOCIETE TITANOR, APPELLEE, V. SELDEN-BRECK CONSTRUCTION COMPANY, APPELLANT.

FILED FEBRUARY 7, 1930. No. 27027.

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

Kennedy, Holland, De Lacy & McLaughlin, for appellant.

Congdon, Finlayson & Burke, contra.

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

PER CURIAM.

This is an action on a written contract to recover for a quantity of tool steel sold by plaintiff to defendant. The district court for Douglas county sustained plaintiff's motion for a directed verdict and entered judgment against defendant for $2,113.54. Defendant has appealed.

We have carefully considered the record and find the same free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY VLCEK ET AL., APPELLANTS, V. BURLINGTON ELEVATOR COMPANY ET AL., APPELLEES.

FILED FEBRUARY 7, 1930. No. 27037.

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

James J. Krajicek and *Votava & McGroarty*, for appellants.

Kennedy, Holland, De Lacy & McLaughlin and *John F. Moriarty, contra.*

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

PER CURIAM.

Plaintiffs brought this action to enjoin the erection of an elevator by defendant Burlington Elevator Company, and certain other industrial buildings by defendant Omaha Flour Mills. It is alleged that in 1924 the property upon which defendants proposed to erect such buildings was placed in what is known as a residential district under the terms of the city zoning ordinance, which ordinance was amended in 1929 to permit the property in question to be used for industrial purposes. A separate demurrer was filed on behalf of each defendant. The district court for Douglas county sustained the demurrers and plaintiffs have appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROBERT BROWNLEE, APPELLANT, V. SCHOOL DISTRICT OF LINCOLN, APPELLEE.

FILED FEBRUARY 7, 1930. No. 27040.

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

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

R. O. Williams and *C. Petrus Peterson, contra.*

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

PER CURIAM.

This is an action to recover damages for personal injuries sustained by Robert Brownlee, a minor, alleged to have been caused by the overturning of a disconnected steam radiator which stood in a hall of the Saratoga school building in the city of Lincoln. The defendant filed a general demurrer, which was sustained by the district court for Lancaster county. Plaintiff has appealed.

We have carefully examined the record and find it free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT, V. FRED SOPER ET AL., APPELLEES.

FILED FEBRUARY 14, 1930. No. 26991.

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

Ziegler & Dunn, G. W. Becker and *F. H. Stubbs,* for appellant.

J. W. Boyd, Bernard McNeny, T. W. Cole and *Stiner & Boslaugh, contra.*

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

PER CURIAM.

Plaintiff brought this action to foreclose its first mortgage upon certain premises owned in fee by defendant Lydia E. Soper. The defendant Hardy State Bank of Hardy held a second mortgage upon the same premises, which mortgage is set up by cross-petition. Defendants defaulted and a decree was entered foreclosing both mortgages. Defendants filed a request for stay. Later sale was had, at which the property was sold to plaintiff. Upon motion to confirm the sale, plaintiff filed objections to confirmation, alleging a misunderstanding as to the application of certain insurance money. The district court for Nuckolls county confirmed the sale over the objections of plaintiff. Plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMAS KASTNER, APPELLEE, V. CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED FEBRUARY 14, 1930. No. 27029.

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

Thomas E. Dunbar, for appellants.

D. W. Livingston, contra.

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

PER CURIAM.

This is an action brought by plaintiff to enjoin the opening of certain streets in the city of Nebraska City which

plaintiff claimed by right of adverse possession. From a decree of the district court for Otoe county in favor of plaintiff, defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

KATE CRABLE ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1930. No. 27089.

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

J. E. Willits, for plaintiffs in error.

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

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

PER CURIAM.

This is a proceeding in error, brought to review the judgment of the district court for Adams county, wherein Kate Crable was convicted of sale, possession, and transportation of intoxicating liquor and the use of an automobile for transportation of intoxicating liquor, and Edward J. Crable was convicted of possession and transportation of intoxicating liquor and the use of an automobile for transportation of intoxicating liquor.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

TRUSCON STEEL COMPANY, APPELLANT, V. CRYSTAL REFRIGERATOR COMPANY, APPELLEE.

FILED FEBRUARY 14, 1930. No. 27166.

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

W. G. Guthrie and *J. C. Cook*, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

PER CURIAM.

This action was commenced in the district court for Dodge county to recover a balance alleged to be due on a written contract. From a judgment in favor of defendant, plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

O. L. KERR V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1930. No. 27268.

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

J. G. Thompson and *B. B. Webber*, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by O. L. Kerr, for a review of the judgment of the district court for Harlan county wherein he was convicted of the crime of incest.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

BENJAMIN KING, APPELLEE, V. WILLIAM T. FENTON, APPELLANT.

FILED FEBRUARY 28, 1930. No. 27257.

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

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

Allen & Requartte, contra.

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

PER CURIAM.

This is an action in habeas corpus instituted by plaintiff against defendant as warden of the state penitentiary. Upon trial in the district court for Lancaster county, plaintiff was discharged from custody, and defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROY PRIEST, APPELLEE, V. ELMER R. PORTER, APPELLANT.

FILED MARCH 19, 1930. No. 26840.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

Gaines, McGilton, Van Orsdell & Gaines and *Weaver & Giller,* for appellant.

Brome, Thomas, Ramsey & McGuire and *A. T. Bradford, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an action to recover damages for malpractice. Upon trial in the district court for Douglas county a verdict

was rendered for plaintiff in the sum of $15,000. From a judgment rendered thereon defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRANK S. SELBY, APPELLEE, V. MARY N. SELBY, APPELLANT.

FILED MARCH 19, 1930. No. 27086.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Brogan, Ellick & Raymond, for appellant.

Congdon, Finlayson & Burke, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an action for divorce brought by plaintiff on the ground of the extreme cruelty of defendant. The decree of the district court for Douglas county awarded plaintiff an absolute divorce and gave defendant the household goods as permanent alimony with an option on her part to be paid the value of the goods if she so desired. Defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARBINE BANK OF FAIRBURY, APPELLEE, V. PHOEBE KLASE, APPELLANT.

FILED MARCH 21, 1930. No. 27103.

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

J. W. Moss and *Melvin Moss,* for appellant.

Heasty, Barnes & Rain, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an appeal from a judgment of the district court for Jefferson county confirming the sale of land sold to satisfy a deficiency judgment rendered on the foreclosure of a real estate mortgage.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRANK L. SVOBODA, APPELLANT, V. HENRY MORTENSEN ET AL., APPELLEES.

FILED MARCH 21, 1930. No. 27127.

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

McKillip & Barth, for appellant.

Norval Brothers and *Thomas & Vail, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

Plaintiff brought this action in the county court of Seward county to recover the sum of $400 alleged to be due on a check drawn by defendant Mortensen on the Cordova State Bank. Upon trial a judgment was rendered in favor of defendants and plaintiff appealed to the district court. The district court for Seward county sustained a special appearance of defendants and dismissed plaintiff's appeal from the county court. Plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CHARLES WIDGREN, APPELLANT, V. MARY OSTMAN ET AL.: AUGUSTA ROSELL ET AL., INTERVENERS, APPELLEES.

FILED MARCH 28, 1930. No. 27097.

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

C. P. Anderbery and *Lewis C. Paulson,* for appellant.

A. C. R. Swenson, Harry O. Palmer and *Arthur L. Palmer, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an action involving a dispute as to the ownership of the sum of $5,000 which was deposited in the State Bank of Minden, Nebraska, by Peter G. Soderberg, deceased. The deposit in question is represented by a certificate of deposit held in trust by defendant Mary Ostman. Plaintiff has appealed from a judgment of the district court for Kearney county, by which the trial court found that the fund in question was held in trust for the benefit of the heirs of Peter G. Soderberg who resided in Sweden.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMPSON, J., took no part in the decision.

WILLYS-OVERLAND, APPELLEE, V. H. C. WILSON, APPELLANT.

FILED APRIL 3, 1930. No. 27102.

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

W. A. Ehlers, for appellant.

Frost, Nimtz & Hogle, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an action to replevin a Ford car and has heretofore been before this court under the same title but bearing general number 25677. Upon the former appeal the judgment of the district court was reversed by a judgment of this court entered on an opinion by the supreme court commission.

Upon a retrial a judgment was rendered giving defendant right to possession of the car and an equitable lien for the amount paid by him on the purchase price of the car. Defendant has appealed and contends that the district court for Douglas county erred in "having refused to submit the question of the damages to the defendant for the wrongful taking of the car in replevin."

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY L. DABERCO, APPELLEE, V. ARTHUR DABERKOW ET AL., APPELLANTS.

FILED APRIL 11, 1930. No. 27072.

APPEAL from the district court for Merrick county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Walter R. Raecke, B. J. Cunningham and *H. G. Wellensiek,* for appellants.

Horth, Cleary & Suhr and *Edward J. Patterson, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an appeal by defendants from a judgment of the district court for Merrick county in which plaintiff recovered damages for malicious prosecution.

We have carefully examined the record and find the same free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARRY C. WILSON COMPANY ET AL., APPELLEES, V. IRVIN MCMURRAY ET AL., APPELLANTS.

FILED APRIL 11, 1930. No. 27129.

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

Pratt, Pratt & Anderson, for appellants.

R. H. Olmstead, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This is an injunction suit in which plaintiffs ask that defendants be enjoined from disposing of certain promissory notes and that such notes be canceled and delivered to plaintiffs. The district court for Douglas county found in favor of plaintiffs and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GERMAN CRAIG V. STATE OF NEBRASKA.

FILED APRIL 11, 1930. No. 27131.

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

John M. Berger, A. S. Ritchie and *John E. von Dorn,* for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and HASTINGS, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by German Craig for a review of the judgment of the district court for Douglas county, wherein he was convicted of the

crime of larceny from the person under section 9598, Comp. St. 1922.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROY F. EVANS, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED APRIL 11, 1930. No. 27139.

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

Weaver & Giller, for appellant.

John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This action was commenced in the district court for Douglas county by Roy F. Evans, a fireman, employed by defendant, the city of Omaha, to recover a portion of his annual salary. On his first cause of action plaintiff sought to recover an amount equal to his pay for one day in each month which had been deducted by the city. The second cause of action is for the recovery of pay for four days during the month of September, 1928, which had been deducted from the regular pay of plaintiff, by an order reducing the personnel of the fire department for four days a month. The trial court found in favor of plaintiff on his first cause of action and for the defendant on the second cause of action. Plaintiff has appealed and defendant has perfected a cross-appeal.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN E. JOHNSON, APPELLEE, V. JONAS O. JOHNSON, ADMINISTRATOR, ET AL., APPELLANTS.

