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MARIE K. KNIGHT, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 22, 1934. No. 28987.

1. **Carriers: NEGLIGENCE: PRESUMPTION.** Where a common carrier is operating a bus on a public street, and is struck by an automobile, causing injuries to a passenger on the bus, there is no presumption, from the mere fact of collision, that the bus company is guilty of negligence.
2. ———: ———: **BURDEN OF PROOF.** Negligence must be determined from the facts bringing about the collision, and the burden is upon the plaintiff to prove negligence of the bus company before recovery can be had against such company.

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

Flansburg, Lee & Sheldahl and *Baylor & Tou Velle,* for appellant.

Comstock & Comstock, contra.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

PAINE, J.

This is an action for personal injuries sustained by plaintiff. Judgment for $750 was entered upon verdict against Henry H. Flood, Myrna Flood, and the Lincoln Traction Company.

Plaintiff was a fare-paying passenger upon a public bus of the Lincoln Traction Company, which was traveling east on Vine street in Lincoln, and when it had nearly crossed the intersection at Sixteenth street an automobile, which was being driven north on Sixteenth street by Myrna Flood, crashed into the side of the bus near the rear end. The bus had stopped at the stop button, which was then on the west side of Sixteenth street, at which time the driver, Miller, saw the Flood automobile a block south, as he proceeded very slowly across Sixteenth street after making the stop. The Flood automobile struck the side of the bus near the rear end, the photograph showing

that the crash tore off the fender at the rear of the rear wheel of the bus, and bent in the side wall clear to the rear of the bus. The picture of the Flood car showed that it had struck squarely on the front of the automobile, as both front fenders and both lamps and radiator showed damage.

Miss Myrna Flood testified that her father was a salesman for the Lincoln Mineral Products Company, and was sick in bed on the day of the accident, and that she was taking an order for a ton of salt from one of her father's customers to the plant when the accident occurred. She testified she was driving a Chevrolet coach belonging to her father. She insisted that the bus failed to stop at the stop button on the west side of Sixteenth street, and came right through, and that she struck it just back of the front door. She testified that she had had to slow up for a van coming out of the Kappa Kappa Gamma house at 616 North Sixteenth street, and that she did not see the bus from the time it approached the stop button until she struck it. She testifies she was driving at 15 miles an hour, and could have stopped within five feet. The weight of the evidence of the majority of the witnesses, and of the photographs of the bus and the car, does not support her testimony upon many points.

The bus driver, having entered the intersection first, after having made the stop at the button, had the right of way, and the front of his bus had cleared the intersection when the Flood car struck the side near the rear. Alma Freehling, a university student, who was sitting near the plaintiff in the bus, testified that the bus was struck at the rear end, and the photograph was correct. She testified that she felt a jar, and thought the bus had hit the curb; that she was not thrown out of her seat. The evidence clearly shows that the driver of the bus was careful, and was guilty of no negligence whatever, and the facts do not justify a finding of negligence on the part of the Lincoln Traction Company.

In *Fagan v. Rhode Island Co.*, 27 R. I. 51, where a boy

of 14 years was injured while a passenger upon an electric car, in which he was asleep about midnight, and said car was struck by a pair of horses followed by a covered wagon, it was held by the court: "In an action for injuries to a passenger by a collision between a car in which he was riding and a vehicle which turned on the track from a country road, the fact of the collision raised no presumption of negligence." (60 Atl. 672.)

In *Di Leo v. Eastern Massachusetts Street R. Co.*, 255 Mass. 140, it was held: "In passenger's action for personal injury in collision between defendant's electric car and an automobile truck, plaintiff had burden to prove, by affirmative evidence, negligence of defendant; the doctrine of *res ipsa loquitur* being *inapplicable.*" (150 N. E. 891.)

Therefore, in the case at bar, where a common carrier is operating a bus on a public street, and is struck by an automobile, causing injuries to a passenger on the bus, there is no presumption, from the mere fact of collision, that the bus company was guilty of negligence. *McCulley v. Anderson*, 119 Neb. 105; *Stangy v. Boston Elevated R. Co.*, 220 Mass. 414; *Blew v. Philadelphia Rapid Transit Co.*, 227 Pa. St. 319.

The trial court, by instruction No. 1, told the jury he had dismissed the action as against the Lincoln Mineral Products Company, and the court would have been justified in directing a verdict for the Lincoln Traction Company, for negligence must be determined from the facts bringing about the collision, and the burden was upon the plaintiff to prove negligence of the bus company before she could recover, and this she failed to do.

The evidence discloses that there was no negligence of any kind on the part of the bus driver. The court should have sustained the motion of the Lincoln Traction Company at the close of all the evidence, and directed dismissal. The judgment of the trial court against the Lincoln Traction Company is reversed and the cause is remanded as to it.

REVERSED.

PERSONAL FINANCE COMPANY, APPELLANT, V. GILINSKY FRUIT COMPANY ET AL., APPELLEES.

FILED JUNE 22, 1934. No. 28995.

Courts: PUBLIC POLICY. Assignment of wages to secure loan made by Iowa resident in Iowa directed to Nebraska employer, which assignment provides for interest in excess of Nebraska small loan legislation (Comp. St. 1929, sec. 45-120), though valid where made, *held* contrary to established public policy of Nebraska and unenforceable.

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

Abrahams & O'Connor, for appellant.

Gaines, McLaughlin & Gaines, contra.

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

THOMSEN, District Judge.

A demurrer was sustained by the district court to a petition attempting to recover on an assignment of wages made in Council Bluffs, Iowa. Plaintiff and defendant assignor are residents of Iowa. The employer, the other defendant, is in Omaha, Nebraska. The assignment is security for a loan bearing 3½ per cent. a month interest. The petition alleges the validity of the contract under the small loans statutes of the state of Iowa. The assignment fails to comply with our statutes in that it provides for a substantially higher rate of interest. Comp. St. 1929, sec. 45-120. The question presented is the validity of the order of dismissal, the plaintiff electing to stand on his petition.

It is our view that plaintiff's petition does not state a cause of action, in that, though the assignment may be valid under the laws of the state of Iowa, it is contrary to the settled public policy of this state. Ordinarily, assignments of this character are judged as to their validity by the law of the state where the assignment is made, but if the enforcement of the contract is contrary to the public

policy of the state in which its enforcement is attempted, the law of the latter state will prevail. 12 C. J. 473. The rule is an old one. *Varnum v. Camp,* 13 N. J. Law, 326; *Herschfeld v. Dexel,* 12 Ga. 582; *Guillander v. Howell,* 35 N. Y. 657.

Only slight consideration of circumstances attending this legislation is required to distinguish these laws from the conventional type against usury. The latter were to guard against excessive rates; the former to combat those which were extortionate and oppressive. Rates as high as 1,300 per cent. were being charged; about one family in five of all American cities in which the population exceeded 25,000 were victims of loan sharks, according to an impartial authority. Russell Sage Foundation 1932 book on small loan legislation, page 54.

"The evils against which the law is directed had become a public scandal. The rapacity of money-lenders who impounded chattels and wages to secure small loans to those in pecuniary distress had become intolerable. Persons engaged in that business were practically uncontrolled. Many of their operations were secret, but the iniquity of their compensation for the use of money created a demand for the restraints of police power. The act in controversy not only puts a limit on exactions for the use of money, but provides punishment for the violation of its provisions and opens to official scrutiny the transactions of all who are authorized to charge limited fees in addition to interest at the rate of 10 per cent. per annum." Judge Rose in *Althaus v. State,* 99 Neb. 465. See, also, *Wight v. Baltimore & O. R. Co.,* 146 Md. 66, 37 A. L. R. 864, and note.

The legislature has thus fixed a limit beyond which, in the interests of public welfare, a contract cannot be enforced. The rate of interest provided in this assignment is beyond the highest lawful rate established by our legislature as a method of destroying a baleful economic practice. The fact that the excess rate is not glaringly higher than our lawful rate makes the violation less apparent,

but no less unlawful. The court is not required by rules of comity to enforce a contract so contrary to our public policy.

The demurrer was properly sustained.

AFFIRMED.

DAY, J., dissenting.

I am unable to concur in the majority opinion and therefore respectfully dissent to the views expressed therein. Another judge prepared a memorandum which so clearly expresses my views that I adopt it in full.

Two questions present themselves: Whether the contract is enforceable in this state, and whether the forum chosen and the procedure are proper. As to the first, it is necessary to examine into the history of small loan legislation.

On ordinary contracts Nebraska's highest lawful rate of interest is 9 per cent. Necessities of small debtors and of their protection have forced legislation granting much higher interest rates. Small loan legislation was passed in this state in 1915 in some measure comparable to the uniform laws passed in other states. Comp. St. 1929, sec. 45-112 et seq. Prior to this beneficial legislation the condition of the country with respect to small loans is summarized from the report of many cases by the Russell Sage Foundation in its 1932 book on "Small Loan Legislation," page 54, as follows:

"The rates charged by the loan sharks were exorbitant: 120 per cent. a year, 260 per cent., 360 per cent., 650 per cent., or even 1,300 per cent. a year. (Citing court decisions.) A wage-earner securing a loan at such excessive rates could, of course, not easily extricate himself from debt. Often he dared not appeal to his employer. He could but pay his periodic assessment to the loan shark; he was, in effect, a peon. As a United States judge expressed it, these practices had 'brought on conditions which were yearly reducing hundreds of laborers and other small wage-earners to a condition of serfdom in all but name.' The best procurable evidence showed that in

the American cities of over 25,000 inhabitants *about one family in five was a victim of loan sharks.* (Italics ours.)

"The social importance of the situation caused the Russell Sage Foundation to have a study of conditions made in 1908. * * * The semi-philanthropic societies, organized by public-spirited citizens and limited in their dividends, had not only maintained their existence but had developed. They were themselves a means of combating the unscrupulous commercial lenders. In 1909 there were 15 such societies located in 14 of the largest American cities. Twelve of them were doing in whole or in part a chattel-mortgage business at an average charge of about 30 per cent. per annum. Since these societies were competing with loan sharks and were composed of prominent citizens who knew their methods and were able to secure the influence necessary for new legislation, they were in a peculiarly auspicious social position.

"At the suggestion of the Russell Sage Foundation these 15 societies met in 1909 and formed the National Federation of Remedial Loan Associations. The Foundation continued to foster the societies by establishing a Division of Remedial Loans."

An exhaustive investigation by the Foundation covering many years, as shown in this report, has established a rate of 3½ per cent. per month as a fair, commercially practicable one, and that is now generally held to be a practical rate for operation of these societies. Reference to the book before quoted (page 113 et seq.) shows enactment into law of the suggested uniform small loan legislation in substantially the form adopted in Iowa in about 30 states of the Union.

The Nebraska statute differs in the apparent rate of interest, the statute providing for 10 per cent. annually on deferred payments, but allows a 10 per cent. brokerage fee semiannually, and is criticized as being possible of a higher rate of interest than the uniform act suggested, the foregoing authority (page 71 and note) citing an instance in Nebraska in which a rate of 50 per cent.

per annum could lawfully be charged under certain conditions, and classifying the law as being subject to this criticism, that "the charges could therefore be easily manipulated."

Since all this legislation is remedial in character, passed for the purpose of protection of the small loan borrower against extortion, and since the value is so clearly apparent, it cannot be said, as a matter of law, that the Iowa statute, because it differs slightly from ours, is contrary to the public policy of this state; on the other hand, it is apparent that, since our own legislation was passed for the purpose of accomplishing the very results heretofore suggested and overcoming the evils theretofore existing, our public policy approves legislation of the character of the Iowa statute involved. The loan here under investigation in the course of regular events would require twenty months for its repayment. For the purpose of a comparison of rates, a computation of total interest on deferred payments if regularly reduced during this period of time would show a total interest of about $36.75 or an actual average rate of 21.6 per cent. per annum, although obviously the debtor would not have the use of the total loan during the entire time. On the same basis a computation of total interest, plus semiannual brokerage fees on renewal, under the Nebraska statute, would produce 20.24 per cent. per annum or a total of about $33.74 for twenty months. Because of all the foregoing we see nothing obnoxious in the enforcement of the Iowa law. Moreover, laws against usury do not ordinarily furnish the foundation for "public policy" so as to prevent enforcement of interest on a foreign contract lawful where made. 39 Cyc. 892. See *Phinney v. Baldwin*, 16 Ill. 108, where a 60 per cent. per annum California note, lawful where made, was enforced in Illinois.

The question, "May a partial assignment of wages, although unassented to by the debtor, be enforced against him in equity?" is argued in the brief of counsel for the plaintiff. It was suggested on the oral argument by plain-

tiff's counsel (at which argument the defendants' counsel did not appear) that this question was the only one presented in the court below. If raised below, defendants seem to have abandoned the proposition, for no mention of it is made in their brief, thus impliedly conceding the correctness of an affirmative. Since no issue of the question is raised by defendants, discussion by the court becomes unnecessary and we decline to pass on it, although the question seems easy of solution. Restatement, Contracts, sec. 156, and Nebraska Annotations under this section; also annotation in 80 A. L. R. 414.

Some question is raised about the assignment, but, though made in Iowa, it complies substantially with our statute. At any rate, the assignment is merely collateral to the debt. 66 C. J. 155. Moreover, generally, debts have no situs or locality but follow the person to whom such debts are owing. *Cooper v. Beers,* 143 Ill. 25; Story, Conflict of Laws (8th ed.) sec. 362; 12 C. J. 471. So, generally, "The validity and effect of an assignment or transfer (of a debt) * * * is determined by the law of the place where the transfer takes place." 12 C. J. 473.

From the pleadings it is apparent that the contract is a valid one in Iowa. If valid there, it is valid here (5 R. C. L. 981, sec. 62; *Joslin v. Miller,* 14 Neb. 91; *Benton v. German-American Nat. Bank,* 45 Neb. 850; *International Harvester Co. v. McAdam,* 142 Wis. 114, 26 L. R. A. n.s. 774) even though the security to which it applies would be considered to have its situs in Nebraska. *Sands v. Smith,* 1 Neb. 108, 93 Am. Dec. 331; 66 C. J. 153, 154, 155; *Coad v. Home Cattle Co.,* 32 Neb. 761; also, 11 Ann. Cas. 225. In any event, the contract being in some aspects more favorable to the debtor than our own statutory law, conscience does not dictate more than ordinary resistance to its enforceability. That high interest rates should apply to those least able to bear such burden, and low rates to those who could well pay more, is the disturbing factor in hearty approval of these laws. The fact that progress has been made in reducing interest to rates less extor-

tionate has some allaying effect, but only in arousing belief in an ultimate solution which will be more equitable. However, the wisdom of statutory law is solely for the legislature, not the courts. *State v. School District,* 99 Neb. 338; *Stewart v. Barton,* 91 Neb. 96; 5 Dec. Dig. (2d) Constitutional Law, sec. 70 (3).

The petition states a cause of action. The demurrer was improperly sustained.

LOGAN A. ROGERS, APPELLEE, V. J. B. MORGAN, COUNTY CLERK, APPELLANT.

FILED JUNE 25, 1934. No. 29280.

1. **Constitutional Law**: LEGISLATIVE ACTS: COMPLIANCE WITH CONSTITUTION: QUESTION FOR COURT. "There is no doubt that the legislature may exercise a reasonable discretion in selecting the method of securing practical equality. But the question whether constitutional requirements have been applied at all is a question for the courts." *State v. Moorhead,* 99 Neb. 527.
2. **States**: LEGISLATIVE DISTRICTS: APPORTIONMENT. Chapter 8, Laws 1933, House Roll No. 162, which provides for apportionment of senatorial and representative districts, fails to comply with section 5, art. III of the Constitution, and is held unconstitutional.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, ELLWOOD B. CHAPPELL, LINCOLN FROST and FREDERICK E. SHEPHERD, JUDGES. *Affirmed.*

Paul F. Good, Attorney General, Max G. Towle, C. L. Clark and *G. E. Price,* for appellant.

Peterson & DeVoe, Burkett, Wilson, Brown & Van Kirk, John S. Bishop, Perry, Van Pelt & Marti and *Barton Green, contra.*

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

LANDIS, District Judge.

This is an action for injunction to restrain J. B. Morgan

as county clerk of Lancaster county, Nebraska, the defendant and appellant herein, from proceeding under the provisions of House Roll 162, enacted by the legislature of 1933, in placing or printing the names of candidates for nomination or election on the ballots at the primary and general election in the two senatorial and six representative districts of Lancaster county. The claim of the plaintiff and appellee is that House Roll 162 is unconstitutional.

Issues were joined and hearing had below by the four district judges of Lancaster county sitting *en banc*. Their unanimous finding was that, in passing House Roll 162 and in the act itself, no attempt was made by the legislature to resubdivide the whole state into senatorial and representative districts; that no changes were made or attempted to be made in any counties of the state except Douglas and Lancaster; that the legislature in the enactment of the act did not apportion the whole state according to population, as required by section 5, art. III of the Constitution of Nebraska; that such apportionment was not done for the correction of inequalities of population of the whole state, and thereby violated the Constitution; that such apportionment cannot be made oftener than once in ten years, and this act wrongfully deprives the rest of the counties of the state of an apportionment for another ten years; and found generally for the appellee and against the appellant that the act was unconstitutional and void, that the appellee is entitled to the relief sought in his petition, that he has no adequate remedy at law in the premises, and that the defendant county clerk should be permanently restrained and enjoined from proceeding under House Roll 162. Judgment was entered on the findings, motion for new trial filed and overruled, and appeal taken to this court.

There is no dispute in the evidence, and it discloses that according to the 1930 federal census the population of the state was 1,377,963, a gain over the 1920 census of 81,591. Comparing the 1930 federal census with that of 1920 the following gain and loss in population in some of the 93

counties in Nebraska is found: Douglas 232,982, a gain of 28,458; Lancaster 100,324, a gain of 14,422; Scotts Bluff 28,644, a gain of 7,934; Adams 26,275, a gain of 3,654; Hall 27,117, a gain of 3,397; Red Willow 13,859, a gain of 2,425; Lincoln 25,627, a gain of 2,207; Boyd 7,169, a loss of 1,074; Brown 5,772, a loss of 977; Cherry 10,898, a loss of 855; Franklin 9,094, a loss of 973; Howard 10,020, a loss of 719; Nuckolls 12,629, a loss of 607; Phelps 9,261, a loss of 639; Webster 10,210, a loss of 712. The unit required to be applied as a basis of apportionment for the 33 senatorial districts is 41,756, and for the 100 representative districts is 13,779. If exact population equality were possible Douglas county with a population of 232,982 should have 16 representatives, a gain of 3 representatives, and which would leave a population of 12,518 unrepresented. Deduct the 4,852 aliens in Douglas county and there would remain 7,666 people unrepresented. Lancaster county with a population of 100,324 would have 7 representatives instead of 6, a gain of 1, and in addition there would be an excess population unrepresented of 3,871, and deducting the 1,384 aliens would still leave 2,487 people unrepresented. Platte county with a population of 21,181 has 1 representative, yet Pawnee county with 9,423 and Johnson county with 9,157 have each a representative. Districts 97 and 98 comprise Scotts Bluff county, district 97 has a population of 19,846, while district 98 has 8,798, and each district has 1 representative. Franklin county with 9,094, and Kearney county with 8,094, each have a representative, yet district 31 in Lancaster county with a population of 15,080 has only 1 representative.

In 1930 the aliens in the state were 12,556. Of these 4,852 were in Douglas county, 1,384 in Lancaster county, 1,182 in Scotts Bluff county, leaving 5,138 in the remaining 90 counties.

It appears that House Roll 162 made no changes in any of the districts in the state except Lancaster and Douglas counties and there changes were made only in boundary

lines; that the act did not apportion the whole state according to population, and that such apportionment was not done for the correction of inequalities of population of the whole state.

The mandate to the legislature for apportionment as to senatorial and representative districts is found in section 5, art. III of our Constitution. This is as follows: "At the regular session of the legislature held in the year nineteen hundred and twenty-one the legislature shall by law divide the state into senatorial and representative districts. In the creation of senatorial and representative districts, any county that contains population sufficient to entitle it to two or more senators or representatives shall be divided into separate and distinct senatorial and representative districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such districts, one senator shall be elected from each senatorial district and one representative from each representative district. The basis of apportionment shall be the population excluding aliens, as shown by next preceding federal census. In like manner, when necessary to a correction of inequalities in the population of such districts, the state may be redistricted from time to time, but not oftener than once in ten years."

This constitutional requirement, which the people of the state have determined, is clear and unambiguous. It is based upon the principle of equality of representation which lies at the foundation of our system of government and requires that no voter shall exercise a greater voting power in the selection of the legislature than other voters. Actually, however, this principle is qualified by the impracticability of mathematical exactness in providing for representation which preserves absolutely the constitutional requirements.

This court has announced the sound rule in *State v. Moorhead,* 99 Neb. 527: "There is no doubt that the legislature may exercise a reasonable discretion in selecting the method of securing practical equality. But the

question whether constitutional requirements have been applied at all is a question for the courts."

The duty of determining the apportionment is reposed in the legislature by the Constitution and the court will inquire only to determine whether the legislature has exercised a constitutional discretion. The court has the jurisdiction to determine whether the constitutional requirements have been violated. It will not consider the motives that may have actuated the passage of an act except as it appears in the law itself or the journals. The validity of an act does not depend upon the motive of its passage, but whether and to the extent it is within the constitutional powers of the legislature to enact it. *State v. Moorhead, supra.* See annotation, 2 A. L. R. 1337, where is found a full and complete discussion of the authorities on the inequality of population or lack of compactness of territory as invalidating apportionment of representatives.

The forty-ninth session of the legislature convened Tuesday, January 3, and adjourned May 9, 1933. With the federal census of 1930 available, the matter of apportionment of legislative representation came up and resulted in the enactment of House Roll 162. Ten years had elapsed since the last apportionment, the state had changed in population and it was apparent that gross inequalities existed in many districts of the state. Appellant, by inference, admits in both his brief and the argument of his counsel that these inequalities exist. It is insisted, however, that these gross inequalities exist because of the immediate preceding apportionment act of 1921. But House Roll 162 adopts the apportionment act of 1921 completely except two counties. The argument amounts to what might be designated as a confession and avoidance. The question here is the effect of House Roll 162. The mandatory provisions under section 5, art. III of the Constitution, are: First. Was the basis of apportionment according to population excluding aliens based on the 1930 federal census? Second. Was the state redistricted to correct inequalities into districts as nearly equal in popu-

lation as may be and composed of contiguous and compact territory?

The matter of apportionment is so essentially legislative, restrained only by the Constitution, that courts interfere therein only when there appears a clear and palpable violation of the fundamental law. It clearly appears that the federal census of 1930 was not the basis of the apportionment. The gross inequalities in representation are so palpable that we can reasonably say that this census was almost completely ignored, not considered or applied to any appreciable extent. It is equally apparent that there were necessary corrections of inequalities in the population of many districts in the state and that House Roll 162 did not correct these.

Not every deviation from exact uniformity in apportionment of population into senatorial and representative districts of contiguous and compact territory will justify resort to the courts, or warrant the conclusion that the Constitution has been ignored. The court will be slow to set aside an apportionment which appears by any exercise of sound discretion to have followed the requirements of the Constitution, and to be a reasonable approximation to equality. But where it is manifest on its face, from mere inspection of the apportionment, that the Constitution has been transgressed, then the act cannot stand. When fair-minded men, from an examination of the act of apportionment, can entertain no reasonable doubt that there are grave, unreasonable and gross inequalities between different districts, the Constitution has been violated, and it is the clear duty of the court to so declare.

The record discloses that in the enactment of House Roll 162 the legislature made no attempt to resubdivide and reapportion the whole state into senatorial and representative districts, that no changes were made or attempted to be made in any counties of the state except Douglas and Lancaster, that the whole state was not apportioned according to population as required by section 5, art. III of the Constitution, that such apportionment was

not done for the correction of the apparent gross inequalities of the population in the respective senatorial and representative districts of the whole state and thereby violated the Constitution, that such apportionment cannot be made oftener than ten years, that the act wrongfully deprives the rest of the counties of the state of an apportionment for another ten years and the correction of gross inequalities for a like period. The act is unconstitutional and void, hence the appellant county clerk should be permanently restrained and enjoined from proceeding thereunder. The unanimous decree of the four judges sitting *en banc* below is

AFFIRMED.

MELL OLSTON ET AL., APPELLANTS, V. WOODS BROTHERS CORPORATION ET AL., APPELLEES.

FILED JUNE 29, 1934. No. 29001.

1. **Specific performance** of an obligation not created by the agreement relied upon will not be decreed.
2. **Brokers**: CONTRACT: DURATION. An agreement with no definite time for performance remains in effect only a reasonable time.
3. ———: ———: TERMINATION. A real estate sales agent may terminate an agreement to sell lots where his principal fails or is unable to convey to a purchaser one of the lots sold and where all the lots are held by the same title.

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

Boehmer & Boehmer, for appellants.

Woods, Woods & Aitken, contra.

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

GOSS, C. J.

Appellants, claiming through Callen (sometimes called Calvin) Thompson, now deceased, sued for a decree for

specific performance of a contract made by Callen Thompson and Woods Brothers Corporation (hereinafter called Woods Brothers), or in lieu thereof that the corporation be required to pay appellants $25,491.18, with interest from October 1, 1932, as damages. From an adverse decree they appeal.

Callen Thompson, being the owner of 40 acres of farm land in the village of College View, and desirous of selling it, on March 24, 1926, entered into a written contract with Woods Brothers. This land is bounded on the north by Van Dorn street, on the south by Summit street, on the west by Fortieth street and extends east from Fortieth street approximately one-fourth of a mile. They agreed to plat, subdivide and grade the tract and to furnish abstracts to purchasers, all without cost to Thompson. They agreed "to pay all taxes during the life of the contract," to commence sales within 60 days, to render a statement of sales and payments every 90 days, after the first year to pay Thompson 6 per cent. interest payable monthly on any unpaid balance due him under the contract, and during the first year to pay him like interest on all sales, but not on more than the balance then due him; they agreed to pay him, "when and as received, all payments made or received on the sale of said property," less 10 per cent. commission to salesmen, until Thompson shall have received $30,000.

In consideration of the foregoing, Thompson agreed to "deliver good and sufficient title and to sign deeds and to procure necessary signatures to effect the sale of any part or parcel of the property" and upon receipt of $30,000 to convey to Woods Brothers by warranty deed any of the property then unsold. The contract provided that Woods Brothers should have no money, except the sales commission, until Thompson had been paid the amount due him as above. The contract fixed no definite period of time for its duration.

Woods Brothers promptly platted, subdivided and graded the land into eight blocks, with appropriate streets.

The allotment is called Woods Brothers-Thompson's Summit. They proceeded to sell the lots to the public on contracts with small down payments. In the spring of 1926 the city council of College View, acting under authority of statute, without petition, authorized the paving of the streets in the allotment. They were paved and the cost was assessed against the lots. In due course approximately $30,000 worth of the lots had been sold. If they had been paid for in full by the purchasers and if the purchasers had paid their instalments of special taxes, Thompson, or those here claiming under him, would have received the full $30,000 contemplated in the contract as going to him, and Woods Brothers would have been entitled to the balance of the lots for their participation in the venture, as intended by the contract. But the purchasers of lots did not carry out their contracts, the market for suburban lots failed to furnish new purchasers of other lots, the general and special taxes inexorably accumulated so that their liens exceeded the market value of the land and the speculation ended disastrously to both contracting parties.

There is no serious claim that Woods Brothers did not account in accordance with the terms of their contract for all money received from the sales. It would not aid the decision to go into the accounts relating thereto. We think it clear from the evidence that Thompson and plaintiffs received all that was due them under the contract considered as a contract of agency authorizing Woods Brothers to sell lots until the sales thereof produced enough to pay the owner of the land the amount stipulated. As we have stated, the actual income produced was not sufficient to reach that point.

It is shown by the petition that Callen Thompson died March 5, 1928, having devised the residue of his estate, in which was included this land, to his heirs at law. The interests went to about 20 different persons, related to Thompson as sister, nephews and nieces (some of them one degree removed by reason of the deaths of their

parents), heirs and devisees of deceased persons entitled to take under the will of Thompson. These various interests ranged all the way from a one-seventh to a one hundred and seventy-fifth interest in the land and to prepare for proof that the estate vested in these parties required the probating of several estates. This made it difficult for the heirs of Thompson to give title to lots sold when they were paid for and deeds would be demanded by the purchasers.

On or about November 8, 1930, Woods Brothers applied to the agents and attorney of the heirs at law of Thompson for a deed to one of the lots which had been sold to Agnes Slot and which had been fully paid for. There is evidence that, after considerable delay, these agents advised Woods Brothers that they were unable to obtain the deed and Woods Brothers made settlement with Agnes Slot for the sums paid by her in the purchase of the lot.

The district court held that the heirs of Callen Thompson breached the agreement between Callen Thompson and Woods Brothers by reason of their failure to deliver the deed to Woods Brothers for the lot sold to Agnes Slot; that the agreement created no obligation on the part of Woods Brothers to purchase the land but constituted Woods Brothers Corporation sales agent for the sale of lots to the public; and entered judgment against those claiming under Callen Thompson.

The agreement clearly did not establish an obligation on the part of Woods Brothers to purchase the land. Specific performance of an obligation not created by the agreement relied upon will not be decreed. *Mercer v. Payne & Sons Co.*, 115 Neb. 420.