FILED APRIL 11, 1930. No. 27141.

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

G. T. H. Babcock, Allen G. Fisher and *Charles A. Fisher,* for appellants.

E. D. Crites, F. A. Crites and *Nichols & Johnson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY, and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This is an action to foreclose a real estate mortgage. From a judgment of the district court for Dawes county in favor of plaintiff, defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CARL THORNTON, APPELLANT, V. LEO BENNINGHOVEN ET AL., APPELLEES.

FILED APRIL 18, 1930. No. 27002.

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

Seymour L. Smith, for appellant.

William McDonnell, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an action to recover damages upon two causes of action, one for false imprisonment and one for malicious prosecution. At the close of plaintiff's evidence, the district court sustained motions to dismiss made by defendants, and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CORA ADA BRABSON, APPELLEE, V. GUST PETERSON, APPELLANT.

FILED APRIL 18, 1930. No. 27006.

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

King & Bracken and *Lewis C. Paulson,* for appellant.

C. P. Anderbery, W. L. Minor and *Prince & Prince, contra.*

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

PER CURIAM.

This is an action to recover damages for personal injuries and for damages to plaintiff's automobile sustained in a collision with the automobile of defendant. Upon trial in the district court for Kearney county the jury returned a verdict in favor of plaintiff for $1,500, and from a judgment entered thereon, defendant has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FARMERS & MERCHANTS BANK OF OMAHA, APPELLANT, V. OTTO J. BAUMAN, TREASURER, ET AL., APPELLEES.

FILED APRIL 18, 1930. No. 27049.

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

Walter H. Justin, for appellant.

Henry J. Beal and *W. W. Slabaugh, contra.*

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

PER CURIAM.

This is an action by the Farmers & Merchants Bank of Omaha for a refund of real estate taxes paid in 1926, 1927, and 1928. The district court for Douglas county sustained a general demurrer filed by defendant, and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HENRY SCHNELL, APPELLEE, V. FARMERS BANK OF DUNBAR ET AL., APPELLANTS.

FILED MAY 1, 1930. No. 27068.

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

Thomas E. Dunbar, for appellants.

Paul Jessen, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This is an action in injunction brought in the district court for Otoe county to enjoin the sale of land on execution. The trial court found in favor of plaintiff and defendants have appealed.

We have carefully examined the record and find that this case is controlled by the decision of this court in *Hiles v. Benton,* 111 Neb. 557. The judgment of the district court is therefore

AFFIRMED.

HENRY WENZEL, APPELLANT, V. D. G. GRIFFITH, APPELLEE.

FILED MAY 1, 1930. No. 27153.

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

S. D. Killen, for appellant.

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

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

Henry Wenzel brought this action in the district court for Gage county seeking his release from the state hospital for the insane located at Lincoln, Lancaster county, Nebraska, by writ of habeas corpus. Defendant Griffith, who is superintendent of the state hospital, filed a special appearance objecting to the jurisdiction of the court on the ground that plaintiff was confined in Lancaster county. The trial court sustained defendant's special appearance and plaintiff has appealed.

The sole issue presented is that of the jurisdiction of the district court for Gage county. We have carefully considered the record and find that this case is controlled by the holding of this court in *Gillard v. Clark,* 105 Neb. 84. The judgment of the district court is therefore

AFFIRMED.

SMITH BAKING COMPANY, APPELLEE, V. INTERIOR FLOUR MILLS COMPANY, APPELLANT.

FILED MAY 1, 1930. No. 27174.

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

Stewart, Stewart & Whitworth, for appellant.

William Niklaus, contra.

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action to recover damages for the partial breach of a written contract for the sale and delivery of flour. The cause was tried to a jury which returned a verdict in favor of plaintiff in the sum of $880.31, and from a judgment entered thereon by the district court for Lancaster county defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GERTRUDE FAUST, APPELLANT, V. HARRY B. GORE ET AL., APPELLEES.

FILED MAY 1, 1930. No. 27182.

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

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

Claude S. Wilson, Roy Gilkeson, Hymen Rosenberg, Frank A. Peterson and *Lloyd E. Chapman, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action to recover damages for personal injuries sustained by plaintiff as a result of being hit by a golf ball driven by defendant Gore. At the close of plaintiff's evidence the trial court sustained a motion of defendant city of Lincoln for a directed verdict. At the conclusion of all the testimony a motion for a directed verdict by the Antelope Golf Club was sustained. The jury returned a verdict in favor of plaintiff and against defendant Gore in the sum of one dollar, and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FARMERS UNION EXCHANGE OF HOLDREGE ET AL., APPELLANTS, V. F. A. YORK ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27202.

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

Frank A. Anderson, for appellants.

O. E. Bozarth and *Dora Nelson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action by plaintiff corporation and its directors to recover a 100 per cent. assessment on the paid-up stock of defendants in the corporation. The stock in question was nonassessable, but plaintiffs allege that such assessment was authorized by the board of directors and stockholders. The district court for Phelps county found in favor of defendants and plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JAMES A. HUNTER ET AL, APPELLEES, V. WILLIAM S. NICHOLSON, APPELLANT.

FILED MAY 2, 1930. No. 27217.

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

Lee Basye, for appellant.

Mitchell & Gantz, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an appeal by defendant from an order of the district court for Sioux county overruling a motion of appellant to vacate and set aside a decree of foreclosure.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMAS S. KELLEY, APPELLANT, V. OTTO J. BAUMAN, TREASURER, ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27223.

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

H. M. Kelley, for appellant.

Henry J. Beal, W. W. Slabaugh and *Holtz & Holtz, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action commenced in the district court for Douglas county to cancel a real estate tax on property owned by plaintiff and to enjoin collection thereof. The trial court found in favor of defendants and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JEWISH COMMUNITY CENTER OF OMAHA, APPELLEE, V. DOUGLAS COUNTY, APPELLEE: M. O. OLSON, APPELLANT.

FILED MAY 16, 1930. No. 27188.

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

William J. Hotz and *Robert H. Hotz,* for appellant.

Monsky, Katleman & Grodinsky, W. W. Slabaugh, Henry J. Beal, John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This action was commenced by plaintiff in the district court for Douglas county to enjoin defendant Olson from obtaining a tax deed to real estate and to cancel the tax on the ground that the property in question was used for charitable, educational, and religious purposes during the years 1924, 1925, and 1926. The trial court found that at the time the 1924 county taxes and the 1925 city taxes were assessed the property was not exempt and gave Olson judgment for $1,870.08 with 12 per cent. interest from November 2, 1925. The trial court further found that the property was exempt during the time the other taxes in question were levied and entered judgment in favor of Olson and against the city of Omaha and the county of Douglas for the amount of the taxes thus paid, but denied him interest thereon. Olson has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CATHERINE MCELHANY, APPELLANT, V. PEARL A. WELSHANS, APPELLEE.

FILED MAY 16, 1930. No. 27234.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Montgomery, Hall, Young & Johnsen, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover damages for personal injuries. The district court for Douglas county sustained the demurrer filed by defendant, and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CORRINE MCCARTY, APPELLANT, V. RUDGE & GUENZEL COMPANY, APPELLEE.

FILED MAY 16, 1930. No. 27241.

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

Sterling F. Mutz, for appellant.

Hall, Cline & Williams, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff while a passenger in an elevator in defendant's store. At the close of plaintiff's evidence the district court for Lancaster county sustained a motion for a directed verdict made by defendant Rudge & Guenzel Company. Plaintiff thereupon dismissed her case against another defendant and has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FIRST NATIONAL BANK OF LEIGH, APPELLEE, V. HENRY KNUDSON ET AL.: NEWMAN GROVE STATE BANK, APPELLANT.

FILED MAY 16, 1930. No. 27242.

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

C. M. Skiles & Vail & Flory, for appellant.

Wagner & Wagner and *W. M. Cain, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover the sum of $7,000 loaned by plaintiff to defendant Knudson and deposited by him in the Newman Grove State Bank to his personal account. The Newman Grove State Bank later applied the sum of $6,874.34 from this deposit to the payment of a past-due note of Knudson. This transaction was approved by Knudson. Plaintiff alleged that the original loan of $7,000 was obtained by fraud and sought to impress a trust upon the amount applied in payment of the Knudson note by the Newman Grove State Bank. The district court for Platte county found in favor of plaintiff, and defendant Newman Grove State Bank has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MICHAEL TIGHE, APPELLEE, V. BEN LAW ET AL.: WILLIAM E. HOWIE ET AL., APPELLANTS.

FILED MAY 16, 1930. No. 27255.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Lawrence I. Shaw, for appellants.

Ziegler & Dunn, John W. Yeager and *Bryce Crawford, Jr., contra.*

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

PER CURIAM.

This is an action to recover damages for personal injuries sustained as a result of a collision between a truck in which plaintiff was riding and a truck owned by defendant Howie. The jury found in favor of plaintiff, and from

a judgment entered by the district court for Douglas county defendants have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GILINSKY FRUIT COMPANY, APPELLANT, V. AMERICAN RAILWAY EXPRESS COMPANY, APPELLEE.

FILED MAY 23, 1930. No. 27156.

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

Gaines, McGilton, Van Orsdel & Gaines, for appellant.

Brown, Fitch & West, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action to recover for damages alleged to have been sustained by plaintiff by reason of the careless and negligent handling by defendant of a quantity of strawberries shipped to plaintiff from Ponchatoula, Louisiana. At the conclusion of the testimony the district court for Douglas county sustained defendant's motion for a directed verdict and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. DAWES COUNTY AGRICULTURAL AND FAIR ASSOCIATION, APPELLEE, V. J. E. STRAIT ET AL., APPELLEES: H. J. STROHMEYER ET AL., APPELLANTS.

FILED MAY 23, 1930. No. 27260.

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

J. E. Porter, for appellants.

F. A. Crites, Allen G. Fisher and *Charles A. Fisher, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in mandamus to compel payment to the relator of the sum of $2,000 alleged to have been levied in the year 1928 for the support of relator. The district court for Dawes county found in favor of relator and interveners have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELLA M. HOSTETLER, APPELLEE, V. FLOYD E. WRIGHT ET AL., APPELLANTS.

FILED MAY 23, 1930. No. 27294.

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

Craft, Edgerton & Fraizer, for appellants.

Miller & Blackledge, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in injunction brought to restrain defendants from interfering with a certain retail merchandise business in the village of Shelton, operated by plaintiff and which defendants Floyd E. Wright and E. J. Wright allege they had contracted to purchase. The district court for Buffalo county found in favor of plaintiff and defendants have appealed.

We have carefully examined the record and find it to be

free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LORRAINE L. MCCORD, APPELLANT, V. JAMES G. MCCORD, APPELLEE.

FILED MAY 29, 1930. No. 27100.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

Brogan, Ellick & Raymond and *George S. Wright*, for appellant.

Gaines, McGilton, Van Orsdel & Gaines, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county seeking a divorce from defendant on the grounds of extreme cruelty. The trial court granted a decree of divorce and gave plaintiff as alimony certain jewelry and household goods, $2,900 in cash and the sum of $200 a month during the life of defendant or until plaintiff should remarry. Plaintiff was also allowed an attorney fee of $2,500. On appeal plaintiff complains only of the allowance of alimony.

We have carefully examined the entire record and conclude that the judgment of the district court should be modified by increasing the amount of alimony from $200 a month to $375 a month, and that an additional sum of $1,000 should be allowed as attorney fees, making a total allowance of $3,500 for services of plaintiff's attorneys in both district and supreme courts. In all other respects the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

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10. Claims against an insolvent state bank are barred by limitation only by compliance with statutory procedure and conditions. *State, ex rel. Spillman, v. State Bank of Papillion* 525
11. Judgment allowing claims against receiver of insolvent state bank and an order for payment *held* not erroneous. *State, ex rel. Spillman, v. Dunbar State Bank* 573
12. An agreement between the cashier of a bank and the purchaser of grain mortgaged to the bank that checks for subsequent purchases would be drawn jointly in favor of mortgagor and mortgagee may bind the bank. *Security State Bank v. Schomberg* 598
13. Conversion of liberty bonds left with a bank for safekeeping and substitution of certificates of deposit without the owner's knowledge *held* not to create a deposit under the guaranty law. *State, ex rel. Spillman, v. Dunbar State Bank* 763

Beneficial Associations.

1. A fraternal beneficiary society erecting a building, part of which it rented to tenants, *held* to have the power to sell the building. *Price v. Fraser* 806
2. Evidence *held* insufficient to establish fraud of officers of a fraternal association in the sale of its office building. *Price v. Fraser* 806
3. Evidence *held* to establish that the consideration for the sale of a fraternal association's property was fair and adequate. *Price v. Fraser* 806

Bills and Notes.

1. A payee taking a note with knowledge that certain apparent makers were in fact sureties *held* not, as to such sureties, a holder in due course. *Hardin Trust Co. v. Wollard* 307
2. In an action by payee against apparent makers of a note, the defense of suretyship and agreement may be interposed. *Hardin Trust Co. v. Wollard* 307
3. A note *held* not nonnegotiable because attached to a conditional sale contract reserving title in the seller until the note was paid. *First Nat. Bank v. Newton* 394

4. To constitute one an accommodation maker, the transaction must be primarily for the benefit of the payee and without benefit to the maker. *Lee v. Hildebrand*..... 717
5. Accommodation paper executed for a specific purpose cannot be enforced by a holder knowing it was being used for an entirely different purpose. *Lee v. Hildebrand* 717
6. A note given by a widow for a debt due from her deceased husband's insolvent estate is voidable without a new consideration, and the creditor's agreement for renewal is not a consideration. *Bank of Commerce v. McCarty* 795
7. An attempted ratification of a forged instrument will not, in absence of a new consideration or estoppel, confer a right of action on the forger. *Bank of Commerce v. McCarty*..... 795
8. As between original parties and as against transferees, not *bona fide* purchasers, a renewal note is open to all defenses available against the original note. *Bank of Commerce v. McCarty*..... 795

Brokers.

1. A broker cannot recover commission from a vendor for whom he was disqualified to act. *Humpe v. Taylor*..... 33
2. A broker cannot recover commission from a vendor where the only service rendered was for the vendee. *Humpe v. Taylor*..... 33

Carriers.

1. Refusal to instruct that it was the carrier's duty to wait sufficient time before putting the car in motion to permit passengers to alight in safety *held* error. *Lieb v. Omaha & C. B. Street R. Co*..... 222
2. Allegation *held* sufficiently broad to cover the question as to whether a street car stopped sufficient time to permit plaintiff to alight in safety. *Lieb v. Omaha & C. B. Street R. Co*..... 222
3. An instruction that a street railway company does not owe a duty to warn alighting passengers that the car is about to be started *held* erroneous. *Lieb v. Omaha & C. B. Street R. Co*..... 222

Chattel Mortgages.

1. A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument suggests, to identify the property is sufficiently definite, and the rule applies to chattel mortgages on growing crops. *Security State Bank v. Schomberg*..... 598

2. Description in a chattel mortgage on growing grain and also on the matured crop, whether "in the field, in cribs or bins, in elevator or any other place," *held* sufficient. *Security State Bank v. Schomberg* 598
3. The rule that a mortgage on a growing crop is not constructive notice of a lien on the matured crop does not necessarily apply to a mortgage on a growing crop and also on the harvested crop. *Security State Bank v. Schomberg* 598
4. Registering of a chattel mortgage is immaterial as between the parties thereto. *Security State Bank v. Schomberg* 598
5. Provision of oral lease reserving title of crops to be grown as security for existing indebtedness *held* to be in the nature of a chattel mortgage and void as to attaching creditors. *Wilcox & Co. v. Deines* 692

Commerce.

A franchise tax on domestic corporations measured by the amount of paid-up capital stock, *held* not a tax on interstate commerce. *State, ex rel. Beatrice Creamery Co., v. Marsh* 197

Conspiracy.

Where several defendants are sued as conspirators in committing a tort, actionable if committed by one alone, a judgment against one or more may be sustained without proof of a conspiracy among all. *Dunbier v. Mengedoht* 706

Constitutional Law. SEE STATUTES.

1. Chapter 168, Laws 1929, the intangible tax law, *held* constitutional. *Mehrens v. Greenleaf* 82
2. A statute will not operate retrospectively to invalidate or impair contracts or interfere with vested rights. *Travelers Ins. Co. v. Ohler* 121
3. Increase in assessed valuation by the state board of equalization and assessment without notice is void. *Northwestern Bell Tel. Co. v. State Board of Equalization and Assessment* 138
4. Courts will not annul a legislative act, unless it clearly contravenes the fundamental law, or is against public policy. *Abie State Bank v. Weaver* 153
5. The statute authorizing granting a license to a guardian to mortgage realty of an insane ward without notice to the ward is not the taking of property without due process of law. *Mead v. Polly* 206

6. The legislature may use its discretion in adopting a classification making a distinction between breeding cattle and feeding cattle for the purpose of tuberculin tests. *State, ex rel. Spillman, v. Splittgerber* 436
7. A statute denying to persons under 16 the right to a license to drive motor vehicles *held* not deprivation of property without due process of law. *State, ex rel. Oleson, v. Graunke* 440
8. Denying the right to a license to operate motor vehicles to persons under 16 *held* neither arbitrary nor unreasonable. *State, ex rel. Oleson, v. Graunke* 440
9. A curative act is one intended to give legal effect to a past transaction which is ineffective because of failure to comply with legal requirements. *Anderson v. Lehmkuhl* 451
10. Mere irregularities in legal proceedings may, in absence of constitutional limitations, be corrected. *Anderson v. Lehmkuhl* 451
11. Retroactive statutes may legalize unauthorized acts which could have been authorized in the first place, but the legislature cannot legalize defective proceedings based on a former act adjudged to be unconstitutional. *Anderson v. Lehmkuhl* 451
12. Alimony, suit money, and attorney's fees, *held* not "debt" within section 20, art. I, Const. *Jensen v. Jensen* 469
13. The Constitution is to be interpreted with reference to the established laws, usages, and customs when adopted. *State, ex rel. Central Realty & Investment Co., v. McMullen* 739

Contempt.

1. Summary proceedings for contempt lie only where the contempt is committed in the presence of the court and the court has judicial cognizance of the facts. *Gonzalez v. State* 13
2. Where evidence must be adduced to determine whether contempt has been committed, a formal complaint must be filed and an opportunity given to defend. *Gonzalez v. State* 13
3. A judgment of contempt must state the facts constituting the contempt; a mere statement of the court's conclusion is insufficient. *Gonzalez v. State* 13

Contracts. SEE PLEADING, 2, 3.

1. General words following particular or specific terms are restricted in meaning to articles of the same kind as those specially mentioned. *Coad v. London Assurance Corporation* 188

2. When plaintiff can maintain his cause of action without the aid of an illegal act he can recover. *Dunbier v. Mengedoht* 706
3. The burden of proving rescission of contract to repurchase stock is on the party pleading it. *Heller v. Speier* 787
4. The purchase price is the measure of damages for breach of contract to repurchase stock. *Heller v. Speier*..... 787
5. A contract will not be set aside for inadequacy of consideration unless the inadequacy is so great as to furnish convincing evidence of fraud. *Price v. Fraser*..... 806

Corporations.

1. If a corporation's assets are honestly valued in view of all facts known at the time, a dividend is not unlawful because the assets subsequently prove to be worth less than the valuation. *Splittgerber Bros. v. Skinner Packing Co*..... 259
2. "Net profits" defined. *Splittgerber Bros. v. Skinner Packing Co*..... 259
3. A purchaser who knew the value of a recently organized corporation's stock was problematical was not justified in relying on representations of a salesman as to its value. *Splittgerber Bros. v. Skinner Packing Co*..... 259
4. The common law rule that a stockholder has the right to inspect the corporation's books at reasonable times and for proper purposes obtains in Nebraska. *State, ex rel. Charvat, v. Sagl*..... 374
5. Transactions between corporations having common officers and directors are presumptively fraudulent. *Price v. Fraser*..... 806
6. A sale by one corporation to another having a common director can be set aside only if the financial interest of the director prevented honest performance of his duties and there was want of good faith and inadequate consideration. *Price v. Fraser*..... 806
7. A corporation not restrained by statute or prohibited by its articles of incorporation or outstanding contracts may dispose of all its property for any lawful purpose. *Price v. Fraser*..... 806
8. A corporation acquiring property in violation of its powers is required to dispose of it. *Price v. Fraser*..... 806

Costs. SEE INSURANCE, 1, 2.

1. Members of a fraternal insurance association successfully suing to recover personalty of the association unlawfully transferred are entitled to attorney's fees. *Folts v. Globe Life Ins. Co*..... 143

2. Generally, attorney's fees are allowed the successful party only where authorized by statute or the uniform course of procedure. *State, ex rel. Charvat, v. Sagl*..... 374

Counties and County Officers.

1. Compensation of member of Adams county board is $950 and $5 for each day actually employed in directing road work. *State, ex rel. Maltman, v. Adams County*..... 826
2. Member of county board is not entitled to mileage while directing road work. *State, ex rel. Maltman, v. Adams County* 826
3. Payment to member of county board for directing road work must be out of the district road fund, and motor vehicle registration or license fees cannot be included therein. *State, ex rel. Maltman, v. Adams County*..... 826

Courts.