No definite duration of the continuation of the sales agency was stated in the agreement. It persisted for several years until changed conditions of the market for suburban lots made it impracticable of performance, laying out of view here its breach by plaintiffs. An agreement with no definite time for performance remains in effect only a reasonable time. *Mercer v. Payne & Sons Co.*, 115 Neb. 420; 1 Williston, Contracts, sec. 38.

The failure of the heirs to make a deed to the lot purchased by Agnes Slot constituted a breach of the contract and indicated an inability to carry it out in a way vital to the disposal of lots on the market. A real estate sales agent may terminate an agreement to sell lots where his principal fails or is unable to convey to a purchaser one of the lots sold and where all the lots are held by the same title.

We are of the opinion the judgment of the district court was right. It is

AFFIRMED.

CHARLES E. KEENAN, APPELLEE, V. NELLIE MCCLURE ET AL., APPELLEES: DAKOTA COUNTY ET AL., APPELLANTS.*

FILED JUNE 29, 1934. No. 28700.

1. Taxation: TAX SALE: REDEMPTION. When accepting payment to redeem land from a tax sale to an individual purchaser, a county treasurer acts in the capacity of a trustee for the holder of the tax sale certificate which evidences former payment of taxes to the county.
2. ———: ———: ———. Money paid to a county treasurer to redeem land from a tax sale to an individual purchaser belongs to the latter, not to the treasurer nor to the county which has already received the taxes.
3. ———: ———: ———. A county treasurer who accepts from a tax debtor a check to redeem land from a tax sale, instead of money, is required to exercise reasonable diligence in presenting the check for payment.
4. ———: ———: ———: NEGLIGENCE OF TREASURER. Where a county treasurer accepted, for taxes and for redemption of land from a tax sale, a check on a bank which failed before he presented the check for payment, canceled the tax liens, paid the holder of the tax sale certificate the amount due thereon, canceled the certificate and subsequently reinstated the tax liens, the reinstatement may be canceled in equity, if the treasurer's negligence in those particulars caused a loss to

*Footnote—On rehearing, former opinion, reported 125 Neb. 753, withdrawn, and judgment of district court affirmed.

such holder in absence of negligence or wrong-doing on his part.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Former opinion withdrawn, and judgment of district court affirmed.*

Sidney T. Frum and *Malcolm R. Smith,* for appellants.

W. V. Steuteville and *Sherman W. McKinley, Jr., contra.*

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

ROSE, J.

As brought, this was a suit in equity to foreclose a 3,500-dollar mortgage on a tract of land in Dakota county. The mortgage was dated March 13, 1928, and the debt was due March 13, 1931. Charles E. Keenan, plaintiff, was mortgagee and Nellie McClure and Robert L. McClure, defendants, were mortgagors. Dakota county and Harry Rockwell, county treasurer, also defendants, were in a controversy with plaintiff Keenan over taxes, the lien for which Rockwell as county treasurer discharged of record December 5, 1930, and reinstated of record March 5, 1931.

Keenan's petition to foreclose the mortgage was filed March 23, 1931. A decree of foreclosure was entered June 8, 1931, and issues as to taxes were retained for future consideration. Under the decree the mortgaged land was sold to Keenan at judicial sale April 12, 1932, for $4,036.34, debt, interest and costs. Of the foreclosure decree and sale no complaint is now made herein.

In a supplemental decree October 26, 1932, the district court found the issues in favor of Keenan in his controversy with Dakota county and its treasurer and canceled the apparent lien for the reinstated taxes. Dakota county and the treasurer appealed. In a former opinion the supplemental decree was reversed, with directions to reinstate the taxes in controversy as unpaid liens on the mortgaged land. *Keenan v. McClure,* 125 Neb. 753.

Upon a motion for a rehearing the cause was reargued at the bar and submitted for further consideration. The question for determination is the validity of the county treasurer's action in reinstating on the records of his office the tax lien which he had formerly discharged of record as paid. In reaching a conclusion in the light of new arguments on both sides, the entire record has been reexamined.

Before maturity of the mortgage March 13, 1931, Keenan, mortgagee, had a contractual right to accelerate maturity of the debt for nonpayment of delinquent taxes and on account of such delinquency he directed his attorney to institute a foreclosure suit. Prior to the preparation of a petition therefor, the treasurer discharged the tax lien and made the official records show full payment of delinquent taxes, thus preventing foreclosure proceedings until after March 13, 1931.

The treasurer sold the mortgaged land to Katrina Quivey of Salt Lake City, Utah, for delinquent taxes November 5, 1928, but which were not delinquent when the mortgage was executed. From her Keenan purchased the tax sale certificate March 16, 1929, and by virtue thereof and payment of taxes for 1928 he acquired a tax lien for $471.40 in addition to his 3,500-dollar mortgage. The county had received from Quivey and Keenan $471.40, including a fee of 25 cents, and the tax lien on the mortgaged land became the lien of Keenan and was not thereafter the lien of Dakota county or of the treasurer.

December 5, 1930, Nellie McClure, mortgagor, defendant, went to the office of the county treasurer and gave him her check on the First National Bank of Sioux City, Iowa, for $678.10. This check represented two items—one for $471.40 to redeem her land from the tax sale evidenced by the tax sale certificate held by Keenan and the other for $206.70 to pay her taxes on the mortgaged land for the year 1929. The treasurer accepted her check instead of money, immediately issued and delivered to her his official certificate or receipt showing redemption of her

land from the tax sale and the payment of taxes for the year 1929. This resulted in discharging of record all her delinquent taxes on the mortgaged land, including Keenan's lien for $471.40, money previously received by the treasurer for the county. These transactions occurred December 5, 1930, in the office of the treasurer, who immediately notified Keenan by mail that a certificate or receipt of redemption of the land from the tax sale had been issued to Nellie McClure. Pursuant to the notice, Keenan appeared at the office of the treasurer during the forenoon December 6, 1930, surrendered his tax sale certificate, which was then canceled, received and cashed the treasurer's check for $471.40, redemption money. The First National Bank of Sioux City, Iowa, upon which the McClure check to the treasurer for $678.10 had been drawn, was closed on account of insolvency at noon December 6, 1930, and did not pay the check. March 5, 1931, Keenan was notified by the treasurer that he had canceled the redemption certificate or receipt for $471.40 and had reinstated of record the taxes against the McClure property. Keenan replied the next day that he thought the county would have to stand the loss.

Should the loss occasioned by the transactions between Nellie McClure and the treasurer fall on Keenan? The witnesses do not agree as to the exact time the McClure check was presented to the treasurer December 5, 1930—Friday. Rockwell, treasurer, testified that Nellie McClure came in about 3 p. m. and that he received her check between 3 and 4 o'clock. By her testimony she fixed the time at 1:30. That she was more nearly correct is shown by evidential circumstances. After leaving the office of the county treasurer, she went to an insurance office in Dakota City, the county seat, and gave the insurance agency her check for $18.40 on the same bank, the First National Bank of Sioux City, Iowa, for fire insurance. This check was presented to the Nebraska State Bank of South Sioux City, Nebraska, the same day, December 5, 1930, forwarded to the First National Bank of Sioux City,

Iowa, and there paid before that bank closed at noon the next day—December 6, 1930. The fair inference is that the McClure check for redemption and for payment of 1929 taxes would also have been paid, if the treasurer, who received it earlier the same afternoon, had acted with the same diligence as the insurance agency. The check for redemption could have been deposited December 5, 1930, with the Bank of Dakota City, his depository. It could have been forwarded from there by mail to the First National Bank of Sioux City, and cleared during the forenoon December 6, 1930. The bank on which the McClure check for taxes was drawn was about five miles from the county treasurer's office and the check could have been directly presented for payment December 5, 1930. The treasurer did not see fit to pursue either course, though he had accepted the check instead of money. When he received the McClure check for $678.10 December 5, 1930, he put it in the cash drawer, where it remained until December 8. He made no effort to deposit or cash it December 5 or 6. When he did offer it at his depository it was rejected because the bank on which it was drawn had been closed. He had canceled Keenan's tax lien and tax sale certificate without notice. He kept both the McClure check and Keenan's canceled tax sale certificate. He made no effort to collect the check from the drawer thereof or to collect from her any part of the taxes canceled by him. He did not present to the receiver of the insolvent bank a claim for the unpaid check though the drawer thereof had $1,000 on deposit when the check was issued and only $18.40 less when the bank was closed. The failed bank reorganized and paid 60 per cent. of deposits. The treasurer, with the McClure check for $678.10 in his hands, made no effort to impound the McClure dividend or 60 per cent. of the McClure deposit and apply the proceeds on the check, though permitted by Keenan to do so without prejudice to the county or its treasurer; did not attempt to recall the redemption certificate he put into the hands of the tax debtor; did not transfer to

Keenan the unpaid check as evidence of a claim for the McClure dividend; did not restore to Keenan the latter's canceled tax sale certificate. The cancelation of the taxes postponed foreclosure of the mortgage while accumulating interest increased the mortgage debt. The reinstatement of the taxes created an apparent lien superior to that of the mortgage.

When accepting payment to redeem land from a tax sale to an individual purchaser, a county treasurer acts in the capacity of a trustee for the holder of the tax sale certificate which evidences former payment of taxes to the county. Money paid to a county treasurer to redeem land from a tax sale to an individual purchaser belongs to the latter, not to the treasurer nor to the county which already received the taxes. After accepting the check from the tax debtor, instead of exacting the redemption money, the treasurer was required to exercise reasonable diligence in presenting the check for payment. A statutory rule is as follows:

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Comp. St. 1929, sec. 62-1603.

Negligence of the treasurer left his reinstatement of canceled taxes without justification in either law or equity. The determining issue in the controversy between Keenan and the treasurer is not whether the McClures paid their tax debts with a worthless check, but whether the treasurer, by reinstatement of the taxes, escaped the consequences of his own negligence and imposed the resulting loss on Keenan who was not chargeable with negligence or wrong-doing of any kind. Under the circumstances outlined herein, the loss resulting from the treasurer's negligence does not fall on Keenan. The reinstatement was properly canceled by the district court. The former opinion to the contrary is withdrawn, the reversal set aside, and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

FRANCES SUVERKRUBBE, APPELLANT, V. VILLAGE OF FORT CALHOUN ET AL., APPELLEES.

FILED JUNE 29, 1934. No. 29199.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: EMPLOYEE. Village marshal, appointed at beginning of municipal year by village board, is, within meaning of section 48-115, Comp. St. Supp. 1933, an official of a governmental agency created by the state, appointed for a regular term of office, and is not an employee, within the meaning of the workmen's compensation law.
2. ———: ———: RIGHT OF RECOVERY. There can be no recovery, under the workmen's compensation law, for an injury to an employee unless it arises out of and in the course of his employment.
3. ———: ———: JOINT EMPLOYMENT. To constitute a joint employment by two or more persons or corporations, there must be some concert of action with reference to the wages or salary to be paid by each, the hours of employment, or term of service of the employee.

APPEAL from the district court for Washington county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Dryden, Dryden & Jensen and *Carl T. Self*, for appellant.

William R. Patrick, Kennedy, Holland & De Lacy and *Edwin Cassem, contra.*

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

GOOD, J.

This is an action to recover compensation death benefits under the workmen's compensation law. Frances Suverkrubbe is plaintiff. Her deceased husband, Albert Suverkrubbe, was the employee. The Village of Fort Calhoun and Nebraska Power Company were employers of Mr. Suverkrubbe and are defendants.

Plaintiff alleges that, while her husband was employed by defendant village as village marshal and by defendant power company as a watchman and caretaker, in the per-

formance of duties for each of his employers, on the night of December 5, 1932, he was shot by a robber or burglar, whom the employee was attempting to arrest; that he died from the effects of the gunshot wound nine days later. The defendant village, as a defense, alleges that Suverkrubbe was an officer of the village, appointed for a definite and fixed term, and was not an employee within the meaning of the workmen's compensation law. Defendant power company denies that the shooting of Suverkrubbe was in the course of his employment by the power company, or that the injury arose out of his employment. The trial court found for each of the defendants and dismissed plaintiff's petition. Plaintiff has appealed.

Plaintiff contends that her husband was not an officer of the village, appointed for a regular term or to complete an unexpired portion of any regular term, but was an employee of the village, within the meaning of the workmen's compensation law.

The workmen's compensation law defines "employee" to cover every person in the service of the state, or any governmental agency created by it, but excludes from its operation any official in the service of the state, or any governmental agency created by it, who has been elected or appointed for a regular term of office or to complete an unexpired portion of any regular term. Comp. St. Supp. 1933, sec. 48-115.

Section 17-208, Comp. St. 1929, provides: "The village board of trustees may appoint a village clerk, * * * marshal and shall appoint a board of health consisting of three members,—the chairman of the village board, who shall be chairman, the marshal, who shall be secretary and quarantine officer, and one other member." Said section further provides: "Said appointees shall hold office for one year, unless sooner removed by the president of the board, with the advice and consent of the trustees."

Section 17-213, Comp. St. 1929, provides: "The marshal shall be chief of police, and shall at all times have power

to make or order an arrest with proper process, for any offense against the laws of the state or ordinances of the village, and bring the offender to trial before the proper officer of the village, and to arrest without process in all cases where any such offense shall be committed or attempted to be committed in his presence." Section 17-209, Comp. St. 1929, fixes the maximum salary which may be paid to village officers, including the marshal.

In the case of *Rooney v. City of Omaha,* 105 Neb. 447, it was held: "A regular term of office, as the term is applied to government employees in the workmen's compensation law (Rev. St. 1913, sec. 3656), means such term of office as has a fixed and definite duration and a date of termination known and fixed by law or other general regulation."

In the opinion in *State v. Galusha,* 74 Neb. 188, it is said (p. 199): "Ordinarily, say the authorities, the word 'term' or 'term of office,' when used in reference to tenure of office, means a fixed and definite period of time"—citing a number of cases.

In the instant case, the record discloses that Suverkrubbe was first appointed to fill out an unexpired term, and at the beginning of the municipal year he was reappointed. His tenure of office, unless removed, would automatically terminate, by the statute, in one year. It was so recognized when he was holding the office and was reappointed at the beginning of a new municipal year. We think that, under the law, there is no question that Mr. Suverkrubbe was an officer of the village, appointed for a regular term of office. It follows that his widow cannot recover compensation death benefits under the workmen's compensation law.

The evidence shows that the power company has no manufacturing or generating plant in Fort Calhoun; nor does it maintain any office or other building therein. It furnishes electricity for lighting the village streets and for use by the village inhabitants. The power company employs one person in the village whose duty it is to

replace worn out or broken electric light bulbs, and once a week to wind the clock which automatically turns off and on the street lights, and to report to the company's office in another city breakage or defects in the company's electric lines. Mr. Suverkrubbe was hired by the power company to perform these duties. He was shot in an attempt to arrest a robber, or burglar, while in the performance of his duties as village marshal. There is no evidence that at the time he was in the performance of any duty for the power company. The burglar, or robber, was not shown to have been in any way interfering with any property of the power company, but had broken into a store building. It necessarily follows that the injury did not arise out of and in the course of his employment by the power company.

Plaintiff, however, contends that there was a joint employment of her husband by the two defendants; that his wages were $75 a month, of which the village paid $60 and the power company $15, and that, pursuant to the provisions of section 48-129, Comp. St. 1929, she is entitled to recover if the injury arose out of and in the course of his employment by either of his employers.

The evidence discloses that Mr. Suverkrubbe was hired by the power company without any reference to his appointment as village marshal, or without any agreement or arrangement between the power company and the village. It also appears that he was appointed marshal without reference to his duties as an employee of the power company, and that there was no conference or arrangement between the village and the power company as to the amount of wages or salary that should be paid by each; that there was no arrangement or agreement as to the hours of labor or the term of service. In order to constitute a joint employment, there must have been some joint arrangement between the two employers as to the employment by each. In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment or term of service, there can-

not be any joint employment, within the meaning of section 48-129, Comp. St. 1929.

From what has been said, it necessarily follows that there can be no recovery by plaintiff in this case. The judgment of the district court is right and is

AFFIRMED.

ORCHARD & WILHELM COMPANY, APPELLEE, V. HANNAH C. PETERSEN, ADMINISTRATRIX, APPELLANT.

FILED JUNE 29, 1934. No. 29208.

1. **Evidence.** In action under compensation law, report of an injury to employee made by employer to the compensation commissioner may be introduced in evidence as an admission against interest of the employer, as to how, when and where the injury occurred, and, in the absence of other evidence, may be sufficient to make a *prima facie* case for claimant.
2. **Master and Servant: WORKMEN'S COMPENSATION LAW: BURDEN OF PROOF.** To recover compensation death benefits under the workmen's compensation law, where liability is denied, claimant must establish by a preponderance of the evidence that the workman sustained an accidental injury arising out of and in the course of his employment, and that his death resulted from the effects of such injury.

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

Edward J. Dugan, Lawrence F. Welch and *John A. McKenzie,* for appellant.

Crossman, Munger & Barton and *Varro H. Rhodes, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, and PAINE, JJ., and CARTER and LIVINGSTON, District Judges.

GOOD, J.

Hannah C. Petersen (hereinafter referred to as claimant), widow of William R. Petersen, deceased, and administratrix of his estate, instituted this proceeding be-

fore the compensation commissioner, to recover from Orchard & Wilhelm Company (hereinafter referred to as the company) death benefits under the workmen's compensation law. The company denied that claimant's husband received an injury arising out of and in the course of his employment, alleged that he died from natural causes and not as a result of any accident, and that the action is barred because no claim for compensation was made by claimant within six months from her husband's death. The compensation commissioner made an award to claimant; the company appealed to the district court, where findings were made in favor of the company on each of the propositions, and award of compensation denied. Claimant has appealed.

For many years prior to February, 1933, Mr. Petersen had been employed by the company as a floor man in its wholesale store in Omaha. On the 9th of February, 1933, Petersen was informed that, because of business conditions, his services would be discontinued after the 28th day of February following. Apparently at the same time, he informed a representative of the company that he had a hernia and he was sent to a physician. It was deemed necessary that an operation should be performed, and Petersen desired his regular physician to perform the operation, to which the company assented. However, Petersen wore a truss and continued his work for the company until the close of February, 1933. The next day he entered a hospital and was operated upon for hernia. The operation appeared to be successful, and Mr. Petersen appeared to be progressing satisfactorily until the 11th day of March, when his breathing became labored, his lips and nails became cyanotic or blue, and he expired within a few moments.

It is claimant's contention that Petersen sustained an accidental injury from "pushing a truck loaded with linoleum up an incline in the store of the said Orchard & Wilhelm," in the course of his employment, causing the hernia, which, in turn, necessitated the operation, and

that death resulted because of the operation. To be more exact, it is claimant's contention that Petersen died from an embolism, and that the embolus was caused by the hernia operation.

The only evidence that Petersen sustained an accidental injury in the course of his employment is that contained in a first report made to the compensation commissioner by a Mr. Nestor, a "personnel director" for the company.

Claimant argues that, in an action for compensation, the report of an injury, made by an employer to the compensation commissioner, may be introduced in evidence, to establish a *prima facie* case and as an admission against interest of the employer, as to how, when and where the injury occurred. She cites and relies upon the following cases: *Northeast Oklahoma R. Co. v. State Industrial Commission,* 88 Okla. 146; *Jacque's Case,* 121 Me. 353; *Carroll's Case,* 225 Mass. 203; *Ross' Case,* 124 Me. 107; *Hege & Co. v. Tompkins,* 69 Ind. App. 273; *Reck v. Whittlesberger,* 181 Mich. 463; *Brown's Case,* 228 Mass. 31. Several of these cases do hold that such a report is in the nature of an admission against interest and may be sufficient to make a *prima facie* case, but none of them holds that such report is conclusive, and in all of the cases cited the findings of the compensation commissioner, or industrial board, as the case may be, have the force and effect of the verdict of a jury in a law action; while in this state compensation cases in this court are tried *de novo,* and this court is required to determine the facts from the evidence preserved in a bill of exceptions, independently of any findings or conclusion that may have been reached by the trial court. We think it may be conceded that such a report, in this state, may be sufficient to make a *prima facie* case, and, if there were no other evidence upon the subject, such a report may be sufficient to sustain a finding for the claimant. However, in this case, there is other evidence which tends to discredit the facts recited in the report.

Plaintiff's work for the company was principally upon

the sixth floor of the store and incidentally, and to a small extent, on the second floor. There are no inclined planes or runways either on the second floor or sixth floor, or on any other floor of the store save on the seventh floor, and the evidence shows that Petersen's work was that of a floor man; that he had no occasion, in the course of his employment, to go to the seventh floor, or to perform any work on that floor. This tends to negative the claim that Petersen was injured by pushing a truck load of linoleum up an incline. Moreover, it is significant that no other person in the store, where there are many employees, is shown to have any knowledge that Petersen had ever received any injury in the course of his employment except Mr. Nestor, who made the report to the compensation commissioner, or that Petersen ever performed any labor on the seventh floor. It is also fairly inferable from the record that the only source of Nestor's information was that obtained from Mr. Petersen. It is also significant that in an action by claimant against an insurance company, to recover for the death of her husband, she alleged in her petition as follows: "Plaintiff further alleges that the said William R. Petersen, on or about the 6th day of February, 1933, * * * received and sustained a hernia, caused by operating a heavily loaded wheelbarrow upon an inclined runway." Under the facts disclosed, we are of the opinion that the evidence will not sustain a finding that Petersen received an injury arising out of and in the course of his employment.

Two physicians testified as to the cause of Petersen's death. One was his attending physician and surgeon, who performed the operation. Another was the surgeon who performed an autopsy, or partial autopsy, after Petersen's death. Each of these doctors testified that in his opinion Petersen died from an embolism. Doctor N., who performed the hernia operation, testified that he was present and observed the autopsy, and that in his opinion Petersen's death was caused by an embolus in the coronary artery; while Doctor E., who performed the autopsy,

testified that there was no embolus in the heart or coronary artery; that there was none in the lungs; that he found no embolus, but that it was his opinion Petersen died from an embolus in the brain. However, the brain was not examined, and the cranial cavity was not opened. But Doctor E. based his opinion, that death was caused from embolism in the brain, on the symptoms which characterized the manner in which Petersen died. He further testified that in his opinion the embolus came from the hernia operation, and further that he had expected to find an embolus either in the heart or in the lungs and was surprised that it was not found. Apparently because the symptoms indicated death from embolism, he concluded that it must be in one of the vital organs and, therefore, was in the brain. Both doctors testified that embolism occasionally resulted from a surgical operation, but usually in such cases there was infection. Both doctors testified that there was absolutely no infection in the operative wound; that it was clean and healing nicely at the time of Petersen's death. Doctor N. also testified on cross-examination that embolism did not result from the hernia operation. Both doctors testified that embolism may result from other causes than a surgical operation.

From a consideration of this evidence, it seems that the actual cause of Petersen's death is a matter of speculation. Had the autopsy extended to an examination of the cranial cavity and had it disclosed an embolus in the brain, one point, at least, would have been cleared up, but even then it would be a matter of conjecture and speculation whether the embolus was caused by the hernia operation.

In this case it was incumbent upon the claimant to establish by a preponderance of the evidence, first, that Petersen sustained an accidental injury, arising out of and in the course of his employment; that such injury necessitated the operation; that the operation caused an embolus to be released into the blood stream, and that the embolus caused his death. We think the evidence is insufficient

to show either that Petersen received an accidental injury, arising out of and in the course of his employment, or that his death was caused by embolism, arising from the hernia operation.

It is unnecessary to consider other assignments of error. The findings of fact of the district court are in accordance with the evidence and require an affirmance of the judgment.

AFFIRMED.

L. W. CHILES, APPELLEE, V. CUSTER COUNTY, APPELLANT.

FILED JUNE 29, 1934. No. 28996.

Appeal. In a law action where jury is waived and trial to the court, findings of fact by trial judge will not be disturbed by this court on appeal, if there is competent evidence to support the findings and judgment of the court.

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

M. M. Runyan, for appellant.

C. H. Holcomb and *R. E. Brega, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

LESLIE, District Judge.

This is a suit by plaintiff against defendant for damages on account of construction of a highway across the land of plaintiff, by which a triangular tract containing approximately 7.87 acres was separated by the roadway from the main body of the plaintiff's farm. Briefly summarized, the facts are substantially as follows:

Plaintiff was the owner of the N. E. ¼ of the S. W. ¼, section 18, and the S. W. ¼ of the N. W. ¼ of the same section, township 16, range 23, Custer county. For many years there had been a public roadway on the east side

of the N. E. ¼ of the S. W. ¼ which turned westward at the northeast corner thereof and proceeded westward to the northwest corner of the N. E. ¼ of the S. W. ¼, section 18, when it again proceeded northward.

In 1925 the county board of Custer county was petitioned to designate this roadway as part of a county highway to extend from the west side of Custer county to a point in the county north of Oconto. No action was taken on this petition until March, 1930, when the road in question was designated a county highway by the board of county commissioners. That summer the county began operations to put it in condition, and when the southeast corner of the N. E. ¼ of the S. W. ¼ of section 18 was reached, it was found that if the old roadway were abandoned a short distance north of said southeast corner and the highway constructed diagonally across the land belonging to the plaintiff, and the S. E. ¼ of the N. W. ¼ of section 18 which joined plaintiff's land on the north and belonged to one Pandorf, four curves could be eliminated. The highway commissioner and the road committee of the county board discussed the advisability of this change of route with the plaintiff and Pandorf, with the result that the highway was routed across the two forty-acre tracts belonging to the said plaintiff and Pandorf. This was in October, 1930. Several months later the plaintiff filed claim with the county board for damages. This claim, it appears, was not acted upon by the board, but a conditional allowance of $100 was made to the plaintiff, and from this he appealed to the district court. Jury was waived, trial had to the court, and judgment awarded plaintiff in the amount of $300. From this the defendant county appealed to this court.

Plaintiff by his petition alleges the ownership of the S. W. ¼, and the S. W. ¼ of the N. W. ¼, section 18, Custer county; that in 1930 the county, in the construction and designation of a highway, appropriated certain of his land, and impaired the value of his entire farm by chang-

ing the course of the road as it had existed and routing it across plaintiff's property.

Defendant admits the appropriation of the land, and that the course of the highway was changed, but alleges that the change was with the knowledge and consent of the plaintiff, and that he agreed to waive claim for damages, and by his conduct is estopped to maintain this action.

The questions at issue are whether plaintiff waived his right to damages, and, if not, the amount of such damages.

It is not contended that there was a written agreement between the plaintiff and the defendant, but conversations had between plaintiff, the highway commissioner and individual members of the board of county commissioners are relied upon by the defendant as constituting an agreement between the plaintiff and defendant.

The evidence shows that in 1930, when work was begun on the highway, the plaintiff accompanied the county commissioner of highways, and at least one of the county commissioners, to the point where it was proposed to abandon the north and south road on the east boundary line of plaintiff's property and build it diagonally across the N. E. ¼ of the S. W. ¼ and the S. E. ¼ of the N. W. ¼ of section 18. The primary purpose of the diversion of the road at this point was the elimination of four curves. Plaintiff testified he informed the representatives of the county in charge of the construction that his land would be damaged by having the road cross the quarter section as proposed, and that he would demand damages. Several witnesses called by the defendant controverted the testimony of the plaintiff as to his intention to make claim for damages against the county, and testified also that plaintiff agreed to waive damages. Defendant having admitted the construction of the highway across plaintiff's quarter section and the appropriation of his land, for which plaintiff was not remunerated, and having pleaded in justification that plaintiff agreed

to waive his claim for damages, the burden was upon the defendant to prove by a preponderance of the evidence the agreement contended for. In our judgment defendant failed to make such proof. Had a jury been retained, we are of opinion that the trial court could not properly have submitted the question of waiver to it. It is not necessary, however, to discuss this, as a jury was waived and trial had to the court which found in favor of the plaintiff. This was the only judgment the trial court could have rendered, as we view it, and the judgment is

AFFIRMED.

MITCHELL DRAINAGE DISTRICT, APPELLANT, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED JUNE 29, 1934. No. 28850.

1. Waters: USE FOR IRRIGATION: PRESCRIPTIVE AND RECIPROCAL RIGHTS. Fact that defendant acquired by prescription right to intercept and use certain waters did not vest any reciprocal rights in plaintiff to compel defendant to continue to intercept such waters under circumstances in this case.
2. ———: ———. Defendant irrigation ditch intercepted and used certain waters for more than prescriptive period. Plaintiff constructed its drainage ditch in the regular course of such waters but without reference to them. However, it was not shown that the ditch would have been any different if plaintiff had taken said waters into account. At the place where the irrigation ditch crossed the natural course of the waters defendant constructed a needle-gate and overflow by which they could be carried through the irrigation ditch. *Held*, that defendant has not lost the right to open the needle-gate and permit the waters to flow through into plaintiff's drainage district.
3. ———: ———: ESTOPPEL. *Held*, that defendant under the facts in this case has not lost the right to carry the waters through its irrigation ditch into plaintiff's drainage ditch on account of acquiescence, dedication or estoppel.
4. ———: ———: PRESCRIPTIVE AND RECIPROCAL RIGHTS. Acquisition of right to divert and use waters of a draw by irrigation district carries no reciprocal right to continue main-

tenance of such artificial condition for benefit of lower owners though maintained for the prescriptive period.