1. A rule of evidence adopted by the supreme court, unless overruled or changed by legislation, is binding on district courts. *Sorensen v. Grand Island Clinic*..... 280
2. A county court in probate matters is a court of general jurisdiction, and its judgments therein, including determination of heirship, cannot be collaterally attacked. *In re Heirship of Robinson*..... 285
3. In a proceeding to determine heirship, title to realty is not involved; the court merely determines who are heirs, and the law of descent passes the title. *In re Heirship of Robinson* 285
4. Decisions of the supreme court of the United States control in determining the issue of negligence under federal employers' liability act; its interpretation prevailing over state law or rule of interpretation. *Diller v. Chicago, B. & Q. R. Co*..... 494
5. A probate judge may waive the right to demand his fee in advance for making a transcript on appeal. *In re Estate of Tagart*..... 647
6. Delay in filing transcript on appeal *held* attributable to county judge. *In re Estate of Tagart*..... 647
7. Where delay in filing transcript was not attributable to appellant, the district court did not lose jurisdiction of the case. *In re Estate of Tagart*..... 647
8. A litigant may not invoke the aid of a court of equity and at the same time deny its jurisdiction. *Geiss v. Trinity Lutheran Church Congregation*..... 745

Criminal Law.

1. As against a plea in abatement, evidence *held* to show that a preliminary examination had been held. *Murray v. State*..... 16

2. Evidence at preliminary hearing *held* to justify an order requiring accused to answer a charge of forgery. *Murray v. State* 16
3. In the absence of any showing, it will not be presumed that a sheriff has such personal interest in a prosecution as will disqualify him from selecting a jury. *Murray v. State* 16
4. The mere indorsement on an information of the sheriff's name as a witness does not justify sustaining a challenge to the array of jurors on the ground that the sheriff was disqualified to select, summon, and guard the jury. *Murray v. State* 16
5. Proof of other similar offenses committed by the accused, to be admissible on the question of intent, should be sufficiently significant and near in point of time as to induce reasonable belief in the intent sought to be proved. *Murray v. State* 16
6. The qualifications of an expert witness are for the court; the weight to be given his testimony is for the jury. *Murray v. State* 16
7. The trial court's decision on the qualifications of an expert will not be disturbed, except for a clear abuse of discretion. *Murray v. State* 16
8. A new trial for alleged misconduct of jurors is discretionary. *Murray v. State* 16
9. Overruling objection to proceeding with trial for murder after adjournment for 26 days by reason of juror's illness *held* not error under the circumstances. *Penn v. State* 95
10. The granting of a change of venue is discretionary. *Penn v. State* 95
11. The credibility of witnesses is for the jury. *Johnson v. State* 217
12. A reviewing court will not set aside a verdict as unsupported by the evidence unless the evidence is so deficient that all reasonable minds must agree that there is reasonable doubt of the guilt of accused. *Johnson v. State* 217
13. Evidence *held* to sustain conviction for embezzlement. *Johnson v. State* 217
14. Prosecutrix' statement of facts of alleged assault with intent to ravish and of the name of her assailant *held* admissible as part of the *res gestæ*. *Dodson v. State* 340
15. Conviction of a lesser offense than that which accused was informed against is not a bar to prosecution for a greater offense if accused is granted a new trial. *Pembrook v. State* 417

16. Accused cannot benefit from a verdict, if he elects to appeal therefrom. *Pembrook v. State* 417
17. Reversal of judgment for murder in second degree and remanding case for new trial placed accused in the same position as if no former trial had been had. *Pembrook v. State* 417
18. The trial court's statement that the evidence would not justify a verdict of murder, and that the case was submitted only on the issue of manslaughter, *held* not a statement of belief that accused was guilty of manslaughter. *Pembrook v. State* 417
19. The weight of evidence is a question for the jury. *Norton v. State* 588
20. The name of defendant need not appear in the body of the verdict, where he is designated by his proper name in the caption thereof. *Norton v. State* 588
21. Felonious intent must be proved beyond a reasonable doubt to sustain a conviction for grand larceny. *West v. State* 633
22. Where felonious intent essential to a conviction for grand larceny is inferable alone from circumstances, they must exclude every reasonable hypothesis except guilt of accused. *West v. State* 633
23. Sentence pronounced on one already serving sentence does not begin to run until expiration of the first sentence, unless otherwise specifically provided. *State, ex rel. Allen, v. Ryder* 704
24. Refusal to permit cross-examination of a state witness as to the number of times he had been convicted of felonies *held* reversible error. *Sulley v. State* 783
25. Giving an instruction mentioning defendant's failure to testify is not reversible error, when followed with the direction that nothing must be taken against him on that account. *Murray v. State* 16
26. Refusal to give requested instructions on matters covered by those given is not error. *Roeder v. State* 116
27. Where the evidence tends to prove a motive for a crime, refusal to instruct that lack of motive is a circumstance favoring defendant is justified. *Roeder v. State* 116
28. Where the charge as a whole correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete. *Norton v. State* 588
29. Refusal to give cautionary instruction on circumstantial evidence *held* error. *Ridenour v. State* 688

Damages.

1. In an action for damages, evidence as to the financial

standing of the parties is inadmissible. *Taulborg v. Andresen* 273
2. Provision for liquidated damages in contract for sale of flour *held* valid. *International Milling Co. v. North Platte Flour Mills* 325
3. Damages are not recoverable for the breach of a void contract. *Foster v. Hartman* 578
4. Verdict of $4,000 for injury to hand and wrist *held* not excessive. *Lewis v. Miller* 765

Death.

1. The life expectancy of the parents of a deceased child determines the amount of damage for wrongful death. *Fisher v. Trester* 529
2. The measure of damages for the benefit of parents for wrongful death of a child is the present worth in money of contributions of which the parents were deprived. *Fisher v. Trester* 529
3. The court should instruct the jury in determining life expectancy to consider not only mortality tables but all other evidential facts and circumstances. *Fisher v. Trester* 529

Deeds.

A grantor cannot, after delivery, invalidate or alter a deed. *Clarke v. Marconnit* 581

Descent and Distribution.

1. Scope and purpose of chapter 65, Laws 1925, an act to determine heirship, stated. *In re Heirship of Robinson* 285
2. Chapter 65, Laws 1925, an act to determine heirship, *held* to repeal conflicting provisions of sections 1423 and 1424, Comp. St. 1922. *In re Heirship of Robinson* 285
3. The heirship statute provides for a limited administration of an estate after two years from intestate's death without administration. *In re Heirship of Robinson* 285
4. The proviso in section 1484, Comp. St. 1922, relating to liens against intestate's realty, *held* not to include liens created on decedent's death in favor of creditors. *In re Heirship of Robinson* 285

Divorce.

1. A contract for a property settlement and alimony approved by the court will not be set aside or modified, except for fraud or change in circumstances. *Williams v. Williams* 8
2. Refusal to modify a divorce decree as to alimony upheld, except as to insurance premiums. *Williams v. Williams* 8

3. The father *held* entitled to custody of child, awarded to divorced mother, on death of mother. *In re Guardianship of Peterson* 511
4. A court has inherent power to enforce compliance with award of alimony, suit money, and attorney's fees, by imprisonment for contempt, if necessary. *Jensen v. Jensen* 469
5. Contempt proceeding for failure to pay award of attorney's fees in divorce suit is predicated on the award and decree and refusal to comply therewith. *Jensen v. Jensen* 469
6. A decree of divorce granted a wife on the ground of extreme cruelty *held* not to estop the husband from suing the wife's relatives for alienation of the wife's affections. *Dunbier v. Mengedoht* 706

Elections.

1. Statute requiring the voter to "make a cross in the square to the left of every candidate for whom he desires to vote" *held* directory, and substantial compliance therewith sufficient. *State, ex rel. Lanham, v. Sheets* 145
2. Statute requiring the voter to make a cross in the square opposite the name on the ballot *held* directory. *State, ex rel. Lanham, v. Sheets* 145
3. Writing name in proper place on a ballot sufficiently indicates intent to vote for such person, though no cross is made opposite the name. *State, ex rel. Lanham, v. Sheets* 145

Eminent Domain.

1. Seepage from irrigation ditches *held* not to entitle adjoining landowners to damages for taking or damaging private property for public use. *Spurrier v. Mitchell Irrigation District* 401
2. The constitutional provision relating to the taking or damaging of private property for public use applies to special damages to land by vacation of a public highway. *Lowell v. Buffalo County* 776
3. The words "or damaged," as used in the constitutional provision relating to damaging of private property for public use, include all damages causing diminution in value of the property. *Lowell v. Buffalo County* 776
4. The law provides for the ascertainment and payment of special damages to private property by vacation of a public highway. *Lowell v. Buffalo County* 776
5. An appeal lies to the district court from an award of special damages to private property by vacation of a public highway. *Lowell v. Buffalo County* 776

6. The jury in determining damages from vacating a highway may consider resulting diversion of travel and removal of a mail box and a schoolhouse. *Lowell v. Buffalo County* 776
7. Special damages to private property by vacating a public highway include any loss or injury that reduces its value. *Lowell v. Buffalo County* 776
8. Ordinarily, a landowner cannot recover, on account of a lawful public improvement, damages suffered in common with the public generally. *Lowell v. Buffalo County* 776
9. A landowner suffering special damages because of vacating a public highway is entitled to recover the difference between the value of his property immediately before and after the change. *Lowell v. Buffalo County* 776
10. A landowner left with only one outlet because of vacation of a public highway may suffer special damages not common to the community at large. *Lowell v. Buffalo County* 776
11. Any factor reducing the market value of real estate may be considered in determining just compensation for special damages. *Lowell v. Buffalo County* 776

Equity.

Laches does not grow out of mere passage of time, but it is founded on the inequity of permitting enforcement of a claim. *Geiss v. Trinity Lutheran Church Congregation* 745

Estoppel.

Where a purchaser permits his agent to take title, he is estopped from setting up ownership against one loaning money on the strength of the agent's title. *Kamrath v. Gilbert* 51

Evidence. SEE RAPE. WITNESSES.

1. Testimony tending to prove that an automobile driver was under the influence of liquor may be given by a non-expert witness. *McCulley v. Anderson* 105
2. Public reputation, and declarations of early settlers, and even of deceased persons, may be competent to establish a monument as marking a section corner, but insufficient to establish it as a particular corner. *Hickman v. Jones* 485
3. Stockman *held* competent to testify to market value of live stock. *Allender v. Chicago & N. W. R. Co* 559
4. Cattle buyer *held* competent to testify to average weight of cattle. *Allender v. Chicago & N. W. R. Co* 559
5. Parol evidence is admissible to prove that a note was

given without consideration as accommodation paper and for a special purpose. *Lee v. Hildebrand* 717

6. Financial statements of a corporation *held* admissible to show the market value of its stock. *Heller v. Speier* 787
7. Testimony of witnesses familiar with the value of stocks generally and knowing a corporation's reputation, assets, and liabilities, *held* competent as to the market value of its stock. *Heller v. Speier* 787
8. Opinion of nonexpert witnesses as to writing has less weight on the issue of forgery than opinion of experts. *Bank of Commerce v. McCarty* 795
9. The opinion of handwriting experts is competent on the issue of forgery in a civil action. *Bank of Commerce v. McCarty* 795
10. Testimony of handwriting experts that a note is a forgery may be sufficient to overturn the testimony of witnesses that they saw the note executed. *Bank of Commerce v. McCarty* 795

Executors and Administrators.

1. A grant of administration has, as a matter of right, no extraterritorial force. *In re Heirship of Robinson* 285
2. Finding as to personal property of decedent *held* erroneous. *In re Estate of Wecker* 537
3. It is the duty of an executor to acquaint himself with the title to decedent's property and to enforce an accounting thereof as against persons in adverse possession. *In re Estate of Freling* 605
4. All chattels of deceased are assets, if the representative by reasonable diligence might have taken possession thereof. *In re Estate of Freling* 605
5. Where an executor's interest in the administration and in the disposition of the estate is such as to prevent impartial performance of his duties, he should be removed. *In re Estate of Marconnit* 73
6. An executor whose personal interests conflict with, or are antagonistic to, his duties as executor is not a proper person to act as such. *In re Estate of Marconnit* 73
7. An administrator is a quasi trustee and should stand at least indifferent between the estate and claimants. *In re Estate of Marconnit* 73

Exemptions.

Whether property in the hands of a garnishee is exempt is to be determined as of the date of service of garnishee summons. *Wilcox & Co. v. Deines* 692

Forgery.

Evidence *held* to sustain verdict of guilty. *Murray v. State* 16

Fraud.

In an action for damages for fraud in exchange of realty, the question as to time when plaintiff discovered the fraud, or facts constituting the fraud or sufficient to require inquiry, is for the jury. *Vrbsky v. Arendt* 443

Gifts.

1. Reservation of interest to the donor during his lifetime does not invalidate a gift. *In re Estate of Sides* 314
2. Where a father gave money to his children, taking notes therefor reciting they should be canceled on his death, and the notes were delivered to a trustee, *held* that it was a gift *inter vivos*, and not testamentary. *In re Estate of Sides* 314
3. Evidence *held* insufficient to establish gift of certain notes. *In re Estate of Sides* 314

Guardian and Ward.

1. Residence of minor, under guardianship law, is that of the parent legally entitled to its custody. *In re Guardianship of Peterson* 511
2. Where a divorced mother, awarded restricted custody of a child, removes from the county where decree was rendered and the father resides, the county court of the county of the mother's domicile does not, on the death of the mother, acquire jurisdiction to appoint a guardian of the child over objections and rights of the father. *In re Guardianship of Peterson* 511
3. A guardian is without authority to surrender custody of his ward to any person, unless licensed by the state department of public welfare. *Foster v. Hartman* 578
4. A guardian's contract to surrender control of his ward during minority is contrary to public policy. *Foster v. Hartman* 578

Hawkers and Peddlers.

The term "itinerant vendor" in licensing ordinance *held* not to include a wholesale baker selling and distributing bread to retail customers. *Petersen Baking Co. v. City of Fremont* 212

Highways. SEE NEGLIGENCE.

1. Right of way privileges on arterial highways are the same as on nonfavored streets, except as modified by the stop requirement. *McCulley v. Anderson* 105

2. The right of a motorist on an arterial highway to assume that a vehicle entering the highway will stop does not warrant excessive speed or disregard of other traffic regulations. *McCulley v. Anderson* 105
3. An ordinance designating a street as an arterial highway does not grant an exclusive privilege to drivers thereon. *McCulley v. Anderson* 105
4. A motorist entering an arterial highway has a right to assume that motorists on the arterial highway will obey traffic regulations, and, if necessary, slacken their speed. *McCulley v. Anderson* 105
5. Compensation on appeal from an award of damages caused by vacating a public highway must be ascertained in the same manner as in actions by ordinary proceedings. *Lowell v. Buffalo County* 776
6. An unexpended balance in the road dragging fund cannot be set aside for use of separate supervisor districts. *State, ex rel. Maltman, v. Adams County* 826

Homicide.

1. The admission of a dying declaration is a question to be determined by the nature of each case. *Penn v. State* 95
2. Dying declarations need not be made in any prescribed form or manner. *Penn v. State* 95
3. The weight and credibility of dying declarations are for the jury. *Penn v. State* 95
4. The admissibility of a statement by the victim that he was shot by accused is a question for the court. *Penn v. State* 95
5. A statement by the victim that he was shot by accused is admissible in evidence, if made under a sense of impending death; and the foundation for its admission may be shown by circumstances. *Penn v. State* 95
6. The time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining its admissibility. *Penn v. State* 95
7. Failure to give a requested instruction on "motive" *held* error. *Trobough v. State* 128
8. Evidence *held* to sustain conviction of manslaughter. *Pembrook v. State* 417

Husband and Wife.

1. The wife's homestead right in lands owned by the husband and occupied by the family is "real estate." *Mead v. Polly* 206
2. Antenuptial contracts are not against public policy. *In re Estate of Maag* 237

3. Antenuptial contracts should be construed in the light of the particular circumstances of each case, and be enforced or annulled according to the facts. *In re Estate of Maag* 237
4. In making an antenuptial contract, the prospective husband must make full disclosure as to the amount and value of his property. *In re Estate of Maag* 237
5. The burden is on the husband or his representative to show that an antenuptial contract apparently unjust to the wife was fairly procured. *In re Estate of Maag* .. 237
6. Antenuptial contract giving $5,000 to the wife on death of husband *held* invalid. *In re Estate of Maag* 237
7. As respects personal property, the husband during his lifetime is unrestricted as to incidents of ownership, except as limited by section 2550, Comp. St. 1922. *In re Estate of Sides* 314
8. Evidence *held* insufficient to sustain finding that deceased husband's gifts to children by former marriage were a fraud on his surviving widow. *In re Estate of Sides* 314
9. A husband may sue for alienation of his wife's affections notwithstanding his own misconduct, where defendant's conduct was the controlling cause of the wife's estrangement. *Dunbier v. Mengedoht* 706
10. A husband's participation in an illegal abortion performed on his wife, where not necessary to prove his case, *held* not to prevent recovery for alienation of his wife's affections. *Dunbier v. Mengedoht* 706
11. In an action by the husband for alienation of a wife's affections, where several persons are alleged to have formed a conspiracy to wrongfully alienate the wife's affections and cause separation and divorce, the damage done is the gist of the action. *Dunbier v. Mengedoht* 706
12. The life estate of a spouse in a homestead becomes extinct upon her death, as do the rights of her common creditors as to such homestead. *In re Estate of Freling* .. 605

Indians.

1. Federal statutes *held* to authorize, on consent of Secretary of Interior, an Omaha Indian allottee to transfer a complete title. *Wollmer v. Wood* 248
2. An Omaha Indian's conveyance of an allotment *held* to give title in fee, exempt from debts of allottee created before patent was issued, but not debts of a subsequent grantee. *Wollmer v. Wood* 248

Indictment and Information.

1. A party may be charged with murder while attempting to perpetrate a burglary in one count, and in another count with murder, where both are parts of the same transaction; and the state is not required to elect to proceed to trial on one of the counts. *Penn v. State*..... 95
2. An information charging assault with intent to kill or wound by shooting *held* to authorize conviction of assault and battery. *In re Application of Flanders*..... 761

Injunction.

1. Where a permanent injunction is denied, plaintiff is not entitled to a supersedeas as a matter of right, unless a temporary injunction is in effect at time of trial. *Harbin v. Love*..... 76
2. A temporary restraining order cannot be continued in effect by supersedeas bond after denial of a permanent injunction. *Harbin v. Love*..... 76
3. Whether an order is a temporary restraining order or a temporary injunction is determinable from the entire record. *Harbin v. Love*..... 76
4. Continuance of the hearing on a temporary injunction from the time provided in the restraining order is not sufficient to convert a restraining order into an injunction. *Harbin v. Love*..... 76
5. A restraining order cannot in effect become an injunction without the giving of a new bond. *Harbin v. Love*..... 76
6. Order in effect at the time of trial *held* not a temporary injunction. *Harbin v. Love*..... 76
7. A default and a resulting perpetual injunction may be set aside on motion supported by an answer stating a complete defense and a showing that the default was excusable. *Ak-Sar-Ben Exposition Co. v. Sorensen*..... 358
8. Evidence *held* to show an abuse of discretion in overruling a motion to set aside a default and a resulting perpetual injunction. *Ak-Sar-Ben Exposition Co. v. Sorensen*..... 358
9. Injunction is not available to enforce a legal right where there is a plain, adequate and speedy remedy at law. *Vance v. Sumner*..... 630
10. The remedy of forcible entry and detainer being adequate, a lessor is not entitled to an injunction restraining the lessee from interfering with lessor's entry on premises under lease. *Vance v. Sumner*..... 630

Insane Persons.

A guardian's proceeding to obtain a license to mortgage realty of an insane ward is a proceeding *in rem*, not requiring service of notice on the ward. *Mead v. Polly*..... 206

Insurance.

1. The statute providing for attorney's fees in an action on an insurance policy is based on public policy. *Messing v. Dwelling House Mutual Ins. Co*..... 36
2. Attorney's fees *held* chargeable against plaintiff in an unsuccessful suit to vacate a judgment on an insurance policy. *Messing v. Dwelling House Mutual Ins. Co*..... 36
3. Articles not clearly within an exemption clause *held* covered by the policy. *Coad v. London Assurance Corporation* 188
4. Insurer *held* not liable for fire loss of automobile while being operated by a lessee. *Borsky v. National Fire Ins. Co*..... 178
5. Where an automobile policy was suspended at the time of loss by fire, *held* error to refuse to direct a verdict for the insurer. *Borsky v. National Fire Ins. Co*..... 178
6. One who pleads an affirmative defense must prove it. *Ude v. Modern Woodmen of America*..... 546
7. Provision in policy that insurer should not be liable beyond actual cash value of property at time of loss *held* valid and determinative of rights and liabilities, and applicable to losses not within the scope of the valued policy act; that loss or damage was ascertainable according to actual cash value, with proper deduction for depreciation; that the provision, loss or damage should not exceed cost of repairs, was merely a limitation on the amount of recovery. *Voges v. Mechanics Ins. Co*..... 553
8. Policy limiting liability *held* to fix damages at actual cash value of building prior to fire as compared with its actual cash value after the fire. *Voges v. Mechanics Ins. Co.* 553

Intoxicating Liquors.