5. ———: ———: ———. Lower owners improving their property in reliance on artificial conditions created by diversion and use of waters of stream acquired no reciprocal right to continuance thereof.

6. ———: ———. Irrigation district could discontinue diversion of said waters at any time and restore them to their original course provided its action was not capricious, wanton or irrational.

7. ———: ———. Upper riparian owner constructing and maintaining artificial structure affecting flow of waters for temporary purpose advantageous to it is not obligated by lapse of time to maintain structure and conditions produced thereby though incidentally benefiting lower owners.

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

Morrow & Morrow, for appellant.

Neighbors & Coulter, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

LIGHTNER, District Judge.

Injunction to prevent defendant from permitting the waters from Wet Spottedtail Draw to pass through its irrigation canal and into plaintiff's drainage district. The finding was for defendant and plaintiff has appealed.

The appellant will be referred to in this opinion as plaintiff, and the appellees, who are the irrigation district and its officers, as defendant. The controversy pertains to water conditions in and about Mitchell in Scotts Bluff county.

For many years defendant company has intercepted the water from Wet Spottedtail Draw and carried it eastward where it was used for irrigation purposes. Prior to the establishment of irrigation, Wet Spottedtail Draw was a dry slough most of the year. After the establishment of irrigation, and particularly after the construction of the Pathfinder Irrigation Ditch, water came therefrom

mostly in the form of seepage and gathered in the Wet Spottedtail Draw and this is the water in controversy in this case. The Pathfinder Irrigation Ditch is about four miles north of defendant's irrigation ditch. The two irrigation ditches were constructed about the same time, 1906 or 1907. The diversion of the Wet Spottedtail water did not prevent seepage waters from coming down into Mitchell and as a result of such waters plaintiff's drainage ditch was organized in 1913 to take care of such seepage conditions. Plaintiff contends that neither when the ditch was constructed nor afterwards when it was improved on several occasions did it take into account the waters that were coming down in Wet Spottedtail Draw; that it relied on defendant continuing to intercept and carry said waters to the east. However, a spillway was put in when the irrigation canal was first built directly opposite Wet Spottedtail Draw, and just after the completion of the drainage ditches in the spring of 1913, that is, in the fall of 1914, the irrigation district made a needle-gate construction in the south bank of its canal just opposite where Wet Spottedtail Draw comes into the same by which said waters could be let through and continued on down into plaintiff's drainage district. This last was not used except for a few days after it was first constructed and again a few days in 1925 or 1926, after which it was closed due to protests from the plaintiff. The needle-gate was again opened in the fall of 1932 which led to the filing of this suit. Plaintiff obtained a temporary injunction, which on the final hearing was dissolved and a general finding was entered in favor of the defendant.

Plaintiff bases its right to relief upon three grounds: (1) That defendant is estopped by changed conditions and long lapse of time to carry the water through its irrigation canal into plaintiff's drainage district. (2) The defendant irrigation district has obtained a prescriptive right to the water as against the plaintiff and the plaintiff has obtained a reciprocal right to have the water con-

tinued as it had been flowing during the prescriptive period. (3) That the new watercourse has by the lapse of time become the natural course of the stream and the right to have the stream continue in its present course has become absolute. Closely allied to the last, perhaps part of it, is the claim that these are new waters developed by irrigation, never had any course except that established for them by defendant by being taken into its canal and carried eastward in its irrigation canal. A more complete statement of the facts as found by the district court supplementing what has just been said follows:

"The testimony in this case shows that the Farmers Irrigation District canal, at the point involved in this action, was constructed about 1907, at which time the banks of said canal, where it crossed Wet Spottedtail Draw, were solid earthen works. At this time there was no water flowing in Wet Spottedtail, nor was there a running stream at that point until several years later. In 1911 or 1912 seepage water began to appear in Wet Spottedtail both above and below the Farmers Irrigation District canal. This seepage condition continued in a progressive manner until the lands now within the Mitchell Drainage District were imperiled. As a result the plaintiff drainage district was formed in 1912, the whole of it being below but extending close to the Farmers Irrigation District canal in Wet Spottedtail Draw. In 1913 the drainage ditch as first constructed was completed, it being what was generally termed a plow ditch. In the fall of 1913 or in the spring of 1914, a concrete structure was placed in the south bank of the Farmers Irrigation District canal which would permit the water from upper Wet Spottedtail to pass through the Farmers Irrigation District canal and into plaintiff's drainage ditch. In the meantime a live stream of water had commenced to flow in Wet Spottedtail Draw and probably had been so running since 1912 or 1913, which water was permitted or allowed to flow through the north bank of the Farmers Irrigation District canal into said canal.

During the irrigation season said water was impounded and used for irrigation purposes and in the 'off season' it was carried down the Farmers Irrigation District canal a quarter of a mile and sluiced back to the river. The gate in the south bank of the Farmers Irrigation District canal, according to the evidence, was kept closed by the defendant district until 1925 when it was opened and the water coming down Wet Spottedtail Draw from the irrigated lands above the Farmers Irrigation District canal was permitted to go on through said Farmers Irrigation District canal and into the drainage ditch of the plaintiff. The evidence shows that plaintiff's board of directors complained to the manager of the Farmers Irrigation District about the damage the additional water was causing and that said gate was immediately closed and not again opened until the fall of 1932, at which time this suit was commenced, praying for an injunction.

"The evidence clearly shows that the water complained of arises within the Pathfinder Irrigation District, which district is not a party to this action. * * * The drainage ditch built by the plaintiff is * * * in the natural watercourse of the Wet Spottedtail watershed. * * * Considerable testimony was produced in an attempt to show whether or not the flowing of this water into the Mitchell drain injured the plaintiff. While the evidence was very conflicting, it is the opinion of the court that some damage resulted from the turning of this water into the Mitchell drainage ditch. * * *

"The Farmers Irrigation District * * * has not obtained nor does it claim any right by prescription against the Mitchell Drainage District, the plaintiff herein. The evidence fails to show where the defendant has claimed any right adverse to the plaintiff upon which a reciprocal right could be predicated. * * *

"Plaintiff has not expended money or made improvements in the belief that a permanent, artificial watercourse had been constructed to carry the water of Wet Spottedtail. Plaintiff contends that plaintiff's drainage ditch was

constructed under the belief that no water would ever come down Wet Spottedtail past the Farmers Irrigation District canal. The evidence does not sustain this point. The drainage ditch was built when seepage first appeared and at a time when very little seepage water had appeared above the Farmers Irrigation District canal. The ditch was constructed with a plow in the first instance. It, undoubtedly, being intended that the erosion and sloughing off of the banks and the natural tendency of the water flowing therein to make its own grade would aid in getting the desired results. If the Farmers Irrigation District canal had not been built, or if a siphon had been constructed under the Farmers Irrigation District canal in Wet Spottedtail Draw, can it be said that the same drain would not have been constructed? With the amount of water in Wet Spottedtail increasing progressively since 1913, can it be said that additional construction and repairs would not have been necessary or that the construction and repair work done would not have been required? Plaintiff contends that, if they had known that the waters of Wet Spottedtail were not to have been permanently diverted, they would have constructed bridges instead of culverts over the highways crossing the ditch and saved the expense of replacing them. The evidence shows that a gate was placed in the bank of the Farmers Irrigation District canal in the fall of 1913 or spring of 1914, indicating an intention to let this water through, which was well known to the members of the board of the Mitchell Drainage District and to which they paid no heed. Can we assume that plaintiff would have anticipated that the water of Wet Spottedtail Draw would have progressively increased to such an extent that in the future they would have constructed bridges instead of the sixty-inch culverts which they did construct? It appears to the court that no one foresaw or could have foreseen the result of the application of large quantities of water for irrigation purposes to lands above the Farmers Irrigation District canal, the seepage that followed, or the necessity for large

drains to carry subsurface water back to the river to avoid the saturation of lands to the surface of the ground that would thereby make them of little value. The court fails to find sufficient evidence to support the theory that plaintiff spent large sums of money, or made valuable improvements, under the belief that the change of the course of the stream was permanent, that plaintiff relied thereon, or that said sums would not have been spent for the improvements made but for such belief. It is my opinion therefore that the theory of changed conditions and acquiescense on the part of the defendant are not supported by the evidence to such an extent that the doctrine of an equitable estoppel should be applied.

"Plaintiff further contends that defendant has acquired a right to the water of Wet Spottedtail by prescription and that plaintiff has obtained a reciprocal right that said waters be not turned back into its drain; that, in legal effect, the new course has become the natural course of the stream. It does not appear from the evidence that defendant has obtained any right adverse to the plaintiff out of which a reciprocal right in favor of the plaintiff could arise. The evidence shows that the state of Nebraska and the United States both claim the return flow from irrigation purposes. The evidence also shows that the defendant has a storage water contract with the United States for certain storage water for use during the irrigation season and that all of the waters flowing down Wet Spottedtail into the Farmers Irrigation District canal is charged against the amount purchased. There can be no dispute that the statute of limitations does not operate against the United States. If the Farmers Irrigation District obtained the use of this water by purchase, it could not be said that their taking of the water could be adverse, especially as against plaintiff."

Plaintiff's main reliance for reversal is upon the principle that the irrigation district by intercepting and using the waters from Wet Spottedtail Draw for more than the prescriptive period has obtained the prescriptive right as

against plaintiff to continue to use them. Plaintiff contends that, plaintiff having lost the right by prescription to have them continue to flow into its drainage district even though the use should be beneficial to plaintiff, and defendant having by adverse use obtained the right to such waters, defendant cannot now cast these waters, which are its waters, back on plaintiff so as to damage plaintiff. Plaintiff further contends that it has relied on a continuance of the diversion so long made by the defendant of these waters and has erected its drainage district without reference to them and on the assumption that defendant wanted them and would continue to use them. It claims that it had the right to build its drainage district in reliance on defendant continuing to do as it had done. There has therefore accrued to plaintiff, so it claims, a reciprocal right to have defendant continue to intercept and care for these waters. Plaintiff's theory of reciprocal rights appears to be sustained by the cases of *Belknap v. Trimble,* 3 Paige (N. Y.) 577; *Mathewson v. Hoffman,* 77 Mich. 420; *Stimson v. Brookline,* 197 Mass. 568, 125 Am. St. Rep. 382; *Kray v. Muggli,* 84 Minn. 90; *Smith v. Youmans,* 96 Wis. 103, 65 Am. St. Rep. 30, 37 L. R. A. 285; *Castle v. Madison,* 113 Wis. 346; *Broadwell Special Drainage District v. Lawrence,* 231 Ill. 86. Defendant on the other hand contends that there is no such reciprocal right. Cases apparently supporting the proposition of defendant are *Goodrich v. McMillan,* 217 Mich. 630, 26 A. L. R. 801; *Lake Drummond Canal & Water Co. v. Burnham,* 147 N. Car. 41; *Drainage District No. 2 v. City of Everett,* 171 Wash. 471. The authorities seem to be hopelessly divided and there is considerable confusion in the application of principles. One of the leading cases in support of plaintiff's position is *Kray v. Muggli, supra,* which holds (see syllabus, 86 N. W. 882): "Where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the

riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state to the injury of such riparian owners."

Among the cases cited by plaintiff *Broadwell Special Drainage District v. Lawrence,* 231 Ill. 86, is particularly in point. In that case the natural course of drainage was northeast. However, many years prior to the beginning of the lawsuit, defendant's predecessors in title established a new course of drainage to the northwest. Some time prior to the beginning of the suit, defendant sought to change such course of drainage back to the normal or natural course prior to the change made by his predecessor in title about forty years before. In doing so, he connected the tile drainage from his land with the drainage system established by plaintiff district. This resulted in overcrowding the conduit of the district, backing up water to plaintiff's damage. It was held that, where the owners of a dominant heritage established an artificial channel so as to divert water naturally flowing upon the servient tenement, through which channel the water flowed without interruption for more than twenty years, mutual and reciprocal rights were acquired by prescription, which exempted the dominant owner from the duty of restoring the water to its original course, and released the servient estate from the burden of the drainage.

Another case cited by plaintiff is *Johnk v. Union P. R. Co.,* 99 Neb. 763. This case holds that a riparian owner cannot restore the channel of a stream to its old bed where he did not act promptly and where the owners along the old bed have changed their position in reliance on the stream continuing in its new bed, even though the

statutory period of ten years has not passed. The *Johnk* case is cited by plaintiff in support of its position, but it is not in our opinion in point. The holding in the *Johnk* case was based on acquiescence and estoppel. The court say: "Had defendants taken steps to restore the stream to its former channel promptly, before the former channel had been obstructed by silt and vegetation, and before plaintiffs had incurred expense in supplying their want of water by artificial means, there is no doubt they would have had the right to do so, but we think their acquiescence and the changed conditions warrant the relief granted plaintiff by the district court." The difference it seems to us is that a stream beginning to flow in a new channel presents at once the condition of permanency, while the Wet Spottedtail waters were always diverted for a specific and temporary purpose and the needle-gate and overflow were a continuing notice of a claimed right to restore them to their original course.

Many quotations could be given from the cases which support plaintiff's contentions, but we do not believe that it would serve any good purpose to do so. The above illustrate the principles upon which they rest.

Turning now to an examination of the authorities cited by defendant. One of the cases it relies on is *Greisinger v. Klinhart,* 282 S. W. (Mo. App.) 473. This case was taken to the supreme court by certiorari where the judgment of the trial court which had been reversed by the court of appeals was affirmed. *Greisinger v. Klinhardt,* 321 Mo. 186, 9 S. W. (2d) 978. However, the facts in that case and the principles applied by the supreme court do not in my judgment make it an authority of any great value in favor of either plaintiff or defendant. The supreme court in 321 Mo. 186, held: "The owners of different parcels of land adjacent to an artificial lake, acquired from a common owner without reservations, have an equal right to maintain the lake and the dam which holds the water. The ownership of the land adjacent to the lake determines the right to maintain and use the lake. Where

all the land borders the lake and belonged to one owner and passes from him in different parcels to different grantees, the right to use and maintain the lake attaches to the different parcels, and under the principle of reciprocal easements the upper owner cannot cut off the supply of water, nor the lower owner remove or destroy the dam or lower the water, without mutual agreement or joint action."

Goodrich v. McMillan, 217 Mich. 630, 26 A. L. R. 801, is also relied on by defendant. This was a case where a lake was established by a dam, or at least the level of the lake was raised by a dam, which went out, and defendant decided not to rebuild it and made a contract with the owner of the flowed lands to surrender the flowage rights. The plaintiffs had established summer cottages, hotels and other improvements with reference to the artificial level thus established. The finding was against the contention of the plaintiffs to the effect that they had the right to rebuild the dam and maintain the waters at the artificial level where it had been maintained above the natural level for nearly seventy years. The *Kray v. Muggli* case, *supra,* is referred to in the following language: "Plaintiffs contend that they have acquired the reciprocal right to have the waters maintained at the artificial level; that such level, in legal effect, has become the natural level. They cite *Kray v. Muggli,* 84 Minn. 90, 54 L. R. A. 473, 87 Am. St. Rep. 332. This decision overruled [*Kray v. Muggli*] 77 Minn. 231, 45 L. R. A. 218. It supports plaintiffs' contention. But it is said in 27 R. C. L. 1206, that 'this decision has been severely criticized,' and in 3 Farnham on Waters and Water Rights, 2406: 'There seems to be no principle on which *Kray v. Muggli* can be supported.' And it is indicated in *Lake Drummond Canal & Water Co. v. Burnham,* 147 N. Car. 41, 17 L. R. A. n. s. 945, 125 Am. St. Rep. 527, that 'the Minnesota decision and some others of like tendency are not in accord with the weight of authority.' "

Those authorities which hold in plaintiff's favor do so

largely it seems to us on the ground that there has been a permanent obstruction or diversion. In *Matheson v. Ward,* 24 Wash. 407, 85 Am. St. Rep. 955, one fork of a river was dammed many years before so as to divert the waters into the remaining forks. This condition of affairs had been carried on for many years and the farmers below the point of diversion had improved their farms in reliance upon a continuance of the same conditions. In *Hollett v. Davis,* 103 Pac. 423 (54 Wash. 326) it was held: "The proprietor of a stream who diverts it into an artificial channel, and continues such change for a time exceeding the statute of limitations, is estopped, as against a person making a beneficial use of the water, to return it to its natural channel to the latter's injury."

This is the same court that held very recently in *Drainage District No. 2 v. City of Everett,* 171 Wash. 471, that because the city had maintained a dam for a number of years and plaintiff had established its drainage district in reliance upon a continuance thereof and the people in plaintiff's drainage district would be greatly damaged by removing the dam and turning the waters back into their old channel did not make it obligatory upon the city to continue to maintain the dam for the benefit of such lower owners. While the rights of the city in this case were obtained by judicial decree, and not by prescription, much that is said in the opinion is applicable to the facts now before us.

The situation in *Broadwell Special Drainage District v. Lawrence,* 231 Ill. 86, very much resembles plaintiff's situation here, yet between the two cases are several distinguishing features, most noticeable of which is the apparent permanency of the diversion in the *Lawrence* case which is not so apparent here on account of the spillway and needle-gate.

In *Lake Drummond Canal & Water Co. v. Burnham,* 147 N. Car. 41, plaintiff, operating a canal for public travel, had obtained many years before the right to maintain a cross canal as a feeder of water into its main

canal. Later deciding that it did not require such additional waters, it blocked off and obstructed the cross canal. Defendant landowners opened it by force. They claimed to receive an incidental benefit through drainage by the cross canal. Defendants' lands did not abut the cross canal, but were several miles from it and natural drainage was in a different direction. Held, that defendants could not compel the plaintiff to maintain the cross canal for their protection. *Kray v. Muggli, supra,* is criticized, and *Belknap v. Trimble, supra,* is distinguished and upheld on the ground of permanency, dedication and estoppel. The opinion emphasizes the idea that a different principle applies where the structure is for a temporary or specific purpose and where it is permanent.

There is, it must be conceded, a clearly distinguishable difference between a prescriptive right obtained for a temporary or specific purpose and one that from the beginning was, or later became, of a permanent character. Dams for mills illustrate the first. A diversion of water out of the old bed of a stream in order to make it more fit for agriculture illustrates the second. The effect may be the same in both, but the purpose is different. The first is for the benefit of the builder of the dam. Advantages accruing to upper or lower owners are incidental only. The second may be for the very purpose of benefiting the owners of the land and they begin at once to make their improvements in reliance on the change thus made being permanent.

A dam is generally held to be a structure for a specific and temporary purpose, although of course it may continue for many years. The placing of the needle-gate in the south bank of defendant's irrigation district was a continuous notice and threat to the plaintiff that the waters from Wet Spottedtail Draw might be let through. Neither can the plaintiff rely upon an estoppel because, as found by the district court, it was not shown that its ditch and other improvement would have been any different if the needle-gate had been opened and the flow continued

year after year. The fact is that the diversion of these waters has been beneficial to the plaintiff. It cannot build up a right, on account of benefits received, to continue to receive such benefits unless in reliance thereon it has altered its position to its detriment.

The reasons for the doctrine which militates against plaintiff are stated in 3 Farnham, Waters and Water Rights, pp. 2402, 2403: "The fact that the exercise of the easement is of advantage to the owner of the servient estate will give him no right to insist on the exercise of the easement on the part of the dominant owner. An easement exists for the benefit of the dominant estate alone, and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment." And at page 2406: "If he (the owner of the servient estate) suffers injury it is purely from his own negligence. There is not an instant during the time that the prescriptive period is running when he could not compel the owner of the dam to remove it or to enter into a contract giving the owner of the submerged land a right to maintain it, which contract might be executed and recorded in such a way as to leave no doubt as to his right to maintain the dam for his own benefit. The law favors diligence and a disposition to protect one's own rights, and is not disposed to permit one to acquire rights against another by passive acquiescence in his transactions."

Plaintiff claims that these are new waters; that they never had any course except that established for them by defendant. While the waters may have been new the course was old. An unprecedented rainfall would have resulted in more waters flowing in the old course, but they would still be entitled to flow in the old course. Could plaintiff have refused the waters because they are new if they had never been intercepted or diverted? The question answers itself. Plaintiff has no valid legal reason for refusing them and none in logic by reason of the fact that they are new. There is a line of authorities to

the effect that, when one improves his property in reliance on the artificial condition created, he will be protected, especially if the owner of the dominant estate continues to exercise his rights. Examples of such are *Kray v. Muggli,* 84 Minn. 90, *Smith v. Youmans,* 96 Wis. 103, and *Castle v. Madison,* 113 Wis. 346, where the construction of a dam raised the level of a lake or caused the formation of a lake where one did not exist before, and the owner of the servient estate built houses or perhaps hotels and pleasure resorts with reference to the new shore line thus created. In the above cases the courts held that reciprocal rights and duties were created, and that the owner of the dam could not remove the same, especially where he does not propose to abandon or surrender his easement. *Goodrich v. McMillan,* 217 Mich. 630, takes the opposite view on practically identical facts and holds that the owner of the dam owes no duty to the servient estate.

Other cases, such as *Belknap v. Trimble,* 3 Paige (N. Y.) 577, *Mathewson v. Hoffman,* 77 Mich. 420, and *Matheson v. Ward,* 24 Wash. 407, are where the entire course of a stream was changed and where the owners along the old course had improved their property with reference to the change. These are often cases where farm lands which before had been marshy and useless have become arable and suited for agriculture and where people have built their homes relying on the stream continuing to flow in its new channel. The holding of the court must to a great extent depend upon the facts of the particular case before it. While the weight of recent authority supports the proposition that no reciprocal right accrues to the servient estate simply from adverse user for the prescriptive period, rights may accrue to the servient estate from estoppel, dedication or acquiescence. A number of opinions refer to the fact that the dominant owner does not intend entirely to abandon his easement as important. *Smith v. Youmans,* 96 Wis. 103. Unquestionably the owner of a dominant estate does not generally owe the

servient estate any duty except not to injure him by irrational conduct or wantonly or capriciously. *Taft v. Bridgeton Worsted Co.*, 237 Mass. 385, 13 A. L. R. 928. Defendant pleads that its purpose in carrying the waters through its canal and into plaintiff's drainage district is to prevent the formation of large deposits of mud and silt which greatly damages its canal. No claim is made that its action is irrational, wanton or capricious. The estate is for the benefit of the one that is dominant, and the servient estate remains servient. While there are many cases where rights accrue to the servient estate on account of acquiescence or estoppel, the mere intercepting of the waters by defendant irrigation district would not and could not give the plaintiff drainage district any rights. The use of it was for the benefit of defendant irrigation company. Through use of such waters for ten years or more the irrigation company might obtain the right to continue to use them. This would give no corresponding or reciprocal rights to the drainage district to require the irrigation district to continue to use or care for the waters unless the defendant became estopped, and the only estoppel suggested in this case is the alleged fact that the drainage district was established and its money expended to defendant's knowledge under the belief induced by defendant that the drainage district would never be asked or required to take care of these waters. Plaintiff to acquire any rights would have to show that it improved its property with reference to the diversion and in reliance on a continuance thereof, which it had no right to do in view of the needle-gate and spillway. The water in Wet Spottedtail Draw progessively increased; plaintiff made no showing that defendant constructed its drainage ditches different or expended more money relying on the diversion, and in view of the spillway and needle-gate it had no right to so rely. Furthermore, plaintiff never had the right to use these seepage or waste waters and therefore the use of them by defendant was not adverse. See *Lambeye v. Garcia*, 18 Ariz. 178, where-

in it is held: "The authorities hold that, while the water so denominated as waste water may be used after it escapes, no permanent right can be acquired to have the discharge kept up, either by appropriation, or a right by prescription, estoppel or acquiescence in its use while it is escaping, and that, too, even though expensive ditches or works were constructed for the purpose of utilizing such waste water, unless some other element enters into the condition of affairs, other than the mere use of the water." The use of the water by defendant was not adverse for two reasons: (1) Plaintiff never had a right to it; (2) defendant's use was favorable and conferred a benefit on the plaintiff. Furthermore, the district court expressly holds that plaintiff drainage district was not constructed under the belief that no waters would ever come down Wet Spottedtail Draw past the Farmers Irrigation District canal. This finding is sustained by the evidence. It thus appears that the necessary elements to constitute an estoppel are lacking. Our conclusion is that the weight of recent authority supports the proposition that no reciprocal right accrued to plaintiff because defendant intercepted and used these Wet Spottedtail waters; that even if such right exists plaintiff has not fully brought itself within the principle of the authorities it relies on, since all idea of permanency is destroyed by the spillway which was put in when the dam was constructed and by the needle-gate which was put in in the fall or early winter after the completion of plaintiff's original drainage ditch; that if plaintiff could acquire any rights to demand of defendant that it continue to intercept and use those waters, such right would have to be based on principles of acquiescence, dedication or estoppel, and that the facts here do not justify a finding in plaintiff's favor on such grounds. The judgment of the district court is therefore

AFFIRMED.

GENEVIEVE BERG, APPELLEE, V. J. M. GRIFFITHS, APPELLANT.*

FILED JUNE 29, 1934. No. 28756.

1. **Appeal.** Affidavits and certified copies of public records, used as evidence on a hearing in the district court, cannot be considered on appeal unless they are made a part of the record and embodied in the bill of exceptions.
2. **Judgment** on the verdict of the jury for the amount of plaintiff's damages, as entered by the trial court, sustained.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *On rehearing, former judgment vacated, and judgment of district court affirmed.*

Chambers & Holland, Joseph C. Reavis and *C. Russell Mattson,* for appellant.

John C. Mullen, contra.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

RYAN, District Judge.

This case was argued and submitted upon a motion for rehearing, our former opinion being reported in 126 Neb. 235. The facts will be found stated in the opinion there reported. In that opinion the case was reversed and remanded for a new trial because of the failure of an incompetent juror to disclose his ineligibility because of age when examined by the trial court. Neither in the briefs filed nor in the argument of counsel was it disclosed that the affidavits and other evidence relied upon by the appellant were not included in the bill of exceptions. The record is bound in one volume and the writer, who also wrote the opinion above referred to, inadvertently overlooked the fact that the affidavits and birth certificate had merely been filed with the clerk and included in the tran-

*Footnote—On rehearing, former opinion, reported in 126 Neb. 235, vacated, and judgment of district court affirmed.

script and were not made a part of and included in the bill of exceptions.

It has been the settled law of this state that error must affirmatively appear of record and that affidavits and other written documents used as evidence on a hearing in the district court cannot be considered by the supreme court unless they are made a part of the record by being embodied in a bill of exceptions. *McMurtry v. State,* 19 Neb. 147; *Burke v. Pepper,* 29 Neb. 320; *McCarn v. Cooley,* 30 Neb. 552; *Beard v. Ringer,* 41 Neb. 831; *Beers v. State,* 24 Neb. 614; *Korth v. State,* 46 Neb. 631; *Norfolk Nat. Bank v. Job,* 48 Neb. 774; *Stansbury v. Storer,* 70 Neb. 603; *Palmer v. Mizner,* 70 Neb. 200.

Complaint is also made that the verdict is excessive. Plaintiff was a school teacher, 26 years of age. Her injuries consist in a cut across the inside of her right wrist, about three inches in length, which severed the tendons controlling three fingers of her hand. Two of the fingers are weakened and practically useless. These are the little finger and the ring finger. She has no control over them. The cut on her wrist left an ugly scar, which bulges out in the upper side when the hand is closed.

Plaintiff is a rural school teacher and this disability to her hand is a considerable handicap in her work. It bothers her in writing and in doing the janitor work which rural school teachers are required to do. She testified, at the time of the trial, that she still suffered some pain occasionally and a great deal of inconvenience. Her salary was not reduced by reason of the disability which, according to the testimony of the doctors, is a 50 per cent. disability and is permanent.

The verdict of the jury was in the sum of $4,683.33. As has often been said, there is no hard and fast rule for the measuring of damages. It is true that the plaintiff up to the time of the trial had not suffered any particular pecuniary loss, outside of about three weeks' disability and a doctor bill of about $100. Her salary has been reduced from $90, which she was earning at the time of the ac-

cident, to $70 a month at the time of the trial, but this was due to the generally prevalent condition commonly referred to as "the depression," and not to the disability resulting from the accident. She has, however, suffered a substantial injury and an injury which will continue to handicap her through life. She is a young woman. This partially disabled hand will prevent her from following many lines of avocation. It will handicap her in rising in her profession. Should she marry, it would be a handicap to her as a housewife. Unquestionably it would be a handicap to her chances of marriage. This court held in *Lewis v. Miller,* 119 Neb. 765, where the injuries resulted in paralysis of two fingers of the right hand and no sensation or feeling in the ulnar side of the ring finger and where considerable pain was suffered, that a verdict of $4,000 was not excessive. That is the only case, out of a large number cited to us, where the injuries were similar to the injuries sustained here. The jury, who under the law are the judges of the amount of damages in the first instance, have returned their verdict. The trial court, who saw the plaintiff and observed her condition and the extent of her injuries, has not seen fit to require a remittitur. We do not feel that we would be justified in disturbing the amount of the judgment as entered by the trial court.

Former opinion set aside and vacated and judgment affirmed.

JUDGMENT ACCORDINGLY.

JESSE VERBECK V. STATE OF NEBRASKA.

FILED JULY 6, 1934. No. 29121.