1. Bootlegging law *held* not in conflict with any other liquor law. *Liske v. State*..... 640
2. Amendment to bootlegging law does not bar conviction for a third offense, although the first and second offenses were committed prior to adoption thereof. *Liske v. State* 640

Judgment. SEE CONSPIRACY. PLEADING, 4.

1. Judgments should be set aside only on the strongest and most convincing grounds. *Messing v. Dwelling House Mutual Ins. Co.* 36
2. Allowance of claims by the probate court of another state does not affect lands in Nebraska. *In re Heirship of Robinson* 285
3. Any one of several defendants adjudged primarily liable for an aliquot part of a judgment and surety for the other defendants as to the remainder may pay the judgment and take an assignment thereof; and such payment does not extinguish the judgment except as to the judgment creditor. *Orchard & Wilhelm Co. v. Sexson* 370
4. Where an assignee is entitled to a revival of a judgment, it should be revived in its entirety. *Orchard & Wilhelm Co. v. Sexson* 370
5. A final judgment on the merits in a proceeding *in rem* is an absolute bar to subsequent proceedings founded on the same facts, and such judgment binds successors in title. *Keim v. Village of Bloomington* 474
6. A judgment does not bar an action between the same parties unless the same issue was involved in both actions. *Hickman v. Jones* 485
7. Judgment in replevin involving possession of hay *held* not a bar to a suit to quiet title. *Hickman v. Jones* 485

Judicial Sales.

1. Exemption of realty from levy and sale under the federal laws may not be considered on proceedings for confirmation of a judicial sale. *Wollmer v. Wood* 248
2. A motion to confirm a sheriff's sale cannot be resisted on the ground that the land is exempt from lien of the judgment, and such an attempt to resist will not bar a subsequent action to remove the cloud of the sheriff's deed. *Wollmer v. Wood* 248

Jury.

1. If a cause of challenge is denied by a juror on his *voir dire* after accused's peremptory challenges are exhausted, he has the right to have the issue tried by the court as other issues of fact are tried. *Trobough v. State* 128
2. Appeal from refusal of county court to make allowance out of estate of deceased husband for the widow is a law action. *In re Estate of Maag* 237
3. The court may determine whether a juror's condition from drink required discharge of the jury. *Fetty v. State* 619

4. The court, in determining whether a juror's drunkenness required discharge of the jury, may consider his appearance and condition. *Fetty v. State* 619
5. Drunkenness of juror is an "accident" or "calamity" requiring discharge of the jury. *Fetty v. State* 619
6. Peremptory challenges are not to be exercised until the jurors have been passed for cause. *Fetty v. State* 619
7. Defendant may examine jurors for cause until the jury is impaneled, and a denial of the right is prejudicial error. *Fetty v. State* 619

Larceny.

1. Felonious intent is an essential element of grand larceny. *West v. State* 633
2. Evidence *held* insufficient to sustain conviction for grand larceny. *West v. State* 633
3. No presumption of guilt arises from the mere possession of stolen property; it is merely a fact to be considered in connection with other evidence. *Ridenour v. State* 688

Licenses.

1. Statute providing for corporation fee for domestic corporations *held* unambiguous. *State, ex rel. Beatrice Creamery Co., v. Marsh* 197
2. Statutory tax on corporations *held* in the nature of a franchise tax, rather than one on property, capital stock, or business. *State, ex rel. Beatrice Creamery Co., v. Marsh* 197
3. An excise tax on the wholesale business of baking, selling and distributing bread to regular customers is void if so excessive as to prohibit business. *Petersen Baking Co. v. City of Fremont* 212
4. To be valid a license tax ordinance must be definite in its application, reasonable in amount, and uniform as to class. *Petersen Baking Co. v. City of Fremont* 212

Malicious Mischief.

Evidence *held* to sustain verdict of guilty. *Roeder v. State* 116

Mandamus.

1. When the law requires a public officer to do an official act at a particular time, courts will, when practicable, coerce performance after the appointed time has passed. *Omaha Armory Bldg. Co. v. Johnson* 29
2. Mandamus is the proper remedy to enforce a stockholder's right to inspect the books and records of a state bank. *State, ex rel. Charvat, v. Sagl* 374

3. A mandamus proceeding is an action at law. *State, ex rel. Charvat, v. Sagl* 374

Master and Servant.

1. When an injury "arises out of," and "in the course of," the employment, stated. *Speas v. Boone County* 58
2. An injury during the noon hour to one dragging roads for a county, *held* to have arisen out of and in the course of his employment. *Speas v. Boone County* 58
3. The statute of limitations is not available to an employer who has agreed within the year after an accident to compensate the employee. *Speas v. Boone County* 58
4. Technical refinements of interpretation will not be permitted to defeat the purpose of the workmen's compensation act. *Speas v. Boone County* 58
5. The rule that findings of the trial court on conflicting evidence in compensation cases will not be disturbed applies to judgments rendered before statute providing for trial *de novo* on appeal. *Travelers Ins. Co. v. Ohler* .. 121
6. Finding as to the cause of disability *held* contrary to weight of evidence. *Travelers Ins. Co. v. Ohler* 121
7. Notice of claim and action commenced within the statutory period after discovery that a latent injury has caused compensable disability is a compliance with the statute. *Travelers Ins. Co. v. Ohler* 121
8. Selection by an employer of one simple tool rather than some other is not negligence. *Phillips v. Chicago, B. & Q. R. Co* 182
9. The rule requiring an employer to exercise ordinary care to provide reasonably safe tools has little application to simple tools in common use. *Phillips v. Chicago, B. & Q. R. Co* 182
10. The employer must use reasonable care and ordinary prudence in selecting tools. *Phillips v. Chicago, B. & Q. R. Co* 182
11. Where there was no evidence of negligence in an action for injury to a section foreman, the court should have directed a verdict for defendant. *Phillips v. Chicago, B. & Q. R. Co* 182
12. To recover against an employer under the federal law, some specific neglect, or act of negligence, proximately causing injury or death, must be alleged and proved. *Diller v. Chicago, B. & Q. R. Co* 494
13. Evidence *held* insufficient to establish negligence of railroad proximately causing death of an employee. *Diller v. Chicago, B. & Q. R. Co* 494

14. An injury resulting in part from an accident is compensable though claimant may be afflicted with an occupational disease. *Skelly Oil Co. v. Gaugenbaugh* 698
15. If injury and preexisting disease combine to produce disability, an employee to recover compensation need not prove that the injury aggravated the disease. *Skelly Oil Co. v. Gaugenbaugh* 698
16. Employer *held* to have notice of injury, rendering service of written notice unnecessary. *Skelly Oil Co. v. Gaugenbaugh* 698
17. Summons on appeal from compensation award may be amended to correct mistake in date of return, even after objections to jurisdiction on that account. *Keil v. Farmers Irrigation District* 503
18. The statutory provision requiring service of copy of petition on appeal from compensation award is directory. *Keil v. Farmers Irrigation District* 503

Militia.

Held, that it was the duty of the adjutant general to lease an armory for the national guard. *Omaha Armory Bldg. Co. v. Johnson* 29

Mines and Minerals.

1. The state may convey saline lands, with the reservation that the salt springs shall belong to the state if they become commercially valuable. *State, ex rel. Central Realty & Investment Co., v. McMullen* 739
2. Congress, by reserving salt springs, intended to include those valuable for making salt. *State, ex rel. Central Realty & Investment Co., v. McMullen* 739

Mortgages.

Oral agreement to give a mortgage *held* void. *Herring v. Whitford* 733

Municipal Corporations.

1. "General fund," in statute relating to taxation of intangibles, referring to cities and villages, *held* to mean a fund set apart for governmental, not corporate, expenses. *Mehrens v. Greenleaf* 82
2. A municipal corporation, so far as its purely municipal relations are concerned, is an agency of the state subject to legislative control. *Mehrens v. Greenleaf* 82
3. Where the legislature grants a municipal power and prescribes exclusive methods of exercising it, the municipality must follow those methods. *Carr v. Fenstermacher* 172

4. A grant of power to a city may imply a means of exercising it in addition to statutory methods. *Carr v. Fenstermacher* 172
5. The cost of a municipal lighting utility in cities of the second class may be defrayed by a tax levy and, if insufficient, by a bond issue. *Carr v. Fenstermacher*..... 172
6. Where a city of the second class has available money to pay for a municipal lighting utility, resort to taxation or a bond issue may be unnecessary, such methods not being exclusive. *Carr v. Fenstermacher*..... 172
7. The word "may" in the statute authorizing a city of the second class to defray the cost of a municipal lighting plant by taxation or a bond issue does not necessarily mean "shall." *Carr v. Fenstermacher*..... 172
8. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose. *Carr v. Fenstermacher*..... 172
9. Cities of the second class *held* authorized to install and maintain a municipal lighting plant out of funds on hand and plant earnings. *Carr v. Fenstermacher*..... 172
10. A city charter provision requiring an appropriation in advance of incurring an indebtedness may not apply to a conditional obligation payable out of funds on hand and net earnings of a municipal lighting plant. *Carr v. Fenstermacher*..... 172
11. A city engineer's estimate of equipment for a municipal lighting utility as costing "not to exceed" a particular sum, *held* a mere irregularity. *Carr v. Fenstermacher* 172
12. A notice requiring bids "on or before" a specific date instead of stating the hour for closing and opening bids, *held* not to invalidate a subsequent contract of purchase. *Carr v. Fenstermacher*..... 172
13. The duty of a city to fix reasonable rates for electricity *held* not violated by a contract to pay for plant equipment out of net earnings. *Carr v. Fenstermacher*..... 172
14. In absence of fraud or mistake, action of city council in passing on the validity of proceedings for consolidation of an adjoining village with a city is final. *State, ex rel. Loomis, v. City of Lincoln*..... 352
15. The trend of legislation and decision is toward relaxation of rules respecting procedure before political bodies only occasionally exercising judicial functions. *State, ex rel. Loomis, v. City of Lincoln*..... 352
16. The determination of a city council on a matter which it is authorized to determine has all the properties of

a judgment of a court of limited jurisdiction. *State, ex rel. Loomis, v. City of Lincoln* 352
17. Power delegated to a city to construct local improvements and levy special assessments therefor will be strictly construed against the city. *Baker v. Dahlman* 425
18. A statute authorizing a city to resurface a street without petition *held* not to authorize resurfacing of more than one street in the same proceeding. *Baker v. Dahlman* 425
19. A decree denying detachment of farm land from a municipality will not be set aside except for mistake of fact or erroneous inference of fact or of law, and this rule applies with peculiar force where the trial judge inspected the premises. *Keim v. Village of Bloomington* 474
20. Police officers of Omaha are required to give bond to the city as obligee for faithful performance of official duties. *Curnyn v. Kinney* 478
21. The statute providing that official bonds shall be obligatory on the principal and sureties for the use of any person injured is part of the official bond of a police officer. *Curnyn v. Kinney* 478
22. Recovery may be had on the bond of a policeman for negligent acts committed by him in the exercise of municipal authority resulting in personal injury, by the person injured. *Curnyn v. Kinney* 478
23. A policeman, operating a motorcycle in transporting himself from one place of duty to another, was acting officially, and was liable on his bond for negligence. *Curnyn v. Kinney* 478
24. Special assessments cannot exceed special benefits. *Neville v. City of Omaha* 550
25. A city may enjoin an individual from conducting a restaurant or commercial business in a district zoned for resident purposes, and the suit is not wanting in equity because the city does not proceed against a school maintaining a cafeteria. *City of Lincoln v. Foss* 666
26. Zoning ordinance *held* to be constitutional under the police power as having substantial relation to the public health, safety, and general welfare. *City of Lincoln v. Foss* 666
27. Zoning ordinance *held* not to confer on board of appeals delegated authority or arbitrary power to give or withhold consent for carrying on business in residence districts. *City of Lincoln v. Foss* 666
28. Cities of the metropolitan class are not liable for damages caused by surface water, because its storm

sewers are insufficient to carry all of such water. *Adams v. City of Omaha* 753

29. Cities of the metropolitan class have authority, but are not required, to construct storm sewers. *Adams v. City of Omaha* 753

30. A property owner cannot recover damages caused by surface water flooding his premises, unless he shows that the damage resulted from some negligent act or omission by the city. *Adams v. City of Omaha* 753

Negligence. SEE HIGHWAYS. RAILROADS.

1. A motorist exercising due care is not liable for negligence merely because he attempts to cross an arterial highway. *McCulley v. Anderson* 105

2. The jury should be instructed as to relative or reciprocal rights of motorists in accordance with an ordinance creating an arterial highway. *McCulley v. Anderson* 105

3. Where plaintiff in a personal injury action makes a *prima facie* case, the burden is on defendant to prove defense of contributory negligence. *McCulley v. Anderson* 105

4. Contributory negligence as a defense must be proximate to the injury. *McCulley v. Anderson* 105

5. Failure to instruct the jury on contributory negligence as a defense in a personal injury action may be erroneous even without a request for such an instruction. *McCulley v. Anderson* 105

6. Negligence and contributory negligence are questions for the jury, where different minds may reasonably draw different conclusions from the evidence. *Lieb v. Omaha & C. B. Street R. Co.* 222

7. Where there is evidence of negligence and contributory negligence, the court must give an instruction stating the comparative negligence rule. *Lieb v. Omaha & C. B. Street R. Co.* 222

8. The presumption of due care arising out of the instinct of self-preservation disappears when evidence on due care is produced. *Eggeling v. Chicago, R. I. & P. R. Co.* 229

9. Negligence in crossing a railroad track *held* more than slight, barring recovery under the comparative negligence law. *Eggeling v. Chicago, R. I. & P. R. Co.* 229

10. A driver must look backward while backing an automobile onto a highway, and must signal his intention to back when reasonably necessary. *Taulborg v. Andresen* 273

11. An instruction defining "proper lookout," as applied to backing an automobile onto a highway, *held* erroneous. *Taulborg v. Andresen* 273
12. One guilty of contributory negligence cannot recover for personal injuries unless his negligence is shown to be slight in comparison with defendant's negligence. *Peterson v. Millnitz* 365
13. A pedestrian before crossing a street intersection diagonally must look in every direction. *Peterson v. Millnitz* 365
14. Contributory negligence is for the jury, when there is a conflict of evidence. *Wortman v. Zimmerman* 682
15. Contributory negligence *held* for the jury under the comparative negligence statute. *Wortman v. Zimmerman* 682

New Trial.

1. Overruling a motion for a new trial for newly discovered evidence, being discretionary, will not be disturbed in absence of abuse thereof. *Blaha v. Chicago & N. W. R. Co.* 611
2. Ordinarily, overruling of motion for new trial on ground of newly discovered evidence of a cumulative or impeaching character is not error. *Wortman v. Zimmerman* 682

Parent and Child.

A parent is entitled to custody of child as against a stranger, unless unfitness of the parent is alleged and proved. *In re Guardianship of Peterson* 511

Parties.

A civil action is maintainable in the name of the real party in interest. *Curnyn v. Kinney* 478

Partnership.

Priority of liens and order of payment out of partner's share of the net proceeds of the partnership determined. *Sacks v. Lytle* 642

Payment.

1. One paying a disputed demand voluntarily, with full knowledge of the facts, cannot ordinarily recover it back on the ground of its invalidity. *Meyer v. Rosenblatt & Son* 471
2. Instruction *held* not to present the law as to voluntary payments. *Meyer v. Rosenblatt & Son* 471

Physicians and Surgeons.

Verdict for $8,000 for malpractice *held* sustained by the evidence. *Sorensen v. Grand Island Clinic* 280

Pleading.

1. Material variance between allegations and proof precludes recovery. *Callaway v. Farmers Union Cooperative Ass'n* 1
2. If defendant relies on nonperformance of contract by plaintiff, he must allege that fact in his answer. *Morearty v. City of McCook* 202
3. Where a breach of contract is not such as to defeat a right of action, defendant cannot plead it in bar, but must plead it in recoupment of damages. *Morearty v. City of McCook* 202
4. Petition on motion to set aside satisfaction of judgment alleged to have been procured by fraudulent misrepresentations *held* not demurrable. *Marshall v. Rowe* 591
5. The issue of insolvency must be proved like any other controverted fact. *Vance v. Sumner* 630

Process. SEE MASTER AND SERVANT, 17, 18.

1. Affidavit for publication of service in an action to foreclose a tax lien *held* sufficient. *Jackman v. Miller* 463
2. Where the truthfulness of facts alleged in an affidavit for publication of service is challenged, the court must set the matter for hearing. *Jackman v. Miller* 463
3. Plaintiff *held* not to have made diligent investigation and inquiry as required for publication of service. *Jackman v. Miller* 463

Public Lands.

The United States in disposing of its public lands may describe them according to any surveys it has made. *Hickman v. Jones* 485

Quieting Title.

1. Conveyance by devisee before expiration of restrictive period *held* voidable, and not void. *Peters v. Northwestern Mutual Life Ins. Co* 161
2. Delay of devisee before bringing suit to quiet title to land conveyed by him before expiration of restrictive period *held* to bar right to set aside deed. *Peters v. Northwestern Mutual Life Ins. Co* 161
3. Mere delay, not exceeding the time limited by statute, will not bar a suit to quiet title, where defendant has not been prejudiced by the delay. *Geiss v. Trinity Lutheran Church Congregation* 745

Railroads.

1. Evidence *held* not to show reasonable excuse for a wagon driver's failure to stop, look, and listen before crossing railroad tracks. *Eggeling v. Chicago, R. I. & P. R. Co.* 229
2. The driver of an automobile struck by an engine at a crossing *held* guilty of negligence, precluding recovery. *Belz v. Chicago & N. W. R. Co.* 312
3. The diverting circumstance of a train passing an automobilist just previous to his being struck by a lone engine *held* not sufficient to take the case to the jury. *Belz v. Chicago & N. W. R. Co.* 312

Rape.

1. Evidence as to identity of accused *held* sufficient to take the issue to the jury. *Dodson v. State* 340
2. In an action for damages caused by an assault with intent to rape, an eye-witness may testify as to the appearance of plaintiff at the time as indicating fear. *Kubicek v. Slezak* 542

Receiving Stolen Goods.

1. Receiving or concealing stolen hogs, knowing them to have been stolen, with intent to defraud, is a substantive crime. *Norton v. State* 588
2. The word "conceals," in the law relative to receiving or concealing stolen hogs, includes the words "with intent to defraud." *Norton v. State* 588

Release.

1. Generally, one seeking to avoid the consequences of a release for personal injuries has the burden of proving that the release was fraudulently procured. *Blaha v. Chicago & N. W. R. Co.* 611
2. The false statement of a physician may be sufficient to avoid a release for personal injuries executed in reliance on the statement. *Blaha v. Chicago & N. W. R. Co.* 611

Religious Societies.

1. The constitution of a religious society is binding on its members, unless contrary to law or public policy. *Geiss v. Trinity Lutheran Church Congregation* 745
2. A bare majority of the congregation cannot alienate church property in violation of the church's constitution prohibiting alienation while three male members do not consent thereto. *Geiss v. Trinity Lutheran Church Congregation* 745

3. Members of a religious society holding title to church property are naked trustees, and a conveyance by them without consent of the society conveys no title to a grantee with knowledge of the society's equitable ownership. *Geiss v. Trinity Lutheran Church Congregation*.... 745
4. A controversy between two church societies belonging to different religious organizations as to title to and possession of a church building is for determination by the civil courts. *Geiss v. Trinity Lutheran Church Congregation* 745
5. Civil courts will exercise jurisdiction to protect property rights of religious societies. *Geiss v. Trinity Lutheran Church Congregation*..... 745

Sales.

1. The "Uniform Sales Act" prescribes rules of law governing every case coming within its provisions. *International Milling Co. v. North Platte Flour Mills*..... 325
2. The "Uniform Sales Act" must be so interpreted as to effectuate its general purpose to make uniform laws of states adopting it. *International Milling Co. v. North Platte Flour Mills*..... 325
3. A vendor or his assignee need not file a conditional sale contract to make it valid as against the vendee. *First Nat. Bank v. Newton*..... 394

Specific Performance.

1. One who has detrimentally altered his position relying on apparent abandonment of a contract will not, ordinarily, be required specifically to perform. *State, ex rel. Spillman, v. First State Bank*..... 39
2. Equity will not, ordinarily, require specific performance of a receiver's contract where serious doubt exists as to the court's power to approve the contract, and the other party may be prejudiced. *State, ex rel. Spillman, v. First State Bank*..... 39
3. Attorney's fees and expenses of litigation are not generally recoverable as damages resulting from breach of contract to sell and convey land. *Smoke v. Pope*..... 432
4. Petition for specific performance *held* not demurrable. *Long v. Osborn*..... 758

States.