Intoxicating Liquors: UNLAWFUL POSSESSION: INSTRUCTION. In a prosecution against defendant for having unlawful possession of intoxicating liquors, an instruction using the phrase "reasonably necessary for the defendant's personal use and needs," instead of the statutory term "reasonably sufficient," for the

defendant's personal use and needs, *held* not prejudicially erroneous, where the evidence proved without dispute that the possession was not in defendant's "private dwelling-house," as that term is defined by statute, but was nevertheless unlawful.

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

McNeny & Sprague, for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Nuckolls county, Jesse Verbeck, defendant, was convicted of having unlawful possession of intoxicating liquors—nine pints of alcohol in glass flasks and three quarts of whiskey in a glass jug. For this offense he was sentenced to serve a term of 60 days in the county jail and to pay the costs of prosecution. As plaintiff in error he presents for review the record of his conviction.

The statute provides, among other things: "No person shall keep or possess intoxicating liquor in his private dwelling-house in an amount more than is reasonably sufficient for his personal use and needs." Comp. St. 1929, sec. 53-111. The trial court, in an instruction to the jury, used the words "reasonably necessary" instead of the words "reasonably sufficient," as they appear in the statute. It was explained by defendant in argument that the words "sufficient" and "necessary" are not synonymous, and he insisted that the error was prejudicial, requiring a new trial. Defendant, however, is not entitled to a reversal if the intoxicating liquors possessed by him were not in his "private dwelling-house." The right to keep the quantity "reasonably sufficient for his personal use and needs" is confined to his "private dwelling-house." Comp. St. 1929, sec. 53-111. What is "reasonably suffi-

cient" cannot lawfully be kept elsewhere. The statute defines the term "private dwelling-house" for the purposes of the law which makes possession of intoxicating liquors unlawful. The legislature provides:

"The term 'private dwelling-house' shall mean a separate dwelling with a separate door for ingress and egress exclusive of outbuildings, and used exclusively as a private residence and not connected by doors or otherwise with any place of business except doctors', dentists' and veterinary surgeons' offices and not connected with any factory, shop, warehouse, club, or other place or building." Comp. St. 1929, sec. 53-101.

Defendant owned and operated a gasoline filling station at the junction of highways No. 14 and No. 3, near Superior, Nuckolls county. The filling station office is a "place of business" connected with the residence of defendant. The residence and the office are under the same roof. There is a door between the office and that part of the building occupied by defendant and his family. Undisputed testimony shows that the liquor was found in a bathroom in the building. The possession therefore was not in defendant's "private dwelling-house," as that term is defined by legislation making possession of intoxicating liquor unlawful. It follows that the error of the trial court in using the term "reasonably necessary" instead of "reasonably sufficient" in no wise prejudiced defendant.

AFFIRMED.

JOHN H. SHERMAN, APPELLANT, V. GREAT WESTERN SUGAR COMPANY, APPELLEE.

FILED JULY 6, 1934. No. 29158.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: TRIAL DE NOVO.** In a proceeding under the workmen's compensation law, where the evidence is conflicting, the supreme court upon a trial *de novo* may consider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses.

2. ———: ———: EXPERT TESTIMONY. In a proceeding for compensation under the workmen's compensation law, disabling injuries to nerves and spine, if any, as the result of an industrial accident, are subjects of expert testimony.
3. **Evidence.** "Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347.
4. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE DISABILITY.** In a proceeding for compensation under the workmen's compensation law, disabling condition of employee *held*, under expert testimony and other evidence outlined in the opinion, not attributable to an industrial accident in which he was injured.

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

Raymond & Raymond, for appellant.

Mothersead & York, contra.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. John H. Sherman, employee, is plaintiff. Great Western Sugar Company, employer, is defendant. In the petition plaintiff stated that while he was engaged in the duties of his employment November 15, 1932, in defendant's sugar factory at Scottsbluff, attempting to couple a steam pipe above him, it fell and struck him on the head, neck and shoulders. He alleged as a result that he fell to the floor, became unconscious, and was taken to a hospital in Scottsbluff, where he was confined two weeks; that he suffered extreme pain and nervous shock. He pleaded injury and disability as follows:

"That plaintiff suffered extreme pain and nervous shock from said injury; that said injury resulted in a fracture and dislocation of one or more of the cervical vertebræ,

a disalignment of the cervical spine and an impairment in rotation and lateral movement of the head and serious injury to the head, muscles and nerves causing pain, numbness, tremor, jerking and such numbness and partial paralysis of the arms and legs as disables the plaintiff from doing or performing any manual labor in the line of his work or from doing any manual labor of any kind, or from engaging in any work requiring steadiness of nerves or strength of his arms and legs, and that plaintiff has been rendered extremely nervous and sensitive to shock and has considerable difficulty in getting around even in a moderate or slow walk, and that said injuries are permanent to the best of his knowledge and belief."

Defendant paid plaintiff $75 and tendered in addition $30 as the limit of compensation to which he was entitled. The general theory of the defense is indicated by the following allegations of defendant's answer:

"Defendant alleges the fact to be that the plaintiff sustained no injuries except slight contusions and bruises of the muscles in the region of the left shoulder and back, and that the plaintiff had fully and completely recovered from such injuries on or prior to December 28, 1932, and that the plaintiff does not now have and since said December 28, 1932, has not had, any disability whatsoever, either temporary or permanent, partial or total, as a result of any accident or personal injury arising out of and in the course of his employment by the defendant."

The compensation commissioner disallowed the claim of plaintiff, who appealed to the district court. Upon a trial therein the issues were found to be in favor of defendant and the proceeding was dismissed. Plaintiff appealed to the supreme court, where he is entitled to a trial *de novo* on the evidence adduced below.

Compensable injury arising out of and in the course of plaintiff's employment by defendant and liability of the latter for additional compensation are the issues. It seems clear from the evidence that at the time of the trial the use of plaintiff's right arm and right shoulder was im-

paired to some extent at least. Whether this condition was caused by the industrial accident and injury pleaded by plaintiff is the controlling question for consideration. The evidence is conflicting. In reaching a conclusion below the trial court had an advantage of which the appellate court is deprived. The opportunity to observe the witnesses while testifying was present below and is absent on appeal. Lack of observation of witnesses while testifying is, on appeal, a handicap in determining an issue of fact on conflicting evidence. For these reasons the fact that the district court gave credence to the testimony of some witnesses rather than to contradictory testimony of other witnesses may be considered on a trial *de novo*. *Jones v. Dooley*, 107 Neb. 162; *Southern Surety Co. v. Parmely*, 121 Neb. 146; *Ellingwood v. Schellberg*, 121 Neb. 207; *Cary v. Reiter*, 122 Neb. 476; *State v. Cheyenne County*, 123 Neb. 1; *City of Wilber v. Bednar*, 123 Neb. 324; *Stone v. Thomson Co.*, 124 Neb. 181.

Plaintiff testified to the accident as alleged by him; to the treatment he received from physicians; to injuries to his neck, right shoulder, right arm and right leg; to symptoms of paralysis; to his suffering; to his incapacity for manual labor.

Injury to nerves and spine and resulting disability, if any, were proper subjects of expert testimony. Plaintiff called two physicians to testify as experts. They did not agree on all details of plaintiff's injuries or on what caused his disability. One of the witnesses was of the opinion that the spinal cord was uninjured and that there was no evidence of paralysis or injury to the brain, but that he could not account for the injury to the right leg. The other physician who testified for plaintiff expressed the opinion that the spinal cord was injured and that there was partial paralysis or a form of ataxia in the right side. Both of these experts had a history of the case and had the benefit of physical examinations and radiographs. Based on the X-ray pictures, physical examinations and appearance of plaintiff, these experts testified

in substance that there was a misalignment of the cervical vertebræ, indicating there had been a fracture of one of them; that the right arm and right side of plantiff's body are affected; that, instead of carrying his head normally, he carries it rotated to the left; that his gait is stiff and somewhat awkward; that his injuries and disability are attributable to the accident in defendant's sugar factory November 15, 1932.

Experts called by defendant had the better advantage. They had examined the plaintiff at the time of the accident or soon afterward and again before testifying. In addition they had examined the radiographs used by plaintiff's witnesses and had the benefit of the latter's testimony at the trial. The physician who attended plaintiff promptly after the accident and during the time he was in the hospital at Scottsbluff testified in substance that he took X-ray pictures of plaintiff's shoulder and lumbar spine, the latter of which now shows no injury; that plaintiff had a contusion over the left shoulder and in the lumbar region; that plaintiff made no complaint of any injury to his neck—the cervical region; that no mark was found on his head; that plaintiff recovered from the accidental injuries and was discharged by witness in that condition late in December, 1932, or in early January, following; that witness took an X-ray picture of plaintiff's cervical spine in July, 1933, and that it did not show any misalignment or misplacement of the cervical vertebræ, leaving no present disability as a result of the accident.

After plaintiff was told he had recovered from his accidental injuries and could go back to work, he insisted he was still disabled, and at the suggestion of defendant was sent to Denver for examination by Dr. Frank J. Evans, a specialist of long standing and large experience in industrial surgery and in general practice. He was also a neurologist with a general practice and was frequently employed as such by industrialists. He testified as a witness and gave a detailed history of the case as

given by plaintiff, made a physical examination of him in Denver and again at Scottsbluff before the trial, examined the X-ray pictures used by the experts for plaintiff and testified that the bodies of the cervical vertebræ are in true anatomical alignment; that he saw no pathological injury to the bones of the neck or to the nerves and that plaintiff's present condition is in no way attributable to the accident. On behalf of the defense, experts explained that the injuries to which opposing specialists testified could not have occurred without preventing plaintiff from walking and otherwise exercising as he did shortly after the accident. Cogent reasons given by defendant's experts strengthen their opinion and weaken the opinion to the contrary. When the credence given by the trial court to the witnesses for defendant and their reasons for their conclusion are considered with their opinion in the light of all the evidential facts and circumstances, the evidence preponderates in favor of defendant.

AFFIRMED.

ADDISON S. PAUL, APPELLEE, V. MELVILLE D. CAMERON ET AL., APPELLANTS.

FILED JULY 6, 1934. No. 28962.

1. **Property.** "Save for the purposes of conveyancing, a lease of more than one year is not real estate." *Ashby v. Peters*, 124 Neb. 131.
2. **Fraud.** "The purchaser of a bond has a right to rely upon the representations on the face of the bond as to the security for the bond, unless, as a matter of fact, he has actual knowledge to the contrary. That question of fact is for the jury to determine." *Ashby v. Peters*, 124 Neb. 131.
3. ———. In this state, in actions for false representations, proof of a scienter is not essential to recovery; and where a petition in this class of cases clearly and positively alleges that the representations relied on by plaintiff were false, while the further allegation in effect "that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact," is in accord with good practice, it is not

essential to recovery that either be incorporated in such pleading or covered in the instructions to the jury.

4. **Corporations**: ACTION FOR FRAUD: PARTIES. "The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant." *Ashby v. Peters*, 124 Neb. 131.
5. **Fraud**: DAMAGES. Under the circumstances of this case, in ascertaining the measure of damages where bonds have been sold for the purpose of investment, by fraudulent representations, it is competent to take into consideration, in ascertaining the true and intrinsic value of such bonds, subsequent events such as the history of the company issuing the same, its subsequent insolvency, the winding up of its affairs, and all other facts and circumstances throwing light on the real and true value of the bonds at the time the same were sold.

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

Wells, Martin, Lane & Offutt and *Brome & Thomas*, for appellants.

John A. McKenzie, contra.

Brogan, Ellick & Shoemaker, amici curiæ.

Heard before GOSS, C. J., EBERLY, DAY and PAINE, JJ., and RAPER and TEWELL, District Judges.

EBERLY, J.

This is an action to recover damages on account of an alleged fraud committed by the defendants Melville D. Cameron, Richard C. Peters, and Cornelius J. Claassen in connection with the sale to plaintiff of certain bonds issued by the Keystone Investment Company. Trial had to a jury, verdict and judgment for plaintiff, and from the order overruling their motion for a new trial, defendants appeal.

The facts, from which the present litigation may be said to have developed, include the following: The Peters Trust Company was a Nebraska corporation, organized in 1907. Defendants Peters and Cameron were of the origi-

nal organizers, and were joined by Claassen in 1909. These three, with others, appear to have exercised control of the business of this corporation until its insolvency in 1930. On November 28, 1916, the Keystone Investment Company was incorporated with 2,500 shares of stock of the par value of $100. The present record does not disclose the amount paid up. On February 1, 1917, the Bee Building Company, a corporation, leased to the Keystone Investment Company the building and property then known as the "Bee Building" for 99 years, the lease being duly recorded. This lease was expressly subject to a first mortgage in favor of the New York Life Insurance Company in the sum of $250,000. So far as disclosed by the present record, the defendants at this time had no interest in, or connection with, the Keystone Investment Company. However, it also may be inferred that these defendants, together with others who with them constituted the control of the Peters Trust Company, later became desirous of securing a desirable place of business for the Peters National Bank and the trust company, which to a certain extent appear in the nature of affiliated organizations, having certain interests in common.

With this objective in view, in April, 1919, the board of directors of the Peters Trust Company, of which the defendants were members, purchased all the outstanding stock of the Keystone Investment Company for $181,000. This Keystone stock was paid for out of the treasury of the Peters Trust Company, which became the transferee and thereafter continued to be the holder and owner of the stock so purchased.

The Keystone Investment Company was thus taken over by the Peters Trust Company and its board of directors was filled by the election of the individuals then comprising the board of directors of the trust company (which included the defendants) who for that purpose were given qualifying shares of stock in the Keystone company, which they did not pay for and of which they were not the owners.

The remodeling of the Bee Building to furnish quarters for the Peters National Bank and the trust company was commenced in May, 1919, and in June, 1919, in accordance with the plan previously agreed upon by the two corporations, both wholly owned and controlled in fact by the same individuals, a deed of trust conveying the leasehold acquired under the terms of the 99-year lease was executed by the Keystone Investment Company to the Peters Trust Company, as trustee, to secure an issue of $400,000 Keystone Investment Company first mortgage real estate gold bonds, and which were thereupon sold by the trust company. It might be stated parenthetically that the applicable statutory limitation then in force as to corporate loans or liability was: "The highest amount of indebtedness or liability to which the corporation shall, at any one time, be subject * * * must, in no case, exceed two-thirds of the capital stock: Provided, however, the above limitation shall not apply to the debts for the risks of insurance companies, deposits in banks, and the notes, bonds, or debentures, of any loan or trust company organized under the provisions of this chapter, where the payment of such notes, bonds, or debentures, shall be secured by the actual transfer of real estate by trust deed or mortgage, for the payment of such notes, bonds, or debentures, which said real estate so transferred shall be of twice the value of the par value of such notes, bonds, or debentures." Comp. St. 1929, sec. 24-205.

It also appears that, after a lapse of four years, on May 17, 1923, "at a regularly called meeting of the board of directors of the Keystone Investment Company," a resolution was duly adopted reciting the previous issuance of $400,000 in bonds, known as the "Keystone Investment Company first mortgage real estate gold bonds," executed by the Keystone Investment Company, and the method by which the same were secured, and stating that the same would mature on June 1, 1924, and that it is for the best interest of the company to issue refunding bonds of like amount. Such resolution further directed "that the Key-

stone Investment Company execute bonds aggregating four hundred thousand dollars, due June 1, 1933, bearing interest from June 1, 1923, at the rate of 6 per cent., payable semi-annually, * * * and secure the same by a trust deed on the above property in favor of Peters Trust Company, trustee; said bonds to be known as Peters Trust Building refunding first mortgage real estate gold bonds, and to be used only for the purpose of retiring said Keystone Investment Company first mortgage real estate gold bonds; and for the purpose of carrying out this resolution, the president and secretary are authorized and directed to execute, in the name of the company, all bonds, trust deeds and other papers necessary and proper to execute said loan."

There is no question that these defendants, as directors, voted to adopt this resolution.

It is also true that in strict compliance with the terms of such resolution an issue of $400,000 in bonds, known as "Peters Trust Building refunding first mortgage real estate gold bonds," was thereupon executed, placed on the market, and sold by the officers, agents and employees of the Peters Trust Company, and the proceeds employed to advance the interests of the stockholders thereof, among whom were the three defendants in the instant case. It appears that in this manner the Peters Trust Company continued to deal in these bonds until in 1929. It also appears that in the last named year both corporations became wholly insolvent, and at the time this suit was instituted the stock was without value. Reference is here made to the opinion of this court in *Ashby v. Peters*, 124 Neb. 131, for a more extended recital of facts.

Plaintiff purchased five bonds of this issue, of a total face or par value of $3,200. The first of the negotiations took place in the main rooms of the Peters Trust Company offices in the Peters Trust Building. Plaintiff's testimony is to the effect that, at the time these bonds were orally recommended to him, a bond was submitted to him, which he carefully read. In company with the bond salesman he

then went over a large portion of the building which he carefully inspected. He read no circulars issued by the trust company pertaining to these bonds, and relied wholly on the terms and covenants appearing on the face and indorsed on the back of the bonds purchased, and the representations made to him, in making his deal. At the top of the face of each bond purchased, in prominent type, appeared the words, "Peters Trust Building refunding first mortgage real estate gold bonds." In the recitals on the face of each instrument appears the following provision: "This bond is one of a series of eight hundred eighty (880) bonds, numbered consecutively from one to eight hundred eighty (880) inclusive, all of like date, form, and tenor, except as to number, amount, and date of maturity, and aggregate the total principal sum of four hundred thousand ($400,000) dollars, the payment whereof, with interest thereon, is secured by a trust deed of even date herewith, duly executed, acknowledged and delivered by said undersigned to said Peters Trust Company, as trustee, conveying certain real estate, known as the Peters Trust Building (formerly Bee Building) Omaha, Nebraska."

Such bonds were executed by the Keystone Investment Company, by "C. J. Claassen" (a defendant), as president, and by the signature of the secretary. On the back of each of these bonds, in the form of an indorsement, in prominent type, are the words, "No.——— First Mortgage Real Estate Gold Bond," etc.

In substance, it is the claim of plaintiff that, accepting as true, and dealing on the basis of, the recitals set forth in and on the bonds he purchased, and relying on the representations thus made, the obligations he bought were secured by a first mortgage on the building he had inspected which was real estate; that these representations were false, and he was deceived thereby, for in truth his mortgage security was neither a first mortgage, nor was it upon real estate.

Appellants insist that a leasehold for more than a year

is "real estate." However, the identical 99-year lease here in controversy was before this court in *Ashby v. Peters, supra,* and there, in effect, this court held that for the purpose of that case, and similar controversies, such lease was not to be regarded as real estate. That determination is controlling here.

Appellants challenge the correctness and propriety of the trial court's instructions relating to the submission of the question of alleged fraud. Fraud was indeed the controlling issue. To set out these instructions at length would unduly extend this opinion.

In consideration of the vital question of fraud, it will be remembered that the bonds, containing the recitals already set forth, which plaintiff purchased, had their inception in, and were issued pursuant to and in strict conformity with, the resolution of May 17, 1923, which was adopted by the affirmative vote of each defendant. The terms and conditions therein contained were consistent with the directions given by, and in harmony with the expressed intent of, the board of directors of the Keystone Investment Company, of which the defendants were controlling members, and such bonds were sold to plaintiff, through the agency of the Peters Trust Company, as in fact being what the resolution adopted May 17, 1923, expressly directed, viz., "Said bonds to be known as Peters Trust Building refunding first mortgage real estate gold bonds."

In *Ashby v. Peters, supra,* in a case involving certain bonds forming a part of the same issue of refunding bonds now under consideration, this court held, in reference thereto: "The purchaser of a bond has a right to rely upon the representations on the face of the bond as to the security for the bond, unless, as a matter of fact, he has actual knowledge to the contrary. That question of fact is for the jury to determine."

This court reapproves the principle so announced as applicable in the present controversy. See, also, 12 R. C. L. 359, sec. 113; *Martin v. Hutton,* 90 Neb. 34; *Foley*

v. Holtry, 43 Neb. 133; *Brucker v. Kairn,* 89 Neb. 274; *Emanuel v. Engst,* 54 N. Dak. 141; *McCandless v. Greusel,* 103 Neb. 472.

In this state we are committed to the view that in tort actions, based on false representations, it is not necessary to allege or prove a scienter. *Gerner v. Mosher,* 58 Neb. 135. Previous to this announcement, Norval, J., in *Field v. Morse,* 54 Neb. 789, 793, employed the following language: "It is the settled law of this state that to entitle a party to relief on the ground of false representations it is not necessary for him to allege or prove that the party making them at the time knew they were false; in other words, whether the defendant acted in good faith or not is immaterial. *Phillips v. Jones,* 12 Neb. 213; *Foley v. Holtry,* 43 Neb. 133; *Hoock v. Bowman,* 42 Neb. 80; *Johnson v. Gulick,* 46 Neb. 817." See, also, *Omaha Electric Light & Power Co. v. Union Fuel Co.,* 88 Neb. 423; 26 C. J. 1131, note 15.

The defendants further challenge the correctness of these instructions of the trial court for the reason that they wholly ignored the third element of the controlling rule announced by this court in *Peterson v. Schaberg,* 116 Neb. 346, viz.: "To maintain an action for damages for false representation, the plaintiff, in substance, must allege and must prove by a preponderance of the evidence the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied on and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages." However, the correctness of this contention must be determined from a reading of this *Peterson* opinion as an entirety. On the point here presented by defendants, Goss, C. J., in delivering the opinion for the court, makes the following observations: "In final effect, the third element above stated is merely an amplification

of the second. If the pleadings allege and the proofs show that one made an actionable false representation, it would follow that he either knew it was false or else he made it without knowing that it was false but as a positive statement of a known fact, and thus, for the purposes of an action, made a false statement. So, while in a case like this, it is not indispensable to state one or the other propositions of this third element in terms in the pleading or in the instructions to the jury, yet we think it a good practice to do so. It helps to clarify the case for the jury."

And, further, referring to instructions given in such *Peterson* case, Goss, C. J., says in part: "Under the law, while good faith may have a tendency to soften the results as to an opinion which is nevertheless erroneous, yet it does not mitigate the effect of a misstatement of a fact acted upon to the actor's injury. Whether the misstatement of that fact be deliberate or spontaneous makes no difference. Thus, the instruction was prejudicially erroneous. In addition to the cases in our court heretofore cited as bearing on this point, we call attention to *Phillips v. Jones*, 12 Neb. 213; *Moore v. Scott*, 47 Neb. 346; *Willard v. Key*, 83 Neb. 850. See, also, 12 R. C. L. 347."

Obviously, the arguments of defendants on the present topics are completely answered by the language of the opinion quoted, viz.: "So, while in a case like this, it is not indispensable to state one or the other propositions of this third element in terms in the pleading or in the instructions to the jury, yet we think it a good practice to do so."

It is quite apparent that in giving the instructions complained of the trial court did not commit prejudicial error.

We have given consideration to defendants' contention that they are not personally liable for their action as members of the board of directors in reference to the sale of the stock in suit. However, we find evidence in the record which, if believed, fairly establishes as a fact that they were each participants in the fraudulent transactions

in suit; that such transactions were really carried on in promoting their financial interests; and they were of the beneficiaries thereof. In this connection we reaffirm the rule announced in *Ashby v. Peters, supra,* viz.: "The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant." See, also, *Tylee v. Illinois C. R. Co.,* 97 Neb. 646; *Farmers & Merchants Bank of Elk Creek v. Farmers & Merchants Nat. Bank of Auburn,* 49 Neb. 379.

Defendants also contend that subsequent events must not be taken into account in determining the value of the bonds in suit as of the date of the alleged fraudulent sale. And, on this ground, objections were originally made to the introduction of evidence relating to the default in payment of the rent and the forfeiture of the 99-year lease, and the subsequent insolvency of the obligor of the bonds purchased, and the fact that at the time the present action was instituted such bonds were worthless. The evidence in the record is without dispute that the bonds were purchased by plaintiff for investment, and held as such until the bankruptcy of the Keystone Investment Company and likewise of the Peters Trust Company culminated. Under these circumstances, the approved rule appears to be that, in ascertaining the measure of damages, where bonds have been sold by fraudulent representation for the purpose of investment, it is competent to take into consideration, in ascertaining the true and intrinsic value of such bonds, subsequent events such as the history of the company, the winding up of its affairs and all other facts and circumstances throwing light upon the real and true value of the bonds at the time the same were sold. 12 R. C. L. 453, sec. 199; *Hindman v. First Nat. Bank,* 112 Fed. 931; *Cramer v. Overfield,* 115 Kan. 580; *Whiting v. Price,* 172 Mass. 240; *Morrow v. Franklin,* 289 Mo. 549; *Hotaling v. Leach & Co.,* 247 N. Y. 84;

Addis v. Swofford, 180 S. W. (Mo.) 548; 57 A. L. R. 1142, note.

We have carefully examined the evidence in the record, and while on many points it is conflicting, still, if believed, the judgment for the plaintiff is amply sustained thereby. It follows that, no prejudicial error appearing, the judgment of the district court is correct, and it is

AFFIRMED.

IVA A. BALTZLY, APPELLEE, V. GERTRUDE GRUENIG, APPELLANT.

FILED JULY 6, 1934. NO. 28983.

1. **Husband and Wife:** MARRIAGE: PUBLIC POLICY. Marriage is a civil contract, but the preservation of the harmonious relations being considered of the highest importance, the state protects the parties from the wrongful intrusion of another.
2. ———: ALIENATION OF AFFECTIONS. Any person intentionally disturbing the relation between a husband and wife, so that the affections, comfort, aid, society, and companionship are alienated, is liable to the party wronged in damages.
3. ———: ———. In an action for alienation of affections, evidence tending to show that the defendant was a person of wealth is inadmissible in the absence of competent affirmative evidence tending to show that the defendant used her financial status as an active inducement to accomplish improper and illegal ends.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Fischer, Fischer & Fischer and *Brome & Thomas,* for appellant.

Rosewater, Mecham, Burton, Hasselquist & Chew, contra.

Heard before ROSE, GOOD, EBERLY and PAINE, JJ., and LESLIE and RYAN, District Judges.

PAINE, J.

Iva A. Baltzly, appellee, hereafter called the plaintiff, brought action against Gertrude Gruenig, appellant, hereafter called the defendant, for damages for the alienation of the affections of plaintiff's former husband, Dr. Oliver D. Baltzly. The jury returned a verdict for $12,500. Defendant appeals from judgment entered on said verdict.

The plaintiff, in the concluding paragraph of her petition, set out: "That as a direct cause and result of the defendant's acts as herein set forth, she completely alienated plaintiff's husband's affections from the plaintiff and by reason thereof plaintiff has lost the society, assistance, support and consortium rightfully owing to her from her husband, by reason whereof she has been damaged in the sum of $50,000."

The defendant in her answer "specifically denies that at any time or in any place or in any manner did she alienate the affections of the said Oliver D. Baltzly from the plaintiff herein, but alleges that the want of love, esteem and affection by the said Dr. Oliver D. Baltzly for the plaintiff herein as alleged in her petition, if true, must have been caused by acts and conditions in no wise connected with the defendant, and defendant further alleges that through no act of the defendant has the plaintiff lost the society, assistance, support and consortium of the said Dr. Oliver D. Baltzly."

The evidence discloses that the plaintiff was 60 years of age in November, 1933, and was born at Galion, Ohio. Dr. Baltzly was born on a farm near Ponca, Nebraska, about 1872, and in 1889 they met in the freshman year of their college course, and each received an A. B. degree from Wittenberg College at Springfield, Ohio, in 1893. After that they each received a master's degree, and later each attained the degree of doctor of philosophy, which shows that both are highly educated. They were married June 11, 1896. The issue of said marriage is one daughter, Olive, named for her father, born at Mansfield, Ohio, September 29, 1897, while Dr. Baltzly was pastor of St. Luke's

Lutheran Church. After preaching at points in the east for several years, Dr. Baltzly became the pastor of the Kountze Memorial Church at Omaha in 1911, it having at that time a membership of 750, and he was retained as pastor and advanced in salary, until 20 years later the church had a membership of about 4,500, and they were paying him $6,000 a year, and he had gained national repute as an author of Lutheran publications. He was made pastor emeritus in August, 1931.

In 1916 the plaintiff received the highest honor and greatest responsibility in the power of the Lutheran church to bestow upon a woman. She was placed at the head of the Women's Home and Foreign Missionary Society of the general synod, an organization of 50,000 Lutheran women, supporting a vast amount of missionary activities in America, India, and Africa. At all times the plaintiff claims that she did all in her power to make the work of her husband's church successful.

The daughter, Olive, became a teacher in the Benson, and later in the Technical, high schools in Omaha, but suffered a nervous breakdown in 1919, and grew worse, and three years later she was confined for a time in Dr. Bishop's Sanitarium in South Pasadena.

The defendant, aged 39 at the time of the trial, resides at 2514 Fowler Avenue, Omaha. She was married to Dr. F. C. Lage on November 24, 1914, each of them being members of the Kountze Memorial Church. This marriage was annulled in Omaha on July 23, 1926, upon her testimony that they had never at any time lived together as man and wife, and in this annulment decree her maiden name was restored to her.

After retiring from the active pastorate of the church, Dr. Baltzly went to Arkansas, and on October 20, 1931, established a residence in the Hot Springs Tourist Court, an automobile camp just outside the city limits of Hot Springs, to acquire the 90-day residence required for a divorce. He filed a petition for divorce on December 26, 1931, and a decree of divorce against the plaintiff was

granted him on May 3, 1932, which did not provide for any support for the plaintiff or the daughter.

More than 20 of the members of the Kountze Memorial Church testified for the plaintiff at the trial, and the evidence discloses that the membership of the church is divided on the merits of the case, but of those members testifying a greater number supported the plaintiff's charges.

The evidence is very voluminous, and no good end would be served by setting it forth at length in all the minute details found in the several volumes of the bill of exceptions.

The defendant testified that she admired Dr. Baltzly very much, and had always assisted him in every phase of church work where she could. As the years passed she gradually spent more time in the church, often remaining for an hour or more with him in his study, or in the sacristy, a little room off the altar, and on a few occasions they were there behind locked doors. The janitor testifies that they remained there a few times until nearly midnight. Testimony indicates that on at least two occasions they were observed in the act of embracing and kissing, this being denied by both of them. One summer Dr. Baltzly spent a few days, while other guests were there, at the defendant's cottage in Minnesota; this was in 1925. They have taken automobile rides together. They would visit together in the church for hours at a time, appearing confidential in their manner. The defendant's counsel insists that they stood so close together on these occasions because Dr. Baltzly is slightly hard of hearing. The weight of the evidence indicates definitely that, when the defendant and Dr. Baltzly were thus together alone, they were happy, contented, and seemingly infatuated with each other.

The domestic relations between the plaintiff and her husband grew more strained as the years went on, and finally on May 23, 1927, an agreement, being exhibit 1, was entered into in the presence of five witnesses, and

received in evidence without objection, which began with these words: "Whereas certain differences have arisen between the undersigned threatening a separation and perhaps a state of facts of more serious consequences." Plaintiff claims she signed it under pressure. The plaintiff, by the terms of said agreement, departed from Omaha on June 15, 1927, taking the daughter, Olive, with her, and established a temporary home in California, and Dr. Baltzly agreed to pay railroad fare of $150, and, in addition, pay $175 a month for the care of plaintiff and their daughter. Plaintiff went to California, and has remained there, and the daughter was at the time of the trial greatly improved in health. Payments under exhibit 1 were made until August, 1931, when he ceased such payments.

Dr. Baltzly, at the trial in the case at bar, testified for the defendant, and strongly against his former wife. He claimed that for years his wife had a very jealous attitude towards the women generally of the congregation, and charged him with having more than a pastor's regard for the women of his church, even before he came to Omaha, where her jealousy greatly increased, and hampered his work. He testified that before 1919 he had determined to secure a divorce from her because of her attitude towards him, but that he did not push the matter then because of his daughter's mental breakdown. He claims that all marital relations between them ceased in 1925. The plaintiff went to the church council in 1926 and asked it to investigate the conduct of her husband with the women members of the church generally, and with the defendant in particular. The church council heard each in the absence of the other; then appointed a committee of five men to investigate, and the committee did not find her accusations sustained. Defendant's counsel says that, from that time on, a small group comparatively, out of a church membership of 4,500, sided with the plaintiff, and there was an open feud between the friends of each; that this small group siding with his wife was joined by some of the ministers of the denomination who were envious of

Dr. Baltzly. He attributes all of their difficulties to his wife's nagging, jealous disposition.

The plaintiff in the instant case testified by deposition in the divorce case brought against her in Arkansas. One of her answers therein was to the following effect, as brought out in this trial: "Instead of being jealous of his success in the church I was eager to help that success. Instead of being jealous of the women members of the congregation, he was as free as air for all contacts necessary in the work of the church. No one realized better than I that he must meet with the women of the church in connection with the church work. * * * The only cases in which I was jealous was in those cases where there was cause to be jealous and cases in which any woman with red blood in her veins would naturally be jealous."

In considering a case of this kind, the law of Nebraska was very well set out by the trial court in instruction No. 5, which reads as follows: "Marriage is regarded by the law as a civil contract, but the preservation of the harmonious relations, when existent between the parties to such contract, is considered of the highest importance; therefore it is the policy of the state to protect the parties to such contract from the wrongful intrusion or interference of others, and to maintain such peaceful and harmonious relations; and if any person intentionally interferes with or disturbs the relation between husband and wife, with the result that the affections, comfort, aid, or society and companionship which the husband ought to have for and bestow upon his wife are withdrawn or alienated from her, the party so offending is liable to the wife in damages."

Twelve propositions of law are set out in defendant's brief as grounds for the reversal of this judgment. It is insisted by defendant that loss of support is not a proper basis of recovery, because the right of support is vested in the wife by law, and cannot be destroyed by the acts of the defendant. We have carefully read the motion for new trial as filed in this case, and the only statement relating

thereto is: "D. There is no evidence that plaintiff has lost the support of her husband."

The trial judge mentioned support in instruction No. 11, and the objections by defendant to that instruction are to several specific points in it, and not to this point. We do not believe that question is before us. *Dunbier v. Mengedoht,* 119 Neb. 706; *Lukehart v. State,* 91 Neb. 219; *Von Dorn v. Rubin,* 104 Neb. 465.

It is insisted by the defendant that, in an action for alienation of affections, evidence tending to show that the defendant was a person of wealth, or the owner of an interest in property, is inadmissible in the absence of competent affirmative evidence tending to show that the defendant used her financial status as an intended active enticement.

In examining the bill of exceptions, it appears that Harry Fischer, the defendant's own attorney, testified that the Gruenig estate, of which defendant is one of the heirs, had a conservative value of $250,000. Evidence as to other holdings of defendant was either testified to by defendant's own witnesses, or was put in the record without any objections being made.

The testimony tended to show that Dr. Baltzly was attracted by finances and property, and that the defendant consulted with him over the handling of her business matters for hours; sometimes in his study, or in the sacristy of the church. As a general rule, testimony as to the financial condition of the defendant has no place in such a controversy, and should not be admitted in evidence. If, however, one who is accused of alienating a husband's affections held out to him her need of his assistance in handling her property, and continually consulted with him, and he was highly flattered and attracted thereby, and enjoyed sharing in such responsibilities, and if this was one of the blandishments by which defendant induced him to desert his wife, it might be material.

The trial court rightly instructed the jury on this question, as follows: "You are instructed that in the event of

your finding in favor of the plaintiff, then in the matter of assessing damages, if any, which you may find from the evidence the plaintiff has sustained, you should not take into consideration any testimony offered and received showing the amount of the wealth of the defendant. Testimony concerning the wealth of the defendant was offered and received only as affecting the mind of Oliver D. Baltzly and as tending to influence him in his action, if you find he was influenced, toward the plaintiff and defendant, and for no other purpose, and beyond considering such testimony for that purpose, such testimony must not be considered by you." See 13 R. C. L. 1479, sec. 528; *Hurley v. Manchester,* 107 Neb. 299; *Robinson v. City of Omaha,* 84 Neb. 642.

The defendant insists that the statute of limitations has run in this case; that the petition was filed more than four years after all affection was destroyed, and consortium lost or impaired; and cites us to *Von Dorn v. Rubin,* 104 Neb. 465, in which Judge Redick sustained a demurrer to the petition, which was affirmed by this court. In that case the alienation was complete in 1911, and suit was brought in 1918.

In the case at bar, exhibit 1, being an agreement between the parties, was for the purpose of effecting a reconciliation, and payments thereunder continued until August, 1931, and in May, 1932, Dr. Baltzly secured his divorce in Arkansas.

It was held in *Dey v. Dey,* 94 N. J. Law, 342: "If husband and wife be living separate, there is always a possibility of their coming together which the law encourages, and an actionable wrong is committed by unlawful interference preventing reunition."

There is no doubt that the conduct which plaintiff complains of covered a period of much more than four years, but under a signed agreement and contemplated reconciliation payments were made until August, 1931, at which time all bonds were severed between the husband and wife. Petition in this action was filed October 19, 1932,

and the jury were properly instructed: "That within four years prior to the 19th day of October, 1932, plaintiff was possessed of the affections of her said husband, Oliver D. Baltzly, or was the recipient of his support, comfort, companionship and consortium, in some degree or measure; * * * that plaintiff was thereafter deprived of the affections, support, comfort, companionship and consortium of her husband." In our opinion, and by the verdict of the jury, the statute of limitations had not run at the time the petition was filed in the case at bar.

It is insisted by defendant that the verdict must have been reached from passion or prejudice, or through some influence outside of the evidence; also, that where the verdict is against the clear weight of the evidence, so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside.

In this class of cases, the motives actuating the different parties become a material subject of proof, and a wide latitude is exercised by the court in admitting evidence for such purpose, which ordinarily might be subject to the objection against hearsay evidence and self-serving declarations. For this reason, the declaration of a deserting husband, showing his mental state at the time, is admissible on behalf of the defendant, and his testimony, being so strongly for the defense, was doubtless weighed carefully by the jury.

The depth of the affection of the husband whose affections are alienated is not material as affecting the wife's right to bring the action, for a want of affection on the part of the deserting husband is not a defense in bar to the maintenance of the action, but simply goes to mitigate the damages.

Courts will seldom interfere with the finding of the jury in such actions, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded. *Phillips v. Thomas,* 70 Wash. 533, 42 L. R. A. n. s. 582; *Ruhs v. Ruhs,* 105 Neb. 663; *Sickler v. Mannix,* 68 Neb. 21; *Potter v. Howser,* 104 Neb.

367; *Sonneman v. Atkinson*, 121 Neb. 752; *Wendt v. Wendt*, 106 Neb. 554; *Rath v. Rath*, 2 Neb. (Unof.) 600; *Butterworth v. Butterworth*, 89 L. J. Prob. n. s. 151, L. R. Prob. (Eng.) 126.

We have examined each of the other assignments of error. We believe the case was fairly tried, and submitted to the jury under proper instructions. No prejudicial error appears in the record, and the judgment is, therefore,

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FIDELITY STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: CITY OF AURORA, INTERVENER, APPELLANT.

FILED JULY 6, 1934. No. 29139.

1. **Banks and Banking**: INSOLVENCY: TRUST FUNDS. A deposit of funds of a city of the second class, paid to the city treasurer for a specific purpose, and to be invested in a class of securities designated by ordinance, *held*, deposit of said funds in a bank designated by the city as its depository, not an investment of said funds, nor illegal deposit of same.
2. ———: ———: ———. Mere fact of itself that officials of a city of the second class are also officers of the bank designated by the city as its depository does not warrant finding that funds in said bank belonging to the city are held in trust for the city.
3. **Opinion Modified.** In *Union Nat. Bank v. Village of Beemer*, 123 Neb. 778, third paragraph of syllabus is modified to conform to the view herein expressed.

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

Craft, Edgerton & Fraizer, for appellant.

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

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

LESLIE, District Judge.

This is an appeal to this court from a judgment of the district court for Hamilton county, in a proceeding brought by the city of Aurora, as intervener, against E. H. Luikart, receiver of the Fidelity State Bank of Aurora.

The intervener claims that at the time of the appointment of the receiver it had on deposit in the bank $29,357.36, that certain assets belonging to the bank had been pledged to the city as security for this deposit, and that after the appointment of a receiver these assets so pledged were sold and application of the proceeds made upon the indebtedness, reducing it to $12,601.52.

The intervener further alleges that of the $29,357.36, total deposit of the city in the bank at the time of the appointment of the receiver, $14,267.59 belonged to what is known as a "Cemetery Investment Fund," collected and held by the city as a trust fund to be invested according to a regulation provided for by ordinance, and intervener asks for judgment directing the receiver to treat the balance of the bank's indebtedness to the city as a preferred claim, having priority over claims of depositors.

The receiver admits that the intervener, city of Aurora, had on deposit in the bank when it went into liquidation and a receiver was appointed, $29,357.36, and that certain securities, assets of the bank, had been pledged to the city as security for its deposit, and that the assets so pledged had been disposed of by intervener and application of the proceeds made upon the indebtedness. The receiver denies that any part of the deposit is or was a trust fund, and alleges that following the adjudication of insolvency of the bank and appointment of a receiver he brought an action to recover from the city the assets which had been pledged to it by the bank, claiming that it had no authority to pledge its assets to secure the city's deposits; that in said action, on appeal to the supreme court, it was determined that the bank could legally pledge its assets to secure the deposit of the city, and that the city having made application of the securities pledged upon its claim, and the

receiver having classified the balance of the claim as a general claim only, the intervener is "one otherwise secured" and estopped to prove a claim other than for a secured deposit. *Luikart v. City of Aurora*, 125 Neb. 263.

The trial court by its decree found that the bank was a duly designated depository for funds of the city of Aurora, and that at the time of the appointment of a receiver the city had a deposit in general checking account and time certificates of $29,357.36; that by agreement between the bank and the city certain securities aggregating in value $23,000 were pledged by the bank to the city as security for the repayment of deposits; that subsequently the pledged assets were liquidated and the proceeds applied in reduction of intervener's claim, and the balance of said claim allowed, payable from the assets remaining after payment of the claims of general unsecured depositors.

Intervener urges that the city's deposits are trust funds: First, because the city and bank officials were identical; second, that the city failed to invest the Cemetery Investment Fund according to its ordinance; and, third, that the bank failed to furnish a depository bond.

In support of its first contention a number of Nebraska cases are cited. The first one is *State v. Farmers State Bank*, 121 Neb. 532. In this case the bank had converted to its own use the proceeds of a promissory note for $4,500, which should have been applied on a debt of one Edward A. Lindquist. The court held that the bank, by reason of its unlawful conversion of the money, became a trustee of that fund for the owner.

The second case is *Union Nat. Bank v. Village of Beemer*, 123 Neb. 778. In this case Wupper, as mayor and bank president, and Severa, as village clerk and bank cashier, sold certain irregularly issued warrants on a sewer construction project to the Union National Bank without notice to the village treasurer of their action. Later the village treasurer deposited funds of the village to pay these warrants. The bank did not apply it to the payment of the warrants, nor make known that they were not in its possession.

The third case, *Nebraska State Bank v. School District,* 122 Neb. 483, concerns a transaction wherein irregularly issued warrants of a school district were sold by the Pierce State Bank to the Nebraska State Bank of Norfolk, one Frank Pilger being both managing officer of the bank and treasurer of the school district. The warrants were bought by the bank from its own funds while there were ample funds on deposit to the credit of the school district in that bank. The bank recouped itself by selling the warrants to the State Bank of Norfolk, and kept the deposit of the school district to use in its own business. The bank profited by a fraud of its officer.

The fourth case, *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538, presents a state of facts almost identical with those in the preceding case. One Studley, school treasurer and bank officer, manipulated school warrants and deposits so that the bank retained and used the deposit which should have been applied to the payment of the warrants.

The fifth case, *State v. Bank of Otoe,* 125 Neb. 414, concerns the deposit of school funds in a bank not designated by the school board as a depository.

In the sixth case, *State v. Bank of Otoe,* 125 Neb. 383, the court made an identical decision with that in the school district case in regard to village funds deposited in a bank not properly designated.

The seventh case, *City of South Sioux City v. Mullins,* 125 Neb. 410, holds that a treasurer of a city of the second class is not authorized to deposit public funds in an undesignated bank.

Obviously the law applicable to the facts in the foregoing cases has no application in the instant case. The facts in those cases upon which the court held the funds in the bank to be trust funds are not present in the case under consideration. In the instant case the bank was designated as a depository, and pledged its assets as security for the repayment of the deposits. No charge of actual or constructive fraud is contended for by intervener.

It might be inferred from reading the third section of the syllabus in *Union Nat. Bank v. Village of Beemer, supra,* that this court held in that case that, because the president and cashier of the bank were also mayor and village clerk, deposits of the village were held by the bank as trust funds. This section of the syllabus incorrectly states the law as announced in the opinion. The court found that certain warrants issued by the village were in the possession of the bank; that it disposed of these warrants without notice to the village; that the treasurer subsequently deposited funds of the village with the bank for the purpose of paying the warrants; that the bank did not apply the money to that purpose nor make known to the village that it had disposed of the warrants. The bank having retained the proceeds from sale of the warrants and also the deposit, the court held that the bank, through its officers who were also officers of the village, was charged with knowledge of the purpose for which the funds had been deposited by the village, and that the bank held the money in trust for the village.

Intervener's second contention is that the Cemetery Investment Fund is a trust fund for the further reason that the city treasurer failed to invest the money according to the provisions of an ordinance of the city. The ordinance is as follows:

"Perpetual Care and Repair. The owner of any lot or lots in the cemetery shall, upon the payment of the sum of fifty ($50) dollars for each and every lot owned by him or them, be entitled to perpetual care of his or their lot, and for one-half (½) lot, the sum so paid shall be thirty ($30) dollars. All money received for the above purposes shall be kept separate and apart from all other funds and shall be known as the 'Cemetery Investment Fund.' Said fund shall be invested in real estate mortgages, city and county bonds and warrants, and in such other securities as the state law permits the state school funds to be invested in. The interest derived from such funds shall be used to pay the expenses of the care and repair of the lots owned by the parties contributing same."

The money paid to the city under provisions of this ordinance by lot owners was for an express purpose, to wit, perpetual care of lots. That the city could not lawfully appropriate it to any other purpose than that for which it was paid to the city may be conceded. It does not follow from this, however, that the city could not legally deposit the fund in a bank designated by the city as a depository for city funds.

The ordinance does not purport to say that money in the city treasury belonging to the Cemetery Investment Fund awaiting investment may not be deposited by the treasurer in the bank designated by the city as its depository. It merely designates the class of securities in which the fund shall ultimately be invested. An ordinance prohibiting the city from depositing any of its funds in the bank designated as a depository would be in contravention of section 17-515, Comp. St. Supp. 1931, which provides:

"The treasurer shall be required to keep at all times on deposit for safe-keeping in the state or national bank doing business in the city or village, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such city or village treasurer."

The amount paid by lot owners to the city was as much a part of the city's funds, although restricted to a certain use, as any other funds coming into the possession of the city treasurer.

Intervener's third proposition that the deposits of the city were held by the bank in trust for the city because of the failure of the bank to furnish a depository bond is disposed of by the holding of this court in the case of *Luikart v. City of Aurora,* 125 Neb. 263, wherein it was adjudicated that a state bank designated as a depository of funds belonging to a city of the second class may by contract legally pledge its assets in lieu of a bond as security for the deposits, and that such contract is binding on the parties thereto.

Holding, as we have, that the money in the bank be-

longing to the city was legally deposited, that no part of it was a trust fund, and the bank having pledged certain of its assets to the city, in lieu of a bond, to secure repayment of the deposit, it follows that the judgment of the district court should be and is

AFFIRMED.

RILEY W. HASKIN, APPELLEE, V. WILLIAM A. LANGDON ET AL., APPELLEES: DAVID R. SHRIVER, APPELLANT.

FILED JULY 6, 1934. No. 28854.

1. **Principal and Agent.** "If the maker of a negotiable note pays the same to one who does not and cannot produce the paper, he thereby assumes the burden of proving that the party to whom he pays the money is the owner of the paper, or the agent of the owner authorized to receive the money for him." *Garnett v. Meyers*, 65 Neb. 280.
2. ———. "The mere fact that a loan broker collected interest on bonds and turned it over to the bondholder may be a circumstance tending to prove agency to do so, but does not of itself prove authority to collect the principal." *Johnson v. Kindig, ante*, p. 360.
3. ———. A loan broker's habitual and general collection of principal and interest and payment of the same over to the holder to whom the broker has sold securities may give rise to an inference that the broker was an actual agent.
4. **Bonds:** PAYMENT. "Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment." *Davis v. Polak*, 126 Neb. 640.
5. **Principal and Agent:** OSTENSIBLE AUTHORITY. "The doctrine of the ostensible authority of an agent can be invoked only by such as have dealt with the agent on the faith of his ostensible authority." *Fike v. Ott*, 76 Neb. 439.
6. **Estoppel.** "Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566.

7. **Principal and Agent.** Preponderance of the evidence *held* to prove that loan broker was agent for mortgagor; that mortgagor's leaving with loan broker, who embezzled funds, sufficient to pay first mortgage did not constitute payment of first mortgage debt, the loan broker not having the papers in his possession nor being authorized by owner to collect.

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

Earl L. Hunter and *R. O. Canaday,* for appellant.

James F. Crowley, Charles E. Bruckman, R. S. Hewitt, Perry, Van Pelt & Marti, James E. Addie, James R. Shively, Stiner & Boslaugh and *Edmund P. Nuss, contra.*

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

THOMSEN, District Judge.

This is an action for the foreclosure of two mortgages. Especially is it a determination of whom of three innocent persons should lose by the embezzlement of a loan broker.

The owner of the land, William A. Langdon, in consideration of the payment to him of $1,000, executed a bond, with interest coupon notes attached, and a mortgage on his land to one of the firm of Hoeppner & Uerling, loan brokers, of Hastings, Nebraska. The mortgage provided that $100 of the principal might be paid, or any multiple thereof, on any interest payment date. The loan would mature in five years, but after about three years Langdon asked the firm for an additional loan of $700, which sum, less some charges and interest on the first loan, was given to him by check after he had executed, to replace the old, a new mortgage, bond and coupon interest notes, in the principal sum of $1,700 secured by the same property. In both transactions the papers were all made to one member of the firm and the notes were negotiable. Langdon neither demanded nor received his old notes or a release of his first mortgage from the loan brokers, nor did he inquire about the first mortgage or who had possession of

the notes at the time the second transaction took place. He relied upon the brokers to satisfy the first mortgage. The notes in both transactions provided that both principal and interest should be payable at the office of Hoeppner & Uerling. Only a typewritten accounting was given by the brokers to Langdon at the conclusion of the second loan. Langdon did not know who owned the first mortgage, but assumed that one member of the firm owned it. The debt secured by this mortgage was never paid by the brokers. Uerling kept the money. The firm is now insolvent; Hoeppner is dead; and Uerling is in the penitentiary.

After the first mortgage was made, it was sold by the firm to Riley W. Haskin, who paid full value for it. Haskin had an assignment of the mortgage given to him, together with the indorsed principal and interest notes, insurance papers and abstract, all of which he took with him and kept in his safe in his own place of business. This assignment had not been recorded when the second mortgage was made. Uerling, of the firm, told Haskin at the time of purchase that Langdon wanted to make payments at the firm's place of business. The notes, of course, so provided. Then, as the interest came due and Haskin received a check from the firm for the interest payments, he would clip the coupon and take it to the firm's office, but he never left any coupon at the firm's office for collection. Haskin had theretofore had similar transactions with the firm in the purchase of mortgages in which the interest and principal were handled in the same way. The record could be clearer as to just how these matters were handled, but from testimony that the other transactions were handled in the same way, one would infer that in these other instances Uerling made similar representations as to the desire of the debtor to make payment at the firm's office and that the notes were all payable there. No other circumstances are shown to assist in inferring an actual agency and the record gives no evidence that Langdon knew of Haskin's prior purchases of mortgages and the handling of collections at Hoeppner & Uerling's office, nor

that he relied upon any apparent authority in the loan brokers collecting for Haskin in former instances from which ostensible authority might thus be established. Under the conditions the equities are more strongly in favor of Haskin. The brokers were Langdon's agents commissioned to pay the debt and not Haskin's agents for collection. Langdon may have been influenced by his prior periodical payment of interest at the office of Hoeppner & Uerling, but "the mere fact that a loan broker collected interest on bonds and turned it over to the bondholder may be a circumstance tending to prove agency to do so, but does not of itself prove authority to collect the principal." *Johnson v. Kindig, ante,* p. 360.

About the day of the execution of the second mortgage, this mortgage was sold by the firm to David R. Shriver. The record shows that Shriver paid $1,700 for this mortgage and had the notes indorsed to him. The papers were all left by Shriver in the possession of Hoeppner & Uerling and placed by Uerling for Shriver in the latter's investment file. Shriver had bought mortgages from the firm for about twenty years.

The district court held that the amount left with Hoeppner & Uerling by Langdon did not constitute a payment to Haskin, but that Hoeppner & Uerling were Shriver's investment agents; that Shriver was bound by the knowledge which the firm had, and that therefore his mortgage should be reduced by the sum of $1,000 principal, and decreed a foreclosure of the (Haskin's) first mortgage with interest and $700 of the (Shriver's) second mortgage and interest.

It seems apparent from the opinion of the trial court that, in reaching the conclusion that the firm was Shriver's investment agent, the court must have taken into consideration evidence in many of the other cases which were at that time tried before him and in a number of which Shriver was a party, and no doubt found that Hoeppner & Uerling invested and reinvested funds of Shriver with or without his knowledge, but with his consent. The record

in this case does not go so far as to disclose these facts. Here the record shows Shriver to be an innocent purchaser for value without notice of any equities against the mortgage and note he purchased. The record shows merely that he bought and paid for a mortgage, had the proper indorsements made, and left the papers in his file in the possession of the firm; that he handled many other transactions in the same way. In other words, he was merely a buyer of investments. This record discloses no other relationship.

Although the question is a difficult one, being made so by reason of the fact that innocent persons must suffer in any event, yet we reach the conclusion, after a very careful consideration of the record and the briefs and arguments of counsel, that the loss must fall upon Langdon, who by reason of his failure to use ordinary business caution enabled John Uerling, of the firm of Hoeppner & Uerling, to embezzle the money. It is not the duty of a creditor to seek his debtor, but rather it is the duty of the debtor to seek the creditor. As said in *Davis v. Polak,* 126 Neb. 640: "Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment." See, also, *Knopf v. Perkins, ante,* p. 366. "If the maker of a negotiable note pays the same to one who does not and cannot produce the paper, he thereby assumes the burden of proving that the party to whom he pays the money is the owner of the paper, or the agent of the owner authorized to receive the money for him." *Garnett v. Meyers,* 65 Neb. 280. If Langdon had asked for the papers and insisted upon their delivery to him at the time of the second transaction, or had insisted upon knowing who owned the mortgage and the note, if they were not available to the loan brokers, Uerling would never have been able to perpetrate the fraud; but the record fails to show any cautionary measure taken by Langdon. The following propositions of law are applicable to the facts:

"Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566.

A loan broker's habitual and general collection of principal and interest and payment of the same over to the holder to whom the broker has sold securities may give rise to an inference that the broker was an actual agent. Restatement, Agency, sec. 43 (2) b, and Neb. Ann. to this section. But if the one who attempts to establish an ostensible agency by these facts did not at the time of his dealings have knowledge thereof and did not rely and act thereon, then such facts are unavailable to him for that purpose. *First Nat. Bank v. Ridpath,* 47 Neb. 96; *Fike v. Ott,* 76 Neb. 439, 443; *Crane v. Gruenewald,* 120 N. Y. 274. However, if the general course of dealing and all other facts and circumstances establish an actual agency, then the principal is bound whether the other relied upon such facts or not. Restatement, Agency, sec. 292a; also sec. 27a; also Neb. Ann. In this case we do not have evidence to establish a reliance by Langdon upon conduct to create an apparent agency of the firm for Haskin, nor do we have sufficient facts and circumstances to establish an actual agency.

Having reached a different conclusion from that of the trial court, the judgment of the district court is reversed and the cause is remanded, with instructions to enter decree in favor of appellant Shriver for the full amount of his mortgage and unpaid interest, subject, however, to Haskin's first mortgage.

REVERSED.

SEBASTIANO VINCIQUERRA V. STATE OF NEBRASKA.

FILED JULY 7, 1934. No. 29062.

1. Criminal Law: ESTOPPEL. A defendant in a criminal action may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable verdict, and thereafter complain of its admission.
2. ———: CIRCUMSTANTIAL EVIDENCE. In a criminal prosecution, where the evidence connecting defendant with the offense is circumstantial, the court should, upon request, give a proper instruction, to guide the jury in determining the sufficiency of circumstantial evidence to warrant a conviction.
3. ———: ———. "To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." *Smith v. State*, 61 Neb. 296.

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

Fradenburg, Stalmaster, Beber & Klutznick, for plaintiff in error.

Paul F. Good, Attorney General, Paul P. Chaney, and *Daniel Stubbs, contra.*

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

GOOD, J.

Sebastiano Vinciquerra, hereinafter referred to as defendant, was convicted of the crime of murder in the second degree. He prosecutes error to review the record of his conviction.

At about the hour of 11 o'clock p. m., on the night of July 3, 1933, while Earl Haning and two companions were sitting at a table in a basement room in his home in Omaha, Nebraska, three shots were fired through the window screen, each piercing the body of Haning, from the

effects of which he died six hours later. No one, except possibly Haning, saw the person who did the shooting, and it is highly improbable that he saw, because the room in which they were sitting was well lighted, and the assailant was outside in darkness. Defendant and one Emmons were arrested and charged jointly in an information with committing the crime. Defendant was given a separate trial. All the evidence relating to the person who fired the shots is circumstantial, unless, as above indicated, Haning could, possibly, have seen his assailant.

Defendant complains of the reception of certain evidence given by Officer Brigham, who testified that he took defendant to the hospital, where Haning was lying on an operating table, and that Haning there stated: "Well, you sure did it this time." He was then looking at the defendant. The officer asked him: "Are you sure he is the man that shot you?" and Haning answered: "Sure, he is the man that shot me." This officer testified that defendant neither admitted nor denied the accusation. This evidence was admitted at the trial, without objection.

Whether evidence of this character should be received in evidence is a matter over which the decisions of the courts of this country are not in harmony. In the case of *O'Hearn v. State,* 79 Neb. 513, it was held that the test of admissibility of statements, made in the presence of one accused of crime who remains silent, is whether the time, place and circumstances surrounding the transaction are such as to lead to the inference that the accused, by his silence, consented to the truth of the statements. However, in the present case, we are not called upon to pass on the question, since no objection was made and no opportunity given the trial court to rule upon the question. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable verdict, and thereafter complain of its admission.

Complaint is made of the giving of the following instruction:

"The evidence in this case is largely what is known as circumstantial evidence; that is, evidence of facts and circumstances tending to indicate guilt, rather than testimony of eyewitnesses.

"You are instructed that in considering circumstantial evidence, if the circumstances tend to prove some fact equally consistent with defendant's innocence or guilt, then you must find all such facts in favor of the defendant."

It is contended that all the evidence is circumstantial, and that the use of the word "largely" in the instruction was prejudicial to defendant. Two eyewitnesses testified to the fact of the shooting, although these witnesses did not see the person who fired the shots. They did see the flash from the gun through the window and their effect upon the body of Haning. The use of the word "largely," even though the facts were all circumstantial, could not have been prejudicial to defendant.

Defendant complains of the refusal of the court to give a requested instruction on circumstantial evidence. The requested instruction is to the effect that, to warrant a verdict of guilty of the crime charged on circumstantial evidence, such evidence must be of a very conclusive nature and tendency, convincing on the whole, leading to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the defendant, and no other, committed the offense charged; that the test to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances proved, tending to connect the defendant with the crime, are of such conclusive and positive a nature as to exclude, to a moral certainty, every rational hypothesis except that of defendant's guilt.

In *Smith v. State*, 61 Neb. 296, it was held: "To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole,

must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." See, also, *Walbridge v. State,* 13 Neb. 236; *Bradshaw v. State,* 17 Neb. 147; *Casey v. State,* 20 Neb. 138; *Kaiser v. State,* 35 Neb. 704; *Davis v. State,* 51 Neb. 301; *Morgan v. State,* 51 Neb. 672; *Johnson v. State,* 53 Neb. 103; *Cunningham v. State,* 56 Neb. 691; 16 C. J. 763; 8 R. C. L. 225, sec. 222.

No instruction was given by the court to guide the jury in determining the sufficiency of circumstantial evidence to warrant a conviction. In the instant case, the defendant was shown by the evidence to have served a term in the penitentiary prior to the commission of the offense charged. He was under a cloud, and his own testimony would naturally be discredited, to some extent at least, by the jury. Under such circumstances, the requested instruction, or one similar to it, should have been given, and failure so to do was prejudicial to the rights of defendant.

There are other assignments of error relating to alleged misconduct of prosecutor and of the court. We have examined them and find them without merit.

Because of the failure of the court to give the requested instruction, or one similar to it, the judgment is reversed, and the cause remanded for a new trial.

REVERSED.

PAINE, J., dissenting.

I respectfully dissent from the main opinion, reversing the judgment and sentence of 15 years to the penitentiary upon a verdict of the jury, returned October 11, 1933, finding the defendant guilty of murder in the second degree.

The deceased was shot just before 11 p. m., July 3, 1933, while sitting in the basement room of his residence with John Rice and Millard Burress, and died a few hours later. Three shots were fired through the basement window, all going into his body, two going clear through. His wife had just gone up to the living-room above the basement

when she heard the three shots fired. The husband, with blood streaming from wounds in his chest and abdomen, got upstairs and laid down on the davenport, and said, "He got me this time." His wife asked, "Who?" and Haning said, "Vinciquerra," referring to the defendant in this case, who had formerly been her husband. She married the defendant in 1913, divorced him in 1920, remarried him in 1922, divorced him in 1926, and married Earl Haning, the deceased, in 1928, and while they had been separated at times, the deceased living in Norton, Kansas, for a while, they had again been living together, at the place where the shooting occurred, for some months. She testified that about two years previously, in 1931, there had been trouble between the defendant and the deceased, in which both of them were wounded as a result of shooting between them. She testified that about this time, 1931, referring to the defendant: "He told me he would like to run across him and would like to have me tell him where he could find him, or if I could give him an idea where he could get him. I told him Mr. Haning had left the city of Omaha, and in fact the state of Nebraska; that he was staying in Kansas, just to get him off the track. * * * Q. Did he state in his conversation that he wanted you to tell him where he was at a definite time? A. Yes, sir. Q. What reason did he give? A. Because he wanted to kill him. He wanted to get even with him."

A. C. Anderson, chief of detectives, Omaha police department, reached the home of Louise Haning, at 2002 North Forty-eighth street, in response to her call, just after her husband had been removed to the hospital. He made a careful search of the basement, and found one bullet in the basement and three exploded shells outside the house from a .32 caliber automatic. The defendant later admitted to the detective that he was the owner of a .32 Colt automatic, and said it was at the store that he was conducting at Twenty-eighth avenue and Locust street. The defendant at that time told him that he did not want any first degree murder "rap" placed against him

when Emmons was the man who fired the shot. The detective asked him how Emmons got possession of the gun, and he said he got it out of the drawer in his store, and was drunk at the time, and added that they would find the gun near the chicken house. An intensive search was made for the gun, both at the defendant's chicken house and the Emmons' chicken house, at which place it was found in a hollow log. It had five cartridges in the magazine and one in the barrel, the gun holding nine when fully loaded. Several days after the shooting, while the defendant was under arrest, he was brought into Detective Anderson's office, where a knife and shells were on the desk. The defendant noticed them, and said, "That is my knife and those are my shells;" the shells being of foreign manufacture. The detective asked him to tell about the shells, and he said, "I at one time bought a whole box of them." The three bullets fired into the deceased were from this box of foreign manufactured cartridges, which are about 3/1000 of an inch smaller, but work in the gun all right.

Roland McDonald, a member of the police force, assigned to the identification bureau, and being the ballistic expert of the department, made many tests with the gun, the shells, and the same kind of bullets fired from the same gun, and told of examining the bullet found in the body of the deceased with a microscope, together with marks of the firing-pin blows on the primer on the empty shells, and testified that the bullets had been fired from the defendant's gun, and that the three empty shells found outside the basement window bore marks showing that they had been fired from the defendant's gun.

Clifford Bovee was a half block from the place when the shooting occurred, and when he got to the corner he saw a model A Ford coupé, of dark color, drive out of the driveway of the deceased's house. The car had no lights burning at the time.

A police officer went to the Haning home immediately after the shooting, and then to the store of the defendant,

where they immediately arrested him, and his car, a model A Ford coupé, was parked outside; the radiator was still warm, and it was a dark colored car.

The defendant in his evidence endeavored to show an alibi, and that he and Emmons were some place else, riding around in his car at the exact time of the shooting, but the jury failed to be impressed in any way by this attempted alibi.

Vernon Clark, a filling station operator, testified that, between 10:30 and 10:45, a very few moments before the shooting, the defendant drove into the station for gasoline; that he acted queerly, and witness watched him carefully, as he thought he might be a holdup; that Emmons came from Riley's café across the street and got in the car and they drove away.

The deceased was sitting in the basement facing the window opening from which the three shots were fired into his chest and stomach. The window was open, there being no glass or anything to obstruct his view of the murderer, save the screen. The others in the room saw the light of the flashes; the deceased at once positively stated that it was the defendant who shot him. I find nothing in the evidence to make it impossible that the deceased, facing the window and looking out after the first shot, did not see and recognize the defendant. He never wavered from this positive recognition during the six hours he remained alive. Exhibit No. 19 is a picture taken from the inside of the basement room of the aperture, showing the screen with the three bullet holes through it, and a very clear outline of a police officer standing outside the window, and this picture was taken the same night at 11:30 p. m. The evidence shows that when deceased was lying upon the operating table in the hospital, and the defendant was brought into the room, he made the statements set out in the main opinion, the last one being, "Sure, he is the man that shot me." This evidence was given at the trial without objection, and was clearly proper under the authority of *O'Hearn v. State,* 79 Neb. 513, 25

L. R. A. n. s. 542. See, also, *State v. Guffey*, 39 S. Dak. 84; *State v. Claymonst*, 96 N. J. Law, 1.

The defendant took the witness-stand and denied that he shot the deceased. He was asked when he had been at that house previously, and answered, "I never have been there for fifteen months,—that time I got shot with Earl Haning." He testified that in 1929 or 1930 he married another woman, but that they were now divorced, and that he had only been back at his place of business about 10 minutes when the officers arrested him the night of the shooting. When cross-examined about statements he made to the police the night he was arrested, he said: "I answered questions down there I never should have." It is very rarely indeed that such definite, positive, and convincing evidence can be produced in a murder trial, as was given to the jury in this case, upon which to base their verdict of guilty.

In the main opinion this conviction and sentence are reversed because the trial judge gave instruction No. 15 on circumstantial evidence, when he might have chosen a much better one. As printed in the defendant's brief, it reads as follows:

"The evidence in this case is largely what is known as circumstantial evidence; that is, evidence of facts and circumstances tending to indicate guilt, rather than testimony of eyewitnesses.

"You are instructed that in considering circumstantial evidence, if the circumstances tend to prove some fact equally consistent with defendant's innocence or guilt, then you must find all such facts in favor of the defendant."

Defendant objects to the use of the word "largely" because defendant claims that the evidence was "entirely" circumstantial. This objection has little foundation, for a large amount of evidence is "direct" evidence of the most positive sort.

It stands to reason that the trial judge, by giving more time and care, could have selected a very much better instruction upon circumstantial evidence, from the dozens

of approved instructions on circumstantial evidence found in text-books on instructions to juries, but in the haste of the trial he dictated and gave the one above set out. Are there such vital defects and important omissions in the instruction as given as to have prejudiced the defendant, and to make it mandatory upon this court to reverse this verdict and sentence? I claim that the instruction as given was favorable to the defendant, and not prejudicial to his interests.

Next, I claim that this court is positively forbidden to reverse this conviction and sentence by enactment of our legislature, being the last paragraph of section 29-2308, Comp. St. 1929, reading as follows:

"No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that *no substantial miscarriage of justice has actually occurred.*"

We find that this section was added to our law by an amendment introduced by Senator Walter V. Hoagland, an experienced trial lawyer, and, upon its passage, was approved by the governor April 8, 1921. It has been contended that, whenever this provision of our law conflicts with our Constitution, the legislative enactment fails.

I admit that it must be applied cautiously, and that it is subject to sections 3, 6, and 11, art. I of the Constitution, and that no case could be affirmed under its provision if such decision was violative of any one of these three sections. In examining each of these constitutional provisions, it is my opinion, that the defendant in the case at bar was not deprived of his liberty without due process of law, as promised him in section 3, art. I of the Constitution, and he has been given a fair and impartial trial by a jury, as promised to him in section 6, art. I of our Constitution, and has faced the witnesses testifying against him, and been protected by the other provisions set out in

section 11, art. I of our Constitution, and these witnesses who faced him at his jury trial gave such overwhelming and convincing evidence that the jury promptly returned a verdict of murder in the second degree against him.

This last part of section 29-2308, Comp. St. 1929, was given an extended discussion in the opinion reversing *Scott v. State,* 121 Neb. 232, and extensive quotations were made from the leading English case of *Makin and Wife v. The Attorney General for New South Wales,* 17 Cox Cr. Cas. 704. Let us examine the *Makin* case, which is cited as a precedent for a reversal of criminal cases, in spite of the section of our statute cited above. Makin and wife were found guilty of the murder of Horace Amber Murray, being an illegitimate baby, under 10 weeks' old, the child of a domestic servant, which the Makins had taken in to nurse upon the payment of a small sum, and upon their representation that they desired to adopt the infant as their own. During the trial of the case, evidence was introduced showing the finding of the bodies of other little infants under circumstances implying that Makin and wife might have been connected with their deaths also. The admission of such evidence was immediately attacked, and the trial judge, realizing the weight of the objection, reserved passing sentence on the prisoners. Lord Chancellor Herschell, in reviewing the case, said that the trial court was wrong in admitting evidence of the finding of the bodies of other infants, and set out that it was claimed there was no evidence of how the little infant came to his death, or that he was murdered by the defendants, but that if, without the inadmissible evidence, there was evidence sufficient to sustain the verdict, and to show that the accused were guilty, then there would be no substantial wrong, or miscarriage of justice. The final paragraph in this case reads as follows: "Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as

for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence."

Another English case referred to is that of *Allen v. The King,* 44 Can. Sup. Ct. 331. Allen, a private soldier, was tried for shooting his captain at Victoria, British Columbia, and sentenced to death, the defense being temporary insanity by reason of overindulgence in alcohol. In this long opinion of more than 30 pages, the Canadian provision, found in section 1019 of the Canada Criminal Code, is set out, and is very similar to the last paragraph of section 29-2308, Comp. St. 1929, under discussion in this case, and it is shown that in the trial of the case Allen was asked whether a witness, Corrigan, had not testified, in the preliminary hearing in the police court, of threats made by Allen against Captain Elliston, and a number of such very damaging statements testified to by Corrigan at the preliminary hearing were thus injected into the evidence, although at the time this was done Corrigan had left the army as a consequence of being afraid to stand cross-examination if called as a witness at the jury trial, and was not in the province when the trial was held. It is clear from this statement of the facts that substantial wrong was done to the defendant, Allen, by the admission of this highly improper evidence, and that the court was right in setting aside the conviction of Allen for miscarriage of justice although dissents were filed.

These two cases were doubtless closely in point when applied to the facts in *Scott v. State, supra,* but can they be used with equal force as precedents in the case at bar, where the reversal is based largely on the fact that the court failed to give the jury a guide to determine the sufficiency of circumstantial evidence to warrant a conviction?

I believe the jury gave only the proper weight to the circumstantial evidence under the instruction given them, which told them that, if a fact was equally consistent with the guilt or innocence of the defendant, they must find all such facts in favor of the defendant.

In our present state of unrest, resulting in a rising tide of lawlessness and crime, this court should, in my opinion, be very reluctant to reverse verdicts of juries unless the members of this court can say that a substantial miscarriage of justice has occurred, as required by section 29-2308, Comp. St. 1929.

I adopt the language of Judge Rose in his dissenting opinion in *Cooper v. State,* 120 Neb. 598, and close this dissent with his words: "I made 'an examination of the entire cause,' and I say with conviction there was no prejudicial error or miscarriage of justice in the proceedings and sentence. Under the evidence a verdict of not guilty would have been a travesty on justice and a reproach to the law."

DAY, J., concurring.

The majority opinion holds that the instruction on circumstantial evidence inadvertently given by the able and experienced trial judge was reversible error. This was made imperative because the defendant requested an instruction which this court has held to be a proper and a necessary one since *Walbridge v. State,* 13 Neb. 236, was decided in 1882, which opinion was written by Maxwell, J. Numerous cases have been decided by this court upon the identical question involved in this case, including those cited in the majority opinion, and the rule has never been questioned until the dissenting opinion in this case.

It is neither a minor nor an inconsequential error. The trial judge stated in his instructions to the jury that the evidence is largely circumstantial. I not only made an examination but read the entire record and can say with a conviction equal to that of my distinguished associate that the evidence connecting the defendant with the crime charged is entirely circumstantial. The dissenting opinion intimates that the reversal was based upon the trial court's failure to cross a "t" or dot an "i." That is not the fact as an impartial reading of the opinion would disclose. For many years, this court has taken an advanced position and refused to reverse judgments for inconse-

quential technical objections which were not prejudicial and obviously would not and did not change the result of a trial. In *Nichols v. State,* 109 Neb. 335, an opinion by Rose, J., held: "In a criminal prosecution an immaterial variance between the complaint before the examining magistrate and the information filed in the district court is not a ground of abatement, where the same crime is properly charged in both." See, also, *Clarke v. State,* 125 Neb. 445. In order that a conviction may be grounded safely upon circumstantial evidence, "it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." *Smith v. State,* 61 Neb. 296. This rule obtains in the great majority of state courts. So also does it apply in the federal courts.

Section 6, art. I of the Constitution, provides: "The right of trial by jury shall remain inviolate." This would seem to entitle the defendant to a jury trial when charged with murder. Chapter 20, art. XI (b), Comp. St. 1929, provides the only method of trial by jury in this state. Section 20-1111, Comp. St. 1929, provides that the trial judges shall instruct the jury in writing upon the law applicable to the case: Quoting from *Webb v. State,* 140 Tenn. 205, annotated in 15 A. L. R. 1034, we find it specially applicable to this case: "In such a case, the main fact—the *factum probandum*—is the fatal stroke, and if there be no direct testimony connecting the accused with the main fact, as the slayer, and the sole evidence is circumstantial, it is error not to instruct the jury as to the rules applicable to that kind of evidence. The error is of the class denominated fundamental. It goes essentially to the basis of the accused's theory for defense."

The people of this state by constitutional provision have decreed that one charged with crime is entitled to a jury

trial. A jury drawn, as it is, from the community, made up of men of varying experiences in life, can only be expected to weigh the evidence in a case, properly, when they are correctly and simply instructed upon the law applicable. The defendant in this case, guaranteed as he was a jury trial, had a right to have the evidence against him weighed by a jury according to the well-known and long-accepted rules of law. He was denied this right. The dissenting opinion does not question so much the correctness of the instruction tendered by defendant, but contends that it was unnecessary in this case. It takes excerpts of testimony from the record from which the conclusion is drawn that the defendant in this case is guilty of the crime charged. The excerpts are those most unfavorable to the defendant, and the inferences therefrom are not impartially drawn. Having determined from this statement of the facts that the defendant is guilty, it is then argued that section 29-2308, Comp. St. 1929, forbids the reversal of the judgment. If the court were to do this, it would be usurping the function and invading the province of the jury. This court has not been given authority to determine the guilt or innocence of a defendant in a criminal case. It is required to observe and support the Constitution of the state and that Constitution provides that a defendant shall have a jury trial. It means that his guilt or innocence shall be determined by a jury under proper instructions as to the law by the court. For this court to sustain a conviction of a defendant where there is a substantial error in a fundamental instruction to the jury, informing them as to the manner in which they shall weigh the evidence, would in fact be a practical denial of a jury trial. This matter was ably discussed in *Scott v. State,* 121 Neb. 232. In that opinion, the history of this statute was traced from the time when it was adopted first in England down to the present day. It is unnecessary to repeat that discussion here, but we refer to it as stating the position of this court upon this question and applicable to this case. However, it does seem neces-

sary to quote conclusions from the *Scott* case. "The scope and effect of the provisions of section 29-2308, Comp. St. 1929, can be determined only in connection with constitutional provisions, and with other sections of the statutes *in pari materia.*" It was further held: "It does not authorize this court to declare that there has been no substantial miscarriage of justice in a criminal case, merely because the court from an examination of the evidence may believe the defendant guilty of the crime charged." The *Scott* case ought to be a sufficient answer to every contention of the minority opinion. In *Stowe v. State,* 117 Neb. 440, opinion by Goss, C. J., this court held that error as to matters of pleading or procedure violating constitutional rights of accused will not be ignored. In *Kleinschmidt v. State,* 116 Neb. 577, opinion by Howell, J., it was held that section 29-2308, Comp. St. 1929, has no application where the province of the jury is prejudicially invaded. See, also, *Fetty v. State,* 119 Neb. 619.

This court has recognized that section 29-2308, Comp. St. 1929, is to be liberally construed in favor of justice, as a remedial statute. *Cryderman v. State,* 101 Neb. 85. It was so construed in *Norton v. State,* 119 Neb. 588; *Broquet v. State,* 118 Neb. 31; *Clarke v. State,* 125 Neb. 445. In the last cited case, it was held, in an opinion by Shepherd, District Judge, that a "variance, if any, between information charging automobile as defendant in liquor case and complaint describing car, but not particularizing, *held* not prejudicial." (250 N. W. 551.) These decisions are representative of the trend followed by this court over a long period of time.

Summarized, the position of this court has been that an immaterial matter not affecting the substantial rights of a defendant was not prejudicial, reversible error. But this court has never yet ignored the violation of a defendant's constitutional right. The argument of the minority opinion is untenable. To follow it to its logical conclusion and apply it to a hypothetical case indicates its fallacy. Suppose a trial judge submitted a case to a jury of men un-

trained in weighing evidence without any instructions whatever. Such a jury, uninstructed as to the law applicable to the case, could not be expected to return a just and lawful verdict with any reasonable certainty. Could this court then examine the evidence and determine the defendant's guilt? The constitutional guaranty to a jury trial would be nullified. In the first place, the legislature in the act of 1921 (Laws 1921, ch. 157) had no intention to deny a defendant the right to a jury trial. If it had any such intention, it was without power to amend the Constitution. This statute was probably suggested to Senator Walter V. Hoagland, who introduced the bill, by similar enactments in other states and in England. Senator Hoagland, who is an experienced and capable trial lawyer, undoubtedly recognized the beneficent and useful purpose of such a statute in preventing retrials of cases for inconsequential errors. But it cannot eliminate from this court's consideration a fundamental error that goes essentially to the basis of a theory of a defense. It cannot deprive a defendant of his constitutional right to a jury trial.

It is not necessary to analyze the evidence or the excerpts and inferences of the minority opinion for that the duty and responsibility of weighing the evidence and determining the guilt or innocence of the defendant has not been placed upon the members of this court. When and if that duty is constitutionally commended to this court, it will be assumed and discharged. Until such a time, this court should continue to function within constitutional limitations and not usurp powers which have definitely not been given to it.

The minority opinion inquires whether the authorities can be used with equal force as precedents with the case at bar where the reversal is based largely on the fact that the court failed to give the jury a guide to determine the sufficiency of circumstantial evidence to warrant conviction. That squarely presents the question, but we are unable to understand by what process of reasoning it is

determined that the jury without a proper instruction to guide them, in weighing circumstantial evidence, gave it only the proper consideration. Even those who view with alarm what is termed the rising crime wave should be the last to desire to destroy and nullify constitutional provisions which guarantee human liberties and human rights. Trial by jury is such a guaranty. The jury was established in our jurisprudence as a guaranty against the tyranny and oppression of an absolute monarch, unaccountable to the people. History reveals that in a republic one may usurp power and become as tyrannical as the ruler of a hereditary monarchy. In times past, executions have been most frequent, and without what we are accustomed to term a trial, under a régime established in the name of the people. If the fight of the state against criminals is unequal, it is not because of the constitutional stability of the courts so much as it is because the state is unwilling to furnish those charged with the enforcement of the law personnel and equipment sufficient to carry on the struggle. It is no solution to the problem to say that because the officers of the law are too few in number, inadequately armed, and have inefficient equipment, the quantum of proof should be less and a man charged with crime should be convicted except by a proof of his guilt according to the age-old rules which have stood the test. It would be the easy and the lazy way.

If according to the minority opinion "a verdict of not guilty would have been a travesty on justice and a reproach to the law," the state would not need an unfair and unconstitutional advantage to obtain a conviction. If this were a fact, the defendant would have been convicted if his constitutional rights had been observed. But the interest of the state is not served by sentencing a man to penal servitude, unless the evidence has been weighed, and he has been found guilty of a violation of the criminal laws of the state. The purpose of the criminal law is to punish the guilty.

But it has often been said and so often reiterated that

it has become looked upon as an axiom that only the guilty escape punishment and that no innocent man is ever convicted. Professor Edwin M. Borchard, professor of law in Yale university, in a recent interesting book entitled "Convicting the Innocent" has compiled the history of sixty-five criminal prosecutions and convictions of completely innocent people. This author has in a very able manner analyzed these cases and exemplified the manner in which these mistakes in the administration of justice occur. His conclusions are so compelling and practical as to interest one who is anxious to determine why the result of a trial is not always accurate. Professor Borchard at page XIII says: "Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these convictions. Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi, character witnesses, or other testimony. These cases illustrate the fact that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy."

There was no identification in the case at bar by any eyewitness, unless it can be said that the alleged statement of the murdered man amounts to such identification. Let it be remembered that this happened after 10 o'clock at night; that the murdered man was in the basement and was shot by somebody on the outside, in the dark, through the screen. The statement of the murdered man was not that he saw the defendant shoot him, but rather that the defendant "got him."

Quoting further from Professor Borchard, at page XIV he states:

"Erroneous convictions on circumstantial evidence exclusively * * * are not many, yet enough to be disturbing. Of the eleven cases of this type here recorded, eight in-

volve charges of murder in the first degree and convictions of murder in the first or second degree.

"No one will suggest that circumstantial evidence should be excluded as a form of evidence. On the contrary, it is often convincing and conclusive. That it is, nevertheless, often misleading and unreliable, the cases here reported attest. Chief Justice Shaw, in his celebrated charge to the jury in Dr. Webster's case (*Commonwealth v. Webster*, (1850) 5 Cush. (Mass.) 295, 312), said: 'The advantages (of circumstantial evidence) are that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.' "

Quoting further from Professor Borchard, page XVIII: "Public opinion is often as much to blame as the prosecutor or other circumstances for miscarriages of justice. Criminal trials take place under conditions with respect to which public interest and passions are easily aroused. In fourteen of the cases in this collection in which the frightful mistake committed might have been avoidable, public opinion was excited by the crime and moved by revenge to demand its sacrifice, a demand to which prosecutors and juries are not impervious. This can by no means be deemed an argument for the abolition of the jury, for judges alone might be equally susceptible to community opinion. But it is a fact not to be overlooked."

We have only quoted from Professor Borchard in so far as his conclusions seem applicable to and helpful in the case at bar. This able analysis and discussion of actual cases demonstrate that innocent men are sometimes convicted. But it is not necessary for us to go outside of our

own state for a demonstration that a mistake may be made and an innocent man convicted. Alvah L. Lytle was convicted of bank robbery. His conviction was affirmed upon appeal to this court. *Lytle v. State*, 120 Neb. 869. In that case, the evidence was not circumstantial. Lytle was positively identified by the president and three employees of the bank. He was also identified by a man who observed him enter the bank. After serving more than two years in prison, another confessed the crime and was able to prove to the county attorney, the president of the bank, and sheriff that he and not Lytle committed the robbery. This erroneous conviction resulted because five witnesses who positively identified Lytle as the man who held up the bank were mistaken.

A further reason might be because, as stated in the report of the county attorney to the pardon board at the time of his conviction, he did not bear a very good reputation by reason of his bootlegging activities. When convinced of their mistake, the county attorney, the sheriff, and the president of the bank hastened to make amends and secured a pardon. It is a frequent argument of those who contend that no conviction should be reversed because of the expense of a new trial. They seem unmindful of the fact that the conviction of an innocent man damages the individual more than the state can recompense. It is a serious thing to send a man to the penitentiary for a crime which he did not commit. It places a stigma upon him which will blight his entire life. In connection with the *Lytle* case, chapter 11, Laws 1933, is of interest and indicates that convicting an innocent man is often expensive for the state. It is as follows:

"An act for the relief of Alvah L. 'Doc' Lytle; to appropriate the sum of $2,500 therefor out of the general fund.

"Preamble

"Whereas, Alvah L. 'Doc' Lytle, a resident of the city of Superior, county of Nuckolls, state of Nebraska, on March 22, 1930, then a peaceable and lawabiding citizen, happily married, his immediate family consisting of a wife and

small child, and while pursuing the lawful occupation of a chef was arrested, and was on March 22, 1930, after a trial had in the district court of Kearney county, Nebraska, sentenced to the Nebraska state penitentiary for the crime of robbing the Exchange National Bank of Minden, Kearney county, Nebraska, said robbery having occurred on March 20, 1930 (actually December 20, 1929); and

"Whereas, on March 22, 1930, said Alvah L. 'Doc' Lytle was sentenced to serve a term of not less than 12 nor more than 15 years in said penitentiary,—at all times protesting his innocence of said crime as charged, and an alibi being his defense and established by a number of witnesses, but disregarded by the court and jury in said case; and

"Whereas, approximately two years thereafter, one John L. Webster was arrested in the state of Illinois, for bank robbery, committed at Bartonsville, Illinois, and upon his arrest, said Webster confessed not only to the Illinois bank robbery, but also fully confessed to the robbery of said Exchange National Bank of Minden, Kearney county, Nebraska, and set forth in complete detail the mode and manner in which said Exchange National Bank of Minden, Kearney county, Nebraska, was robbed; and

"Whereas, the said Webster's confession convinced the county attorney of Kearney county, the district judge before whom said Alvah L. 'Doc' Lytle had been tried that the wrong man had been convicted; and

"Whereas, a full and complete hearing was had before the Nebraska state board of pardons and paroles which exonerated said Alvah L. 'Doc' Lytle, said opinion of the said board of pardons and paroles, dated March 8, 1932, being concluded as follows:

" 'After reviewing the newly discovered evidence, we are satisfied that Lytle is innocent of the charge on which he is serving, conviction is therefore held for naught, and it is ordered that Alvah L. Lytle be discharged and restored to all his civil rights;' and

"Whereas, the character and reputation of said Alvah L. 'Doc' Lytle, prior to his unwarranted and unlawful conviction of a felony, as aforesaid, was exemplary and above reproach; and

"Whereas, after serving approximately two years in the Nebraska state penitentiary for a crime which he, the said Alvah L. 'Doc' Lytle was innocent, he received upon his discharge from said penitentiary the usual ten dollars that is given to every departing convict; and

"Whereas, Alvah L. 'Doc' Lytle has been incalculably injured in his good name, honor and reputation by the atrocious mistake made by the peace officers, the prosecutors and the courts of this state and in equity and good conscience should, in a measure, be recompensed for the great wrong, humiliation and suffering which this unfortunate miscarriage of justice has brought to him; now therefore

"Be it Enacted by the People of the State of Nebraska:

"Section 1. That there is hereby appropriated out of the general fund of the state of Nebraska, the sum of twenty-five hundred dollars for the relief of Alvah L. 'Doc' Lytle.

"Section 2. Said sum so appropriated shall be in full of all claims and demands on the part of said Alvah L. 'Doc' Lytle against the state of Nebraska on account of his wrongful conviction of the felony of bank robbery by the courts of this state; and the auditor of public accounts is hereby authorized and directed to draw a warrant for the amount therein specified upon the general fund; and the state treasurer is hereby directed to pay said warrant to Alvah L. 'Doc' Lytle, his heirs, successors or assigns, that said payment be made only on condition that said Lytle pay counsel for service in securing this payment not to exceed fifteen per cent. (15%) of amount paid."

This case exemplified the expense to the state of the wrongful conviction of an innocent man. It also is positive proof that an error can and has occurred. But it poorly expresses the great injury suffered by Mr. Lytle.

It ought to impress police officers, prosecuting attorneys and judges with the grave responsibility resting upon them to protect society from the criminal and yet at the same time to so perform their various duties that no innocent man shall suffer an ignominious conviction.

In conclusion let us summarize:

A. The trial court failed to give the jury a guide to determine the weight of the circumstantial evidence.

B. That the failure to give the proper instruction on circumstantial evidence is a fundamental error, and goes essentially to the basis of the accused's theory for defense.

C. That this court cannot weigh the evidence and determine the guilt of the defendant and then under section 29-2308, Comp. St. 1929, determine that no substantial miscarriage of justice has actually occurred, where a substantial right has been denied.

D. That this court cannot usurp the function and invade the province of the jury and thus deny the defendant his constitutional right to a jury trial.

E. That a failure to observe constitutional rights increases the possibility of error from which lamentable consequences follow.

EBERLY, J., joins in the concurring opinion.

IN RE ESTATE OF EVA NELSON. EVANGELICAL COVENANT HOSPITAL, APPELLEE, V. S. P. SWANSON, EXECUTOR, APPELLANT.

FILED JULY 13, 1934. No. 28974.

1. **Contracts.** Where one dealt with a woman who could neither read nor write, who had never transacted any important business without aid, and who made her mark to the instrument, it is incumbent on the former to show by a preponderance of the evidence that the latter fully understood the object and import of the writing she executed.
2. **Specific Performance.** Where a preponderance of the evidence shows clearly that the minds of contracting parties did not meet on the main provision of the contract, owing, on one side,

to old age, inability to read or write, incapacity to transact important business and absence of independent advice, a court of equity may decline to enforce performance.

3. **Wills.** A written agreement by an inmate of a hospital, if she dies in it, that all her property shall become the property of the hospital, where she had previously paid in full for her life maintenance therein, *held* unenforceable under the circumstances outlined in the opinion.
4. **Contracts.** "A promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration." 13 C. J. 353.
5. **Specific Performance.** A party seeking specific performance of a contract may be denied relief in a court of equity, where he has failed to perform on his part.

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

L. B. McDonald and *I. H. Floersch,* for appellant.

George W. Pratt and *D. B. Anderson, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

ROSE, J.

This is a proceeding in equity to establish and enforce an alleged written contract under which Eva Nelson is said to have agreed that all property belonging to her at the time of her death should become the property of Evangelical Covenant Hospital, if she died therein. The hospital, an institution in Omaha, is claimant and plaintiff. The contract is dated April 10, 1931. Eva Nelson died in the hospital June 24, 1932. Plaintiff prayed for the establishment of the contract and for an order on S. P. Swanson, executor, defendant, to turn over to plaintiff all of decedent's property in his hands. Prior to the date of the alleged contract, Eva Nelson made a will which was duly probated July 22, 1932.

In an answer, the executor, defendant, denied unadmitted allegations of the petition, and pleaded in substance that Eva Nelson, April 10, 1931, the date of the

alleged contract, was old, mentally deficient, could neither read nor write and understood English imperfectly; that she had been led to believe that $2,000 which she had previously paid to plaintiff obligated the latter to provide her care and maintenance for life; that, if she signed the contract sought to be enforced, she was persuaded by fraud of plaintiff to do so; that she never intended to enter into such a contract; that, in any event, it was void for want of consideration. Defendant prayed that the alleged contract be declared void and that the proceeding be dismissed.

Upon a trial of the cause the district court decreed the validity of the contract, ordered enforcement thereof and directed the executor to turn over to plaintiff all money and other property belonging to decedent's estate, after paying the expenses of administration.

S. P. Swanson, executor, defendant, appealed to the supreme court, where the cause is for trial *de novo,* independently of the findings and decree of the court below. The contract which plaintiff seeks to enforce in equity is here copied:

"Agreement

"This agreement, made and entered into this 10th day of April, A. D. 1931, by and between the Evangelical Covenant Hospital, party of the first part, and Eva Nelson, party of the second part, witnesseth:

"Whereas, Eva Nelson is acquainted with the work being done by the Evangelical Covenant Hospital, and is desirous of doing what she can to promote the work of the said hospital; and

"Whereas, she now has two thousand ($2,000) dollars which she desires to donate to the said hospital for promoting its work; and

"Whereas, the hospital is in a position to use said donation to good advantage in promoting its work as a charitable institution, said donation of two thousand ($2,000) dollars from the said Eva Nelson, is herewith gratefully

accepted, and receipt of same acknowledged with thanks; and

"Whereas, she is desirous of having an opportunity of engaging herself and usefully occupying her time according as her health and ability will permit, during the remaining years of her life, she now being over seventy-five years of age; and

"Whereas, the Evangelical Covenant Hospital is prepared and willing to furnish said Eva Nelson with such employment, including care and support,

"It is, therefore, mutually agreed by and between said parties hereto that the said Evangelical Covenant Hospital, in consideration of the covenants on the part of Eva Nelson, hereinafter contained, will furnish said Eva Nelson such employment, with room, board and care, as long as she shall elect to remain with said hospital, and that in consideration of any service that she shall render, the said hospital shall pay her the sum of one ($1) dollar per week for and during such time as she shall be able to work, and that in the event of her being unable to work, she shall nevertheless receive board, room and care as long as she shall elect to remain with said hospital.

"In consideration of the foregoing, the said Eva Nelson agrees to accept such employment, and further agrees that in the event that she remains with the hospital until death, that any and all property belonging to her at her death shall thereupon be and become the property of the said Evangelical Covenant Hospital, in consideration for permanent employment and care.

"In witness whereof, we have hereunto subscribed our names this 10th day of April, A. D. 1931.

"Evangelical Covenant Hospital,
"By Chas. W. Swenson, President.
"Attest: Chas. O. Anderson, Secretary,
"Party of the first part.
"Eva X (her mark) Nelson, by Rose Wise,
"Party of the second part.
"Witness: Rose Wise, Olga W. Bengtson."

In view of issues to which both parties directed testimony, a court of equity should look into the place and the circumstances under which this contract was signed. Eva Nelson, in advance of such contract, paid Evangelical Covenant Hospital, plaintiff, $2,000 as early as April 8, 1931, for some purpose. The contract in controversy was signed later and is dated April 10, 1931, when she was an inmate. The transaction, according to plaintiff's witnesses, took place in an office occupied by Young, the head of the hospital, and Rose Wise, assistant superintendent of nurses. There were present on that occasion, Charles W. Swenson, president, Charles O. Anderson, secretary, who was also attorney, Rose Wise, assistant superintendent of nurses, Olga W. Bengtson, an employee of the hospital, all officers or employees who were interested in getting money for the hospital, and Eva Nelson. For plaintiff, Swenson signed as president, Anderson as secretary, and the name of the woman who is alleged to have contracted away her property was signed also by a representative of plaintiff—"Eva Nelson, by Rose Wise." The principal obligor's part in the execution is represented by a mark—"X." The evidence is that Eva Nelson was then past 80 years of age. Rose Wise who signed her name testified she was a frail little woman. She was in the custody of plaintiff with the understanding that it was for life, if she chose to remain that long. Under the circumstances the burden was on plaintiff to prove that she understood her property was to become the property of plaintiff if she died in the hospital. The following is settled law: Where one dealt with a woman who could neither read nor write, who had never transacted any important business without aid, and who made her mark to the instrument, it is incumbent on the former to show by a preponderance of the evidence that the latter fully understood the object and import of the writing she executed. *Selden v. Myers,* 20 How. (U. S.) 506; *Spelts & Klosterman v. Ward,* 2 Neb. (Unof.) 177; *Wixson v. Nebraska Conference Ass'n,* 122 Neb. 771. Eva Nelson was without counsel of her own selecting, when she

made her mark, and there was not a relative, or old friend, present. She was surrounded by plaintiff's officers and employees. The record does not show that she had an opportunity to call for independent advice or the aid of those who had preserved her earnings and other property for her from youth to helpless old age. In ordinary business transactions a testator, a donor or a grantor, who desires the drawing of a formal instrument disposing of property, calls upon an attorney and tells him what is wanted. In the present instance the contract had been drawn in advance ready for execution without any evidence of a request from the inmate.

A considerable part of the testimony adduced by plaintiff was directed to the point that Eva Nelson understood the contract, was satisfied with it, and said so. Interested witnesses who were present testified that the contract was explained to her; that it was read to her four times, twice in English and twice in Swedish; that she seemed to understand it and said she understood it and was satisfied. Explanation was needed. Evidence to which credence should be given is to the effect that she was a native of Sweden and uneducated; could not write or read writing either in English or Swedish; could read only a little Swedish print and understood very little English; called on others to conduct her correspondence; never conducted, without aid, any important business for herself; could purchase groceries and other articles of little value, but did not trust herself in important matters or to make change in odd sums; depended on others to aid her in all important business transactions; had worked all her mature life as a domestic in homes and other places.

Notwithstanding testimony of interested witnesses that the contract was read, reread and explained, and that Eva Nelson said she understood it and was satisfied, there is convincing testimony that she never understood all her property would become the property of the hospital, if she died there. There is no evidence that she was asked directly if she knew that was what the contract meant.

Celia Johnson, a disinterested witness, testified she had known Eva Nelson 40 years; said she was frail and delicate; had worked all her life; was 82 or 83 years old at the time of her death; was not intelligent enough for ordinary conversation; called on her at the hospital just before Christmas, 1931, when Eva Nelson stated in effect she had paid $2,000 for her home and maintenance in the hospital as long as she lived; was to get back part of it if she left; that the reason she did not go to Immanuel Old People's Home was because that institution wanted her to sign over all her property to it and she did not want to do that.

Undisputed evidence shows that Eva Nelson was fond of her blood relatives; visited them; gave them presents; corresponded with them through friends with whom she made her home; bequeathed them, prior to the contract, her property by will which was duly probated July 22, 1932. Neither before nor after the date of the contract, therefore, according to undisputed evidence, did Eva Nelson intend to leave her property to plaintiff.

S. P. Swanson, also a native of Sweden, testified in substance that he was executor of Eva Nelson's will; that he was not related to her and was not a beneficiary; that he became acquainted with her in Sweden 60 years ago; that she was an orphan without education; that she had made her home with witness and his wife or their married daughter for 40 years; that she did not take care of her own business; that she had money and earnings; that witness invested money and earnings for her in her own name in the Omaha Building & Loan Association for over 40 years; that she never personally made deposits; that she never had possession of her pass-books, witness having kept them always—had them at the time of the trial; that she did not know what money she had and paid no attention when told about it; that he had handled her money for her ever since she earned her first dollar; that when she needed money he went with her to the building and loan association and helped her to get it; that he never charged

for his services and she never paid him anything; that his wife or daughter helped her to buy her clothing, and aided her at times when making change, wrote her letters for her and read to her the letters she received; that she had about $8,000 in addition to what she had paid to the hospital; that she told witness she wanted to go to plaintiff's hospital for life and would have to pay $2,000; that he had $400 of hers in a safe deposit box, took it out of the box and gave it to her and she paid the cash to Young, the head of the hospital, who gave her a receipt reciting that the 400-dollar payment was "on account hospital care;" that she did not know what the receipt meant and wanted to give it back; that witness, in the office of the building and loan association, transferred to Young from her account, $1,600, asked Young if that was all she would pay, and he said, "Yes, that is all she is going to pay;" that, when witness gave her the $400, she said to him: "I will pay the hospital $2,000 and I can stay there the rest of my days * * * and that is all I will pay;" that she never said anything to witness about the contract to leave her property to the hospital, if she died there; that he never knew about it until after her death; that he would have prevented her from taking that step had he known about it.

This testimony came from a witness who had no pecuniary interest in the estate of decedent, though he had managed and preserved it for her from the time she earned her first dollar until she died at the age of 82 or 83 years. His testimony, in view of all the circumstances, is entitled to credence and prevails over testimony of interested witnesses that Eva Nelson said she understood the contract and was satisfied after it was read and explained. No evidence adduced by plaintiff has been overlooked. It has all been considered in connection with the surrounding circumstances. The preponderance of the evidence is in favor of the executor on the issue that Eva Nelson did not understand all her property would become the property of plaintiff, if she died in the hospital, and

that her mind did not meet with that of plaintiff on the main provision of the contract.

The contract treats the $2,000 which plaintiff received as a donation, whereas Young gave Eva Nelson a receipt for $400 of that sum, reciting that it was on account of hospital care. The rest of the $2,000, or the 1,600-dollar item, was transferred to Young with the distinct understanding that the whole was for home, care and maintenance during life, without obligation for any further payment. It is clearly shown by evidence to which credence should be given that Eva Nelson was received at the hospital under a distinct agreement that the $2,000 which she had paid was for home, maintenance and care during life. It follows that the subsequent contract for the rest of her property for the same home, maintenance and care, if she died in the hospital, was without consideration, the contract itself showing that such property was not the subject of a gift.

Plaintiff can rightfully claim nothing under the provision allowing Eva Nelson to earn a dollar a week for labor. Her name was signed by Rose Wise, assistant superintendent of nurses, who testified that the former was a frail little woman who could not perform any physical labor. She did, however, work in the kitchen at different times and never received a penny for her services.

Looking through technical forms of the written instrument to truth, right and justice, as disclosed by the evidence, a court of equity is not bound to enforce the contract in controversy. The judgment of the district court is reversed, the contract canceled, and the proceeding dismissed at the costs of plaintiff in both courts.

REVERSED, AND DECREE FOR DEFENDANT.

HARRY WEINER, APPELLEE, V. AETNA INSURANCE COMPANY, APPELLANT: ROME MILLER, CROSS-PETITIONER, APPELLEE.

FILED JULY 13, 1934. No. 29195.

1. **Insurance: INCENDIARISM: CIRCUMSTANTIAL EVIDENCE.** The question whether an insured burned the building, covered by fire insurance policies sued on, may be established by circumstantial evidence.
2. ———: ———: **PROOF.** Each act and circumstance offered to prove fraudulent burning of insured building must contribute something to the proof of that fact.
3. ———: ———: **QUESTION FOR JURY.** A fraudulent fire can rarely be proved except by circumstantial evidence, and the question is for the jury if there is evidence of the fraudulent act.
4. **Evidence.** Civil actions are determined by a preponderance of the evidence, even though the defense relied on imputes a crime. It is not necessary to establish in a civil action the defense of incendiarism beyond a reasonable doubt.
5. **Appeal: DIRECTION OF VERDICT.** When court sustains motion of plaintiff to discharge jury and render judgment at close of defendant's evidence, the appellate court will assume the existence of every material fact which the defendant's evidence tends to establish, and give the defendant the benefit of logical deductions therefrom.

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

Crofoot, Frazer, Connolly & Stryker, for appellant.

Shotwell, Monsky, Grodinsky & Vance, Daniel J. Gross, Leon & White and *Hotz & Hotz, contra.*

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

PAINE, J.

This is an appeal from an order discharging the jury at the close of the defendant's evidence, and entering a judgment for plaintiff for the full amount of two insurance policies issued upon the Millard Hotel, Omaha, which burned February 8, 1933. Attorney fees were also allowed Abel V. Shotwell, Daniel J. Gross, and Fred S.

White in the sum of $229.28, and to William J. Hotz, attorney for Rome Miller, in the sum of $14.64.

The petition alleged that the Millard Hotel was located at the northeast corner of Thirteenth and Douglas streets, Omaha, and was a five-story brick building, and had a composition roof, and was protected from fire by a complete sprinkler system, and alleged the purchase of a $2,500 policy, attached to the petition as exhibit A, which would have expired May 21, 1933, being policy No. 17296.

The petition further alleged that about 10 o'clock p. m., February 8, 1933, a fire started in said building, which totally destroyed the building, without any act, design, procurement, or fault on the part of the plaintiff, and resulted in a total loss, and that the actual value of the building at the time of the fire was $170,000, and that plaintiff carried a total amount of fire insurance on said building at said time of $142,500.

Plaintiff further alleged that, at the time of the fire, the Central Life Assurance Society, an Iowa corporation, held a mortgage on the property, on which loan Rome Miller was an indorser on the notes secured by said mortgage, and had paid one of the notes in the sum of $5,000, and was subrogated to the rights of the mortgagee thereunder, and plaintiff prayed judgment for the face of the policy, with interest at 7 per cent. from May 1, 1933.

For answer to this petition the defendant, Aetna Insurance Company, admitted the issuance of the policy and the occurrence of the fire; denies that said fire was without fault, design, or procurement on the part of the plaintiff, and alleges the fact to be that said fire was brought about by the act, design, procurement, and fault of the plaintiff, for the purpose of attempting to collect on the large sums of insurance carried by the plaintiff upon said property. It is further denied in the answer that the value of the property was $170,000, and alleged that its fair and reasonable value at the time of the fire was not more than $50,000, although plaintiff was carrying a total amount of fire insurance upon it of $142,500.

A similar suit was brought by the same plaintiff against the same defendant in the district court for Douglas county, upon exactly the same kind of a policy, being policy No. 17344, for $2,500, for a like premium of $12.58, which second policy would have expired July 20, 1933, and similar pleadings were filed by each of the parties. On December 4, 1933, the trial court entered an order that the two cases be tried at the same time, said order being in effect an order for consolidation of the cases. On December 12, 1933, the trial having been in progress since December 4, and the defendant having rested, the plaintiff moved the court to discharge the jury and enter judgment in favor of the plaintiff, reserving the right to put in rebuttal testimony if the motion was overruled; but after argument the motion was sustained. On December 14, 1933, a motion for new trial was filed by the Aetna Insurance Company, hereinafter called the defendant, setting out eight grounds of error of the trial court, one of which was in not requiring plaintiff to rebut the evidence offered by the defendant for misconduct of the plaintiff, and because the decision of the court is not sustained by sufficient evidence, and is contrary to the weight of the evidence and contrary to the law.

The evidence discloses that Harry Weiner bought the Millard Hotel in 1918, and had conducted it since that time, and had been its sole owner since 1921. He bought the property for $120,000, paying $20,000 in cash, and giving back a mortgage for $100,000, which had been reduced about a half. The gross income from the hotel for the fifteen years had averaged over $50,000 a year, but during the recent depression years had declined until the gross income for 1932 was only $26,317.97, and it was indicated that the hotel could not be operated profitably on that income.

At the time of the fire delinquent taxes upon the hotel property had been paid by the Central Life Assurance Society, assignees of the first mortgage, in the sum of $6,500.12, and the decree of foreclosure was entered 23

days before the fire, showing the total amount due of $51,918.98, and a second lien for Rome Miller for $5,149.98, and a nine months' stay had been taken by Harry Weiner.

Exhibit No. 49, giving a record of all policies of insurance upon the Millard Hotel, was received in evidence without objection, and discloses that on the date of the fire there was a total of 43 policies of insurance in force, as follows: Two policies for a total of $40,000 against windstorm; five policies on the furniture, fixtures, and equipment, of a total amount of $36,500; one policy on use and occupancy of $27,500; four policies of rent insurance, amounting to $20,000; and 31 policies of fire insurance, amounting to a total of $142,500. A careful examination of the exhibit No. 49 discloses that $15,000 of fire insurance would expire in 34 days after the fire; $10,000 would expire 16 days later; $17,000 would expire 30 days later; and $14,000, 21 days later; or that, by May 21 following the fire, some $56,000 of the fire insurance on this building would have expired, involving an expense of between $2,000 and $3,000 to secure the usual annual renewals at the rate paid on the policies in suit.

On October 19, 1931, Mr. Weiner had given a chattel mortgage on all of his hotel fixtures and household goods as additional security to the holder of the first mortgage upon the hotel property. He also owed a bill for a carload of coal, of $638, and on October 21, 1932, Armour & Company transcripted a judgment for a small bill of $46, and the judgment was still unpaid. Will H. Thompson & Sons were suing him for $50 and attorney fees. E. H. Luikart, as receiver of the State Bank of Omaha, had brought suit against the plaintiff on October 16, 1931, upon promissory notes for $26,000, and recovered a judgment for $28,836.58 and interest on May 15, 1933.

The plaintiff owned a residence property at 2109 Webster street, Omaha, which had been mortgaged to the Omaha Loan & Building Association, and the balance due was $3,400.67, and payments on the loan were in arrears

in the sum of $705, and as of July 24, 1933, the taxes were delinquent in the sum of $307.95, and the association had threatened foreclosure prior to the time of the fire.

On March 14, 1930, the plaintiff had leased the Fifth Avenue Hotel in Omaha for 20 years, at a rental of $500 a month for the first two years, and higher thereafter, and had turned said hotel over to his son to manage. Alfred C. Kennedy, receiver, testified that on March 1, 1933, there was $6,300 rent delinquent on said Fifth Avenue Hotel, and that the taxes that plaintiff agreed to pay by the terms of the lease were delinquent in an amount of approximately $6,000.

Entry No. 8 of the abstract sets out that a suit for personal injuries was filed against the plaintiff and two others on December 24, 1932, and that the same was still pending.

In regard to the value of the Millard Hotel property at the time of the trial, several well-known realtors of Omaha testified that the value of property in that neighborhood was declining.

Edward M. Slater, a realtor, who had served on appraisal committees of the real estate board, made an appraisal of the Millard Hotel building in June, 1932, by actual inspection and observation. He testified that the hotel was 50 years old, of an old type of frame and brick construction, and was worth between $50,000 and $60,000.

Thomas F. Quinlan, a realtor for 15 years, who had sold and leased down-town property, including hotels, had also made an inspection and appraisal of the Millard Hotel in June, 1932. He testified that the hotel was about 52 years old, of wood and brick construction, and that on February 8, 1933, the Millard Hotel and the ground on which it was located were worth from $50,000 to $60,000.

C. D. Glover, for 31 years a realtor, making a specialty of appraisal work in Omaha, having considerable experience in the appraisal of hotel properties, testified that he was familiar with the Millard Hotel; that it was built in 1882, of ordinary brick construction; that the fair and

reasonable value of the hotel property, for a slow sale, would have been $50,000 at the time of the fire. In his cross-examination he was asked whether he knew that from 1918 to the time of the fire, a period of 15 years, the hotel had taken in from transients, regular roomers, and rentals of stores, a total of $851,575.11. This would indicate average receipts over a 15-year period of $56,770 a year. It was indicated that the income for 1931 had been $37,020.97, and for 1932 had been $26,317.97. Glover testified as to the business storerooms on the street floor in the hotel building; that there were seven store fronts facing Douglas street, one had been divided into two parts, and the bus station and a little additional space on the Thirteenth street side. He testified that a tailor shop and the bus depot paid no rent, and that four others were vacant at the time of the fire. He testified that the value of a commercial building was largely based on its earning capacity, and that the type of tenants had gradually changed.

The fire which destroyed the Millard Hotel started at about 10 p. m. on Wednesday, February 8, 1933. A guest from an upstairs room telephoned down that the hotel was afire, and an alarm was at once sent in. Between 10:04 and 10:12 several fire companies were present and had streams of water turned on the fire.

The fire started in what was known as the rehearsal room, which was entered from a main hall through double doors on the floor above the lobby. It was a very large room, about 80 feet long east and west and about 40 feet wide north and south, and was nearly two stories in height, and at the time of the fire was used as a storage room. It was filled with trunks, scenery, billboards, extra beds, chairs, and other furniture, and in the southeast corner had about 50 mattresses in two piles on the floor about 10 or 11 feet high, which had been left over from an American Legion convention, when Omaha hotels were all filled.

The bill of exceptions is found in several volumes, and in

this opinion we will confine ourselves to reciting briefly what the evidence shows occurred around the hotel within 48 hours of the fire.

Robert Hutchins had been night engineer in the hotel since January 1 preceding. His hours were from 5 p. m. to 7 a. m. He testified that Otto Maurer was day engineer. Their duties were to keep up steam and do whatever repair work was necessary around the hotel. He testified that, besides the main stairs to the floor above the lobby, there was a back entrance leading to the rehearsal hall; that you could go through a swinging door in the lobby that led towards the toilet, and you could go through a door to the left, and then up the back stairs to the first floor; that there was a little hallway there, which made a little jog, and then you could go right back to the rehearsal room. To go up to the rehearsal room this back way, it was necessary to have a key, as the door on the first floor was generally kept locked, and the key to that door was kept behind the desk in the lobby. On the evening before the fire occurred, February 7, Hutchins first saw Weiner about 8 p. m., coming through the door of the rehearsal room. Weiner asked him what he was doing, and he told him he was up in the laundry to see that nothing would freeze. Weiner said he was doing a little looking around too. He saw Weiner again that evening an hour or two later in the rehearsal room. He testified that water was coming down in front of the boiler, and that is how he happened to go back up to the rehearsal room; that Otto Maurer, the day engineer, was with him. They went into the rehearsal room through the double door back of the elevator. It was dark in the room. They could not turn on the lights. He got out his flashlight and put it on the ceiling, and then they saw Weiner up on a ladder 18 or 20 feet long. He had it leaning up against a sprinkler pipe, and Weiner was up on that ladder and had a piece of pipe in his hand, which was disconnected, and water was dripping out of the pipe. That he asked Weiner what was going on up there, and he made no answer for quite a

little bit. Then Mr. Maurer asked him what was wrong, and then went over by the side of the door and hooked two wires together, and that made a light in the rehearsal room. That Mr. Weiner had on a unionall coverall and a cap, and had a flashlight in one hand. After the lights were lighted, Hutchins noticed a rubber hose, about the size of a garden hose. It was lying on the floor, with one end sticking out the window. That after the lights were lighted, Weiner came down off the ladder, went into a little room just off to the north of the mattresses from the rehearsal room, and changed his clothes. That he had never seen him do any manual work around the hotel before, and had never seen him dressed in coveralls before, and had never seen him working around ladders or the sprinkler system before that time. That if anything happened in the way of leaks, the witness, Hutchins, fixed them if he could during his night shift, and if he could not, that Mr. Maurer fixed them the next day. That after Weiner finished changing his clothes he went down to the lobby, and the witness went to the basement.

Gail Hood testified that he had been living at the Millard Hotel with his wife for about four years before the fire, and occupied room No. 302, which was nearly over the rehearsal room. He and his wife had been in the show business for years, in character and comedy parts, and had trunks filled with costumes, clothes, etc., all of their personal property in the hotel being set out in an exhibit, and amounting to about $1,600, which was all lost at the time of the fire. Mr. Hood worked two months as a night engineer at the hotel during October and November, 1932. Mr. Weiner let him out because he did not have a license, and the city inspector complained, but he occasionally worked around the hotel for Mr. Weiner. He owed Weiner between $300 and $400 for room rent, and a restaurant bill of $90 at the time of the fire. On February 7, the evening before the fire, he was loafing around the lobby, and went down in the basement to talk to Robert Hutchins, the night engineer. When he got to the basement, both

Otto Maurer, the day engineer, and Robert Hutchins, night engineer, were there. There was a lot of water down in the basement on the floor, which came from the sprinkler up in the rehearsal hall, and he and Maurer went up to look at the sprinkler. There was no light in the rehearsal hall that night, because there was a fire in the switch that afternoon and the switch had been disconnected, but it could be lighted by putting the two little ends of the wires together. Maurer turned his flashlight to look at the sprinkler system, and it had been taken apart. The pipe was disconnected at the ends. There was a plug in one end that led to the water, and the pipe was sagging down. The sprinkler heads were about eight feet apart across that room. There was a hose in the room, one end lying over by the window and the other end below the sprinkler. After he went to his room to go to bed, he got a telephone call, and went back downstairs and asked Maurer what he wanted, and was told to go back to the carpenter shop and help Robert Hutchins bail out water. Water was running out of the coal bin under the stoker pit, so they baled the water out for 15 or 20 minutes to keep the water from getting around the electric motor there. They then went back to the lobby and Maurer decided to get a room and stay there all night. Hood got up about 6:30 the next morning, February 8, and in going downstairs looked into the rehearsal hall. The hose was not in there, and he had never seen a hose there before. He worked all day the 8th, helping Otto Maurer tend the fires. About 2 p. m. Weiner came down to the basement and went in the tool room. He had a pair of shears and a piece of cardboard. About 5 o'clock that afternoon, before Maurer left, he showed Hood how to run the freight elevator. Hood had never run it before. Hood had some of Maurer's furniture stored in his room. It had been there all winter, to save storage on it, as Maurer and his wife got new stuff and moved it into an apartment. Hood had supper in his room, and went down to the rehearsal room a little before 7 p. m. and threw his flashlight on the

sprinkler, and it had been put back together, but part of the false ceiling in the room had been taken out in checkerboard shape. Three or four pieces about four feet square had been taken out right above the mattresses. At about 8 o'clock he and his wife went down to the lobby. Witness described how a person could leave the lobby and go up to the rehearsal room through the back entrance, and, leaving his wife, he started to go up the back steps that led to that door, and when he started to open the door Mr. Weiner turned the doorknob on the other side, and they met. This happened at about 9:40 that evening. He testifies that Weiner went back to the desk in the lobby, and Hood went upstairs to his room and started to pack. He did not stay in the room very long, and went down to the basement. While in the basement his wife came to the basement steps, holloing "Fire." The electric lights went out about the same time. He took his flashlight and went to the sprinkler valve to see if it was turned on, and the gauge indicated that it was turned on. When he got up to the lobby he looked up through the glass in the dome and saw a flame on the south side of the rehearsal hall. He testified that Weiner was back of the desk at the switchboard; that Jack Lindee and he started upstairs to see if they could salvage some of his stuff. That Lindee's mother's room was right across the hall from his room. On the way up to his room with Lindee, they opened the double doors to look into the rehearsal hall. Something seemed to be wedged against them, but they pushed and looked into the rehearsal hall and saw plenty of fire. The fire was where the mattresses were. It was awfully hot in there, and he had to put his hand to his face to keep it from burning, it was so hot. There was no water coming from the sprinkler system, so far as he could see.

Jack Lindee, 19 years old, resided with his parents in the Millard Hotel. He was in the lobby when the fire started. He went up the stairway and was between the first floor and the second floor above the lobby when the lights went out. With Gail Hood he went to the rehearsal

room and opened the double door leading from the hall into the room. He saw the whole back end of the rehearsal room burning like a wall of fire. It was only a minute or two after he had learned the hotel was on fire when he got into the rehearsal room five or six feet. The rehearsal room had some kind of a false ceiling in it; sprinkler pipes hung from the ceiling, and the flames were reaching the ceiling at the time he backed out.

Mrs. Vera Hood testified that she was seated in the lobby just before the fire, and that she was watching Weiner; that he picked up the keys after her husband left, and went right back through the swinging door and turned to the left, and did not go back to the toilet room; that they went to their room and stayed a few minutes and went back down to the lobby; that Weiner was not there, but she next saw him coming back from the same direction he had gone. He did not come out of the toilet room, but came from the left, where he went through the swinging door to the north, and went back to the desk again; that he was brushing his hands as he came through the swinging door, and just then the lights began to flicker in the lobby, and that she happened to look up at the glass dome and she could see fire where the rehearsal room is, and the colored boy came running down the steps, went to the desk, and told Mr. Weiner the second floor was on fire.

Henry Glade had been a captain of the Omaha fire department for 12 years; had served 24 years on the department. He served at Station No. 3, Nineteenth and Harney streets; received the first alarm at 10:04 p. m. from the box at the southwest corner of Thirteenth and Douglas. His men went up on the canopy on the Thirteenth street side of the Millard Hotel, and had water on the fire within six minutes after the alarm. They looked into the large rehearsal room and saw fire coming from the ceiling above. The fire was all dropping down from the ceiling. It was one of the hottest fires that he ever attended while on the fire department. The entire rehearsal room was afire. He states that water had no effect on it whatever.

He testified a stringy fire came down from the ceiling, and it looked like it was burning liquid falling from the ceiling. He directed his hose at the place where the fire was dropping, and it had no effect on it whatever.

James F. Matcha testified he had been a city fireman for 16 years. He was with Captain Glade on the canopy; had one foot on the window, but could not get into the rehearsal room because it was one mass of flames. Fire came down from the ceiling like a rolling ball. It was a roaring furnace. He saw no water coming from the sprinkler system while he was at the fire.

Harry Sydnor, a city fireman for 17 years, was a member of Company No. 5. The other members were Captain Thomas Shandy, George Brandt and John Cogan. Sydnor testified that his boot got full of water, and he went down the ladder to empty it, and while down there was a crash of the wall, and all of the other members of his company were killed. He also testified that he saw no water coming from the sprinkler system, and that he saw stringy burning stuff dropping from the ceiling.

Leo Lenz, a city fireman, testified that he had attended between 2,000 and 3,000 fires, including every kind of burning material. He got a step or two into the rehearsal room and then backed up. The fire was "falling from above in a kind of liquid mass, burning and awful hot." Quite a number of times there were explosions in the fire. He saw no water coming from any sprinklers at any time during the fire.

Earl Graham testified he had been a member of the Omaha fire department 24 years, and was captain at Station No. 12; that they went to the hotel on the second alarm, which was 4 to 6 minutes after the first alarm; that they got to the fire in about two minutes, and went up on the canopy to fight the fire. He said he could see burning stuff dropping down from the ceiling, "quite a ways back from the top," embers and stringy-looking stuff; that water had little effect on the fire.

Harold Hoden, a fireman, said it took about three

minutes to get there; that he was on the fire escape on the north side of the building. He described the fire as a roaring blast and fire; that water did not have much effect on it; "it looked like there was a liquid fire of some kind."

Chris Wahl was a carpenter, doing odd jobs at times for Weiner, and testified that the afternoon of the fire in the rehearsal room he was requested by Weiner to fix a hole in the end of a pole about 20 feet long; that he asked Weiner if he wanted a hook put in it, but Weiner stated he had ready what he wanted to use it for; that the witness last saw the pole in the rehearsal hall.

Lucius L. Dunaway, fire protection engineer for the Nebraska inspection bureau, reached the fire at 10:20 p. m., and stayed there all night. From a room in the Dodge Hotel across the alley, he had a good view into both the second and third floors of the Millard Hotel. He was familiar with the automatic sprinkler system, and in the glare of the flames watched the sprinkler lines, but no water came from any of the sprinkler heads. One of these heads was introduced in evidence. He said that these little bars, called links, melt at 160 degrees, and melted one of them with a lighted match before the jury. He explained that when the link melts it releases the cap sealing the water in, and the water rushes out, when the system is working, through a half-inch opening, at the rate of 50 gallons a minute, strikes a deflector above the opening, and sprays out in a large circle. The next day after the fire he examined many of the lines of the sprinkler system, and found many places where the fusible links had melted, but the sealing caps were still sitting loosely in place, showing no force of water in the pipes of the automatic sprinkler system to raise off the caps.

The evidence shows conclusively that the automatic sprinkler system was out of commission on the night of the fire, and no water came from any of the jets observed. The evidence shows that the plaintiff was found working with the system, and having a disconnected pipe of the system in his hand, and, as water was dripping from the

disconnected parts, that the system was not frozen. The fire insurance policies in suit carried a rider, reading: "Automatic Sprinkler Clause No. 2. This policy being written at a reduced rate, based on the protection of the premises by automatic sprinklers, it is a condition of this policy that, in so far as the sprinkler equipment and the water supplies therefor, are under the control of the insured, due diligence shall be used by the insured to maintain them in complete working order, and that no change shall be made in said water supplies without the consent of this company in writing."

At the close of the defendant's testimony, plaintiff moved the court to discharge the jury and enter a judgment for the plaintiff, reserving, however, the right to put on testimony in rebuttal should this motion be overruled. After argument the court sustained this motion, and made this statement to the jury: "Gentlemen of the jury, it seems a waste of your time to have kept you here during all this time and not have the issues between the parties determined, but the facts of the matter are, as I said to you, this is the first of a series of about thirty cases involved in this fire, and if this were the only one of the cases the court might hesitate much longer in determining this as a matter of law. It being the first of that series, and the defendant having an opportunity to appeal this and have the questions of law determined which would affect all of the other cases when they would be tried, I think it is a valuable saving of time ultimately to have the law of this case determined and have the defendant know just where it stands with respect to the law of its case." And thereupon the court discharged the jury and entered judgment for the plaintiff.

In the bill of exceptions we find a great deal of unnecessary record made of conversations between the attorneys, and some comments made to witnesses by attorneys which were entirely improper. The rulings upon evidence were as strict in a few points as if it were a state case for arson, but on another trial such errors will doubtless not occur.

In the briefs, of over 400 pages, counsel have presented to the court every legal phase involved, but only a few of the points can be discussed in this opinion.

1, 2. A case somewhat in point is that of *Girard v. Vermont Mutual Fire Ins. Co.*, 103 Vt. 330, holding that the question of whether insured burned the building, covered by fire policy sued on, might be established by circumstantial evidence. Each act and circumstance offered to prove fraudulent burning of the insured building must contribute something to the proof of that fact. When fraud is the issue, the evidence necessarily takes a wide range.

"So here, though the fraud in its ultimate aspect was the burning of the buildings, any fact or circumstance, before or after that event, which in any way indicated a purpose to accomplish that fraudulent result was admissible. Indeed, that ultimate fact might be wholly established by circumstantial evidence. * * * And, when such evidence is resorted to, objections to testimony on the ground of irrelevancy are not favored because the force and effect of circumstantial facts depend largely upon their relation to each other; and acts and circumstances, although wholly inconclusive when separately considered, may by their number and joint operation be entirely sufficient to establish the *factum probandum.*"

3. In *Bruff v. Northwestern Mutual Fire Ass'n*, 59 Wash. 125, the fireman designated it as a flash fire. No one had been in the place since the defendant left it. We think the evidence tending to show a destruction by fire of incendiary origin, and connecting the respondent therewith, should have been submitted to the jury for their consideration. It is held in many cases that, in a matter of this sort, if there is any evidence that the fire was incendiary, the matter should be submitted to the jury.

In *Lesser v. Jefferson Fire Ins. Co.*, 133 S. W. 551 (141 Ky. 667) it was said: "A fraudulent fire can rarely be proved except by circumstances, and the question is for the jury if there is any evidence at all of the fraudulent act."

It is earnestly insisted that there is no proof that he set the house on fire. Our rule is that the question is for the jury if there is any evidence, and we cannot say that there was no evidence, in view of all the circumstances.

In *Catalanotto v. Minneapolis Fire & Marine Ins. Co.*, 15 La. App. 320, it is firmly established that in cases of this kind circumstantial evidence is not only admissible, but is usually the only evidence obtainable, since it is very evident that in almost no instance can direct testimony of eyewitnesses be obtained. Persons desiring to burn their property for the purpose of collecting the insurance, or for any other illegal purpose, do not discuss their intentions with others, nor do they carry out such intentions in the light of day. See, also, *Dunn v. Springfield Fire & Marine Ins. Co.*, 109 La. 520; 14 R. C. L. 1223, sec. 403. "Public policy will not permit a recovery by one who seeks to profit through his own crime." *Smith v. Germania Fire Ins. Co.*, 102 Or. 569, 19 A. L. R. 1444. See *Kimball Ice Co. v. Hartford Fire Ins. Co.*, 18 Fed. (2d) 563, 52 A. L. R. 799; *Bellman v. Home Ins. Co.*, 178 Wis. 349, 27 A. L. R. 945.

4. As the wilful or fraudulent burning of insured property is usually criminal, the question at once arises, if the defense to a suit on the policy is that the property was fraudulently burned, will it be necessary to prove such defense beyond a reasonable doubt, as would be required in a criminal case of arson, or should the defense be simply required to prove that fact by a preponderance of the evidence?

It appears that Illinois courts, with the exception of one case, have uniformly held that such a defense must be proved beyond a reasonable doubt, there being several citations of Illinois cases in 26 C. J. 542. We also find a very few early cases to the same effect, such as *Schultz v. Pacific Ins. Co.*, 14 Fla. 73, decided in 1872, in which action was brought to recover $6,000 insurance on freight shipped on a North German barque, "Mutter Schultz," from Pensacola to England. The defense was that the

vessel was designedly cast away or run ashore, and that the jury must be satisfied of this fraudulent purpose beyond a reasonable doubt. This decision and other early holdings followed the early English case of *Thurtell v. Beaumont,* 1 Bing. 339, 130 Eng. Reprint 136, decided in 1823. The plaintiff in the case at bar says in his brief: "Where the defendant relies upon the defense that property insured was destroyed by the wilful act of the insurer, he must specially plead and prove such defense, that is to say, the defendant has the burden of proving that the plaintiff committed arson"—citing *Herpolsheimer v. Citizens Ins. Co.,* 79 Neb. 685.

However, in 26 C. J. 542, we find citations from the federal courts, and from 20 states which have passed upon the question, declaring that such an action is but a civil case, and that the true rule is that it is not necessary to establish in a civil action the defense of incendiarism beyond a reasonable doubt. The supreme court of Alberta held that the unwisdom of the burdensome rule of evidence appears when one considers the modern extensions of the criminal law, and that many cases of fraud, and even of negligence, may now be crimes. *Laidlaw v. Hartford Fire Ins. Co.,* 29 D. L. R. 229. See *Brooks v. Liverpool & London & Globe Ins. Co.,* 144 So. (La. App.) 788.

In *Silverstone v. London Assurance Corporation,* 176 Mich. 525, the defense was the wilful burning by insured. It was held generally that the court should permit the widest latitude in cross-examination of plaintiff, and that an instruction requiring that the jury must be convinced that the "greater weight of circumstantial evidence" establish the fact of wilful burning required too high a degree of proof, it only being necessary to establish the defense by a preponderance of the evidence. In this case the evidence was to the effect that plaintiff's business was a losing one, and that he was in embarrassed financial circumstances, and in urgent need of money.

There should be no doubt on this point, and this court takes the stand, with the great majority of the courts, and

with the more recent trend of opinion, that it is only necessary to establish the defense of incendiarism by a preponderance of the evidence.

5. An appellate court, in reviewing an order discharging a jury at the close of the defendant's evidence, and entering judgment for plaintiff, will consider such motion as a demurrer to the defendant's evidence, and will assume the existence of every material fact which defendant's evidence tends to establish, and give the defendant the benefit of the logical inferences therefrom, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have entered such judgment therein. *Kehl v. Omaha Nat. Bank,* 126 Neb. 695; *Zielinski v. Dolan, ante,* p. 153; *Bainter v. Appel,* 124 Neb. 40; *In re Estate of Hoagland,* 126 Neb. 377; *Meyer v. Omaha & C. B. Street R. Co.,* 125 Neb. 712; *La Fleur v. Poesch,* 126 Neb. 263; *Gilbert v. Bryant,* 125 Neb. 731.

It is the province of a jury, and not the court, to determine whether one witness, or one set of witnesses or another, is telling the truth.

Many other questions are discussed in the briefs, but in a new trial they may not arise.

For the reasons stated herein, we find that the trial court erred in discharging the jury and entering judgment for plaintiff.

REVERSED, AND NEW TRIAL ORDERED.

EARL H. WILKINS, ADMINISTRATOR, APPELLEE, V. WALTER SKOGLUND, APPELLANT.

FILED JULY 13, 1934. No. 28824.

Bills and Notes: CANCELATION. When the payee voluntarily destroys a promissory note with the intention of canceling the debt, he thereby discharges the obligation under that provision of the negotiable instruments act which states, in effect, that a negotiable instrument may be discharged by intentional can-

celation thereof by the holder, although another provision of said act declares that the holder may renounce his rights under the instrument, but that a renunciation must be in writing.

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

Waring & Waring, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and PAINE, JJ., and MEYER, District Judge.

MEYER, District Judge.

This is an action by the administrator of the estate of August Skoglund against Walter Skoglund, son of the deceased; the petition declaring upon a lost note for $2,000, which said note was made, executed and delivered by the defendant to his father. Defense was made on the ground that said indebtedness had been duly satisfied and paid or forgiven by August Skoglund in his lifetime.

The evidence discloses that the note in question was given November 8, 1930, and was due in one year; that August Skoglund died September 5, 1932, leaving two children, Walter, the defendant, and Clyde, and that for some time prior to his death he made his home with Clyde upon a farm owned by the said August Skoglund; that he kept his papers at the home of Clyde, in a trunk in his room upstairs; that among his papers in the trunk, opened after his death, were certain liberty bonds and his canceled check for $2,000 by which he had advanced to defendant said sum at the time said note was given, but that the note in question could not be found.

Defendant's wife testified that in the spring of 1931 she had a conversation with August Skoglund at their home in the presence of her husband, the defendant, and the defendant offered to prove by her that August Skoglund then talked with her concerning the note in question and told her that he was indebted to Walter Skoglund in the approximate sum of $500 for two years' board and lodg-

ing; that he had given certain property to his son Clyde, and that in order to equalize between his two sons he had destroyed the note given by his son Walter, and further offered to show that some time during the following summer her father-in-law again made substantially the same statement to her. Defendant also offered to prove that he had had a conversation with his father concerning the note in question; that his father told him that as Clyde had received an automobile and some other property from him, which was of the approximate value of $2,000, he had destroyed the note given him by Walter, and then and there told defendant that the note, having been destroyed, would not be collected by him and that it would not be found or available after his death. These offers were objected to as incompetent under the statute (Comp. St. 1929, sec. 20-1202) on the ground that the adverse party was the representative of the deceased person, and for the further reason that the defendant was seeking to prove a rescission by parol testimony. The objections were sustained by the trial court and the evidence excluded. Offers of proof by the wife's testimony that August Skoglund had lived with the witness and her husband, and that he did in fact give Clyde certain property, were also rejected as incompetent, whereupon defendant rested. Verdict was directed for plaintiff. Defendant has appealed.

It is now virtually conceded by the plaintiff that the prohibition of the statute referred to in the objection does not apply to the wife of the defendant. There being no real estate involved, she does not have a direct legal interest in the result of the proceeding and the objection to her testimony for this reason was therefore without foundation in fact. It is equally clear, we think, that the defendant's testimony comes directly within the prohibition of such section, unless same was waived. The administrator called the defendant as his witness and asked him concerning the making of the note, which he admitted, and also asked him if he had paid the note, to which he replied in the negative. Defendant contends that plaintiff thereby

waived, under the statute, any objection to the admission of the defendant's conversation with his father. We do not think that the testimony elicited from the defendant waives the bar of the statute as to such conversation concerning an alleged destruction or renunciation of the note. No testimony was adduced by the administrator of any conversation with August Skoglund. The nonpayment of the note cannot be said to be a transaction. Defendant's evidence that he had not paid it was merely negative in character and showed an absence of a transaction. The only transaction touched upon by the plaintiff was the making of the note. This does not waive the bar to additional, other or different transactions or conversations occurring several months later. *In re Estate of Neckel,* 80 Neb. 123; *Dickenson v. Columbus State Bank,* 71 Neb. 260; *Bergfield v. Bergfield,* 124 Neb. 67.

We next consider the principal question presented by the record, to wit: Was the wife's testimony concerning the conversations with the said August Skoglund otherwise objectionable? Plaintiff insists that a release of liability of a maker of a negotiable instrument cannot be predicated on oral testimony; that a cancelation, to be effective, must be in writing unless the note is delivered up to the maker, and cites in support thereof section 62-804, Comp. St. 1929, as follows: "The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." Defendant contends that the section cited does not apply where the payee intentionally destroys the evidence of the indebtedness with the intention of canceling the obligation; relying upon section 62-801, Comp. St. 1929, as follows: "A negotiable instrument is discharged: First. By payment

in due course by or on behalf of the principal debtor; Second. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation; Third. By the intentional cancelation thereof by the holder; Fourth. By any other act which will discharge a simple contract for the payment of money; Fifth. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

In support of his position, plaintiff cites *Pitt v. Little,* 58 Wash. 355; *Baldwin v. Daly,* 41 Wash. 416; *Whitcomb v. National Exchange Bank,* 123 Md. 612; *Leask v. Dew,* 184 N. Y. 599; *Portland Iron Works v. Siemens,* 135 Or. 219; *Kohn v. Zaludek,* 38 S. W. (2d) (Tex. Civ. App.) 110; *Ott v. Stone,* 225 Mo. App. 132; *Engle v. Brown,* 202 Mo. App. 345. These cases hold that under the uniform negotiable instruments act the third and fourth methods of discharging a negotiable instrument, as set out in our negotiable instruments act at section 62-801, above, are controlled by the provisions of section 62-804, above; that the word "renunciation" in the negotiable instruments act is used in the sense of release; that it not only describes the act of surrendering a right of claim without recompense, but that it also includes the relinquishment of a demand upon an agreement supported by a consideration, and that, in the absence of any written release or surrender of the note to the maker, the maker is not relieved from liability, even in those cases where accord and satisfaction are shown.

A review of the other decisions which have been brought to our attention discloses a rather long line of cases holding that the provisions of the negotiable instruments law, corresponding with the provisions appearing in section 62-804, above, providing that renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon, does not apply to a discharge of a note by novation, accord and satisfaction, or estoppel.

In *Gorin v. Wiley,* 215 Ill. App. 541, it was held that the renunciation section did not apply to a discharge by no-

vation. The court observes that this "section was undoubtedly intended to protect the innocent holder of a negotiable instrument from the necessity of meeting a defense of payment to or discharge by the original payee while the instrument was in his hands." To the same effect is *Nelson v. Hudson,* 221 Mo. App. 211.

In *Epstein v. Gradowitz,* 76 Cal. App. 29, it was held that the failure to surrender the instrument did not defeat an oral renunciation made for a valuable consideration, where the holder, as a part of the arrangement, promised to return the instrument to the maker, and there were not involved any rights of innocent third persons.

In *Bradley & Metcalf Co. v. McLaughlin,* 87 Okla. 34, the renunciation section was held not to apply to accord and satisfaction.

In *McGlynn v. Granstrom,* 169 Minn. 164, the court cites and disapproves the line of decisions first set out above, and says that the first section of the negotiable instruments act enumerates the methods whereby a negotiable instrument is discharged and "attaches that result to intentional cancelation or 'any other act which will discharge a simple contract for the payment of money.'" The court says further that "renunciation" of the one section of the statute is different from the "discharge" of the other section; that a writing was not an essential element to every discharge of a negotiable instrument of the law merchant, which it was sought to express and make uniform by the negotiable instruments act; that "it would be a radical as well as an impractical departure to make essential to any of the discharges * * * a written memorial of the transaction;" and says that under the discharge section "the cancelation of a negotiable instrument discharges it. Although it may well be in effect a renunciation of the maker's rights against all the parties and discharge them, it certainly need not be in writing. It may be by purposely burning the instrument or otherwise destroying it. *Henson v. Henson,* 151 Tenn. 137, 37 A. L. R. 1131."

In *Jones v. Wettlin,* 39 Wyo. 331, the court, after citing the line of cases cited by plaintiff and reviewing the origin of the section on renunciation, states that the negotiable instruments law adopted in the various states of this country is modeled after the British act, and that the only effect of the statute is that a renunciation, if in writing, is now valid in this country though made without consideration—citing Williston on Contracts, sec. 1833, with a note stating that the rule as laid down in *Baldwin v. Daly, supra,* is unsound. The court further states that a simple contract may, among other things, be discharged by novation and by accord and satisfaction, and this without writing or delivery of the instrument evidencing the previous indebtedness; that this was the rule of the law merchant and remains in force. The court says further: "Unless, therefore, the section on renunciation was intended to be read in connection with section 4052, *supra,* and was intended to control it, the methods of discharge under these sections must be considered as independent of each other, and as referring to different situations. * * * If the section on renunciation controls section 4052 when the discharge is by novation or accord and satisfaction, it would seem that it would control that section as well when the note is in fact paid by money, and this would seem to lead to the absurd result that payment cannot be shown, unless the fact thereof is in writing or unless the note or bill is delivered." To the same general effect are *Lockhart State Bank v. Baker,* 264 S. W. (Tex. Civ. App.) 566, and *Hall v. Wichita State Bank & Trust Co.,* 254 S. W. (Tex. Civ. App.) 1036. These cases are discussed in detail in *Henson v. Henson,* 151 Tenn. 137, from which we quote at length hereafter.

We find, then, some conflict in the authorities, with the better reasoned cases holding, with reference to the matters in them litigated, that the renunciation and discharge sections are independent of each other and refer to different situations and that "renunciation" as used in the negotiable instruments act refers to the formal and express

release of the common law. None of these cases, however, are cases in which is involved the effect of a voluntary destruction of a note by the payee, although it seems to be well settled, at least at common law, that the destruction by the donor of the evidence of indebtedness with the intention to make a gift to the debtor is sufficient forgiveness of the debt. See *Henson v. Henson, supra,* and cases therein cited on this point.

The only case called to our attention or that we have been able to discover in which the facts are substantially identical with those in the case at bar is *Henson v. Henson,* cited in *McGlynn v. Granstrom, supra.* In that case, plaintiffs purchased of W. R. Henson, the father of the plaintiff, L. A. Henson, several tracts of land, giving a series of notes therefor. The first note was paid, and later W. R. Henson died. Before his death he declared to members of his family and others his intention of forgiving the plaintiff's indebtedness, and in order to carry out his intention, he directed Mrs. Lulu Henson, wife of the defendant J. A. Henson, to burn said notes, which she did. Action was brought by the administrator of the estate of W. R. Henson for the collection of these notes. Defendants insisted that under the provisions of the negotiable instruments act the discharge or cancelation must be in writing in order to be effective. The court said:

"When the two sections above quoted are construed together, it is apparent that they are neither inconsistent nor in conflict. Section 119 provides five acts which constitute a discharge. Section 122 provides that a note may (also) be discharged by renunciation provided the renunciation is in writing. In the first section the legislature did not see proper to require that the discharge be in writing, while in the other section it did. It is unnecessary to discuss the reason for this distinction.

"In *Lockhart State Bank v. Baker,* 264 S. W. (Tex. Civ. App.) 566, this question was involved, and the court in its opinion said:

" 'The question, therefore, is whether subdivision 4, sec.

119, negotiable instruments act (article 6001-119), providing that a negotiable instrument may be discharged by any act which would discharge a simple contract for the payment of money, is limited or controlled by article 6001-122, relating to discharge of such instrument by express renunciation, and requiring it to be in writing. Appellant's contention has been recently decided adversely to it in the case of *Hall v. Wichita State Bank & Trust Co.*, 254 S. W. (Tex. Civ. App.) 1036, in a well-considered opinion by the Amarillo court of civil appeals, and in which a writ of error was refused by the supreme court November 12, 1923. We quote the following from this opinion:

" ' "From what has been said it seems apparent to us that it was the intention of the lawmakers by section 122 to deal with the formal and express release of the common law, and by the provisions of section 119, par. 4, to continue in effect other recognized methods of discharging obligations of this character. An express release is not necessary to a discharge by novation. The intention or agreement to accept the new obligation in lieu and discharge of the old may be implied."

" 'The method of discharging the note in suit in the *Hall v. Bank* case, *supra*, was by novation; while the discharge of the note in suit in the case at bar was by accord and satisfaction, and by equitable estoppel, or estoppel *in pais*. These methods of discharging simple contracts were recognized by the common-law and equity courts, and we are clear in the view that it was not the intention of the legislature to preclude these defenses by enacting article 6001-122, *supra*. It is evident that it was the intention of the legislature to incorporate in this article of the statute the common-law rules as announced by the text-writers and adjudicated cases of both England and America, which declared that a contract might be released by a formal instrument for that purpose without the necessity of showing a consideration therefor; or upon payment of a less consideration than provided in the contract and a surrender to the debtor of the instrument evi-

dencing the contract for cancelation; such was considered in law equivalent to a release in writing. See 1 C. J. 543, sec. 46, notes 8, 9, and 10, and cases there cited. * * *

" 'It is also clear to our minds that it was the intention of the legislature, in enacting article 6001-119, and the various subdivisions, *supra,* to incorporate in the statutory law other methods of discharging negotiable instruments, which had theretofore been declared by the common law to discharge a simple contract. Neither of these sections relate to, limit, or control the other, but relate to and control separate and entirely distinct matters. We therefore do not sustain appellant's contention that it was the intention of the legislature in enacting section 122, *supra,* to cover all character of discharge of negotiable instruments, and to preclude thereafter proof of any character of discharge by oral testimony.' "

The court then held that the destruction of the instrument constituted a cancelation and that the cancelation need not be in writing, and stated further that the payee, having intentionally destroyed the best evidence of the debt, will not be permitted to establish the same by secondary evidence and that the administrator stands upon no better ground than the trustee.

We agree with the conclusions reached by the Tennessee court, and the trend of the prevailing opinions interpreting the sections of the negotiable instruments law in question tends to support such holding. It follows then, under this view, that the rulings of the trial court excluding the wife's testimony were prejudicially erroneous.

The judgment of the trial court is hereby reversed and the cause is remanded.

REVERSED.

RUTH M. JENSEN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JULY 13, 1934. No. 28971.

1. **Damages: INSTRUCTIONS.** An instruction is erroneous which tells the jury that, in fixing plaintiff's damages in a personal injury action, they may consider the pain and suffering and loss of earnings which plaintiff will in all probability suffer in the future; only such pain and suffering and loss of earnings as the evidence shows with reasonable certainty plaintiff will experience in the future may be considered by the jury. *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60.
2. **Trial.** Testimony in rebuttal that the defendant company, at the time of the trial, had poles on its lines at other places, set closer together than defendant's witnesses had placed the location of its poles in the vicinity of the accident at the time the pole in question was removed eight years before, was