On presentation of proper vouchers, the state auditor must draw warrants on the general fund and against the appropriation for the national guard. *Omaha Armory Bldg. Co. v. Johnson*..... 29

Statutes.

1. A statutory proviso should be strictly construed in the light of the act of which it forms a part and in furtherance of its purpose. *In re Heirship of Robinson*..... 285
2. An unconstitutional law imposes no duty and confers no authority on any one, and creates no obligation which can be enforced by subsequent legislation. *Anderson v. Lehmkuhl*..... 451
3. Chapter 106, Laws 1927, purporting to validate proceedings for formation of a light and power district, *held* invalid as special legislation. *Anderson v. Lehmkuhl*..... 451
4. A later act will not be construed as repealing a former act where they may stand together. *Liske v. State*..... 640

Stipulations.

Overruling an objection to introduction of affidavits in evidence *held* not error where the parties had agreed to their use. *Folts v. Globe Life Ins. Co*..... 143

Taxation.

1. The constitutional provision that foreign corporations shall not be given greater rights or privileges than domestic corporations refers to the granting of franchises and corporate privileges, rather than taxation. *State, ex rel. Beatrice Creamery Co., v. Marsh*..... 197
2. A pledge payable at death from pledgor's estate, not based on a fair and valuable consideration, but beneficent and donative, is subject to inheritance tax. *In re Estate of Wheeler*..... 344
3. Where a deed to land had not been recorded, affidavit in proceedings to foreclose a tax sale certificate, that the owner was unknown and the land was therefore made a party, conferred jurisdiction. *Jones v. Gibson*.... 574

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. A compilation by a competent witness of original records, in court subject to inspection, *held* competent as against a general objection. *State, ex rel. Sorensen, v. Kistler* 89
2. Comments of the trial judge tending to discredit a witness may be prejudicially erroneous. *McCulley v. Anderson* 105
3. Where evidence on a controverted issue of fact is sufficient to support a verdict for defendant, a peremptory instruction for plaintiff is erroneous. *Farmers Grain, Lumber & Coal Co. v. Taylor*..... 216
4. One tendering an instruction which is given cannot thereafter assert there was no evidence tending to prove

facts assumed thereby. *Splittgerber Bros. v. Skinner Packing Co.* 259
5. Counsel should not make declarations of fact, nor repeat incompetent questions, nor make comment on evidence or witnesses until time for argument. *Splittgerber Bros. v. Skinner Packing Co.* 259
6. Where plaintiff in a personal injury action makes no attempt to show that defendant is not indemnified by insurance, it is not proper for defendant to show that he is not. *Taulborg v. Andresen* 273
7. All instructions or communications to the jury should be given in open court in the presence of the parties or their counsel. *Taulborg v. Andresen* 273
8. Refusal of a requested instruction is not erroneous, where the substance thereof is given in another instruction that is free from error. *Sorensen v. Grand Island Clinic* 280
9. An instruction summarizing the allegations of the pleadings and the issues *held* not necessarily erroneous as submitting unproved charges of negligence, in view of other instructions. *Sorensen v. Grand Island Clinic* .. 280
10. Where both parties request a direction of a verdict, they submit the case to the court on the issues of law arising on the facts as found by the court from the evidence. *First Nat. Bank v. Newton* 394
11. The trial court should not direct a verdict unless the evidence is so clear that reasonable minds cannot come to any other conclusion. *Vrbsky v. Arendt* 443
12. An instruction requiring a finding for defendant on proof of payment, in reliance on agreement to repay overpayments, *held* erroneous as assuming existence of the agreement. *Meyer v. Rosenblatt & Son* 471
13. Failure to instruct with reference to issues of account stated and accord and satisfaction tendered in reply and supported by evidence *held* error. *Meyer v. Rosenblatt & Son* 471
14. Where the evidence will support a verdict for plaintiff, it is error to give a peremptory instruction for defendant. *Allender v. Chicago & N. W. R. Co.* 559
15. A peremptory instruction against defendant is erroneous where the pleadings and proof are sufficient to sustain a verdict in his favor. *Security State Bank v. Schomberg* 598
16. Whether instructions produced misconception in minds of jury is determinable by considering all the instructions and the tendencies of the proof. *Blaha v. Chicago & N. W. R. Co.* 611

17. In a will contest, where competent evidence relating to mental capacity and undue influence is conflicting, the issues are for the jury. *In re Estate of Noren* 653
18. Error in instructions, or in failure or refusal to give instructions, not affecting substantial rights, will be disregarded. *In re Estate of Noren* 653
19. Instructions must be considered as a whole. *In re Estate of Noren* 653
20. Mere inexactness in the language of an instruction is not ground for reversal, where the jury were not misled. *In re Estate of Noren* 653
21. Where the evidence conflicts as to condition of a driveway to an elevator, the question is for the jury. *Luther v. Farmers Union Cooperative Ass'n* 676
22. A party desiring an instruction to guide the jury in weighing certain features of evidence must make request therefor at conclusion of the evidence and submit in writing the instruction desired. *Luther v. Farmers Union Cooperative Ass'n* 676
23. Error cannot be predicated on failure to instruct, without a request therefor, unless a statute or positive rule of law requires an instruction. *Luther v. Farmers Union Cooperative Ass'n* 676
24. The trial court may direct a verdict where the evidence will not support a conflict on questions of fact. *Lee v. Hildebrand* 717
25. Refusal of instructions covered by instructions given is not error. *Lewis v. Miller* 765
26. Instruction as to negligence of driver of automobile *held* properly refused as not supported by evidence. *Lewis v. Miller* 765

Trusts.

Evidence *held* insufficient to establish a trust in lands. *Clarke v. Marconnit* 581

Vendor and Purchaser.

1. Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge. *Smoke v. Pope* 432
2. Purchaser of land in possession of a third person is bound to inquire about the occupant's interest therein. *Smoke v. Pope* 432
3. One purchasing land with knowledge of another's previous contract to purchase it is not a purchaser in good faith. *Smoke v. Pope* 432

4. Equity may reform a contract for the purchase of land and require specific performance of the contract as reformed. *Smoke v. Pope* 432
5. Where vendee treats a contract of sale as a mortgage and forecloses, vendor is entitled to a stay. *Hawkins v. Mullen* 567

Venue.

Service of summons on a defendant residing in another county, and not jointly liable with those served, is not authorized. *First Nat. Bank v. Newton* 394

Waters.

1. The department of public works is invested with reasonable discretion. *State v. Oliver Bros* 302
2. "Abandonment" defined. *State v. Oliver Bros* 302
3. Defendant's negligence *held* not the proximate cause of injury. *Spurrier v. Mitchell Irrigation District* 401
4. Whether failure of an irrigation district to construct drains to take care of percolating water is negligence or wilfulness is a question of fact. *Spurrier v. Mitchell Irrigation District* 401
5. Statute *held* not to require an irrigation district to drain all nearby land seeped by percolating subterranean water; and the remedy therein provided is exclusive. *Spurrier v. Mitchell Irrigation District* 401
6. The owner of an irrigation canal is not as insurer against seepage, but is liable only for negligence and intentional wrongdoing. *Spurrier v. Mitchell Irrigation District* 401
7. One cannot recover for seepage, in absence of allegation and proof of negligence or wilful acts. *Spurrier v. Mitchell Irrigation District* 401
8. Irrigation districts are created to serve a public interest, and are common carriers. *Spurrier v. Mitchell Irrigation District* 401
9. Irrigation districts must furnish water to those entitled thereto under the appropriation at a reasonable and uniform price. *Spurrier v. Mitchell Irrigation District* 401
10. An irrigation district, being liable for failure to deliver water to a landowner entitled thereto, is not liable for injury resulting from lawful application of water to lands by the owners. *Spurrier v. Mitchell Irrigation District* 401
11. Irrigation is recognized and encouraged by the Constitution and statutes. *Spurrier v. Mitchell Irrigation District* 401

12. A landowner may irrigate his land artificially and he is not answerable to an adjoining landowner unless guilty of some negligent or wilful act, the proximate cause of damage. *Spurrier v. Mitchell Irrigation District* 401
13. Subterranean drainage from lawful irrigation is a burden the lower land must bear. *Spurrier v. Mitchell Irrigation District* 401

Wills.

1. In construing a will, the court will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *Peters v. Northwestern Mutual Life Ins. Co.* 161
2. "Rules of law" mentioned in section 5594, Comp. St. 1922, relating to construction of wills, do not mean rules of construction in conflict with the intent of the testator. *Peters v. Northwestern Mutual Life Ins. Co.* 161
3. Will construed and *held* to pass the fee simple title; and that the restriction on alienation was valid. *Peters v. Northwestern Mutual Life Ins. Co.* 161
4. Whether there is a violation of restrictions against alienation of a fee simple title devised by will must be determined by the facts and law in each suit. *Peters v. Northwestern Mutual Life Ins. Co.* 161
5. Where proponents have established a *prima facie* case of testator's sanity, contestants must rebut it. *In re Estate of Bayer* 191
6. Evidence *held* to establish testamentary capacity. *In re Estate of Bayer* 191
7. The burden is on contestants to prove undue influence. *In re Estate of Bayer* 191
8. If the evidence is insufficient to sustain a verdict for contestants on the issues of testamentary capacity and undue influence, the court should direct a verdict for proponents. *In re Estate of Bayer* 191
9. Devise to A and B "and their children, to be theirs forever," *held* to create them sole owners of the fee. *Bunting v. Richardson* 300
10. Bequest to testator's wife as long as she remained his widow *held* to vest a determinable fee, and not a conditional life estate. *Anderson v. Anderson* 381
11. A defeated litigant in a will contest is not entitled to a trial *de novo* on appeal to the supreme court. *In re Estate of Noren* 653

12. A confidential adviser who receives valuable property under the will of an aged person must overcome the presumption of undue influence. *In re Estate of Noren* 653
13. Instructions as to mental capacity and undue influence *held* not erroneous. *In re Estate of Noren* 653
14. Evidence of the financial condition of contestant is admissible in a will contest. *In re Estate of Noren* 653

Witnesses.

1. A party not objecting to taking testimony of a witness not under oath waives the objection. *Fetty v. State* 619
2. A qualified witness may express an opinion as to the speed of an automobile coming directly toward him. *Lewis v. Miller* 765
3. Refusal to permit a party to contradict his own witness *held* not an abuse of discretion. *Lewis v. Miller* 765
4. The statute authorizing interrogation of a witness as to previous conviction for felony does not limit the inquiry to a single conviction. *Sulley v. State* 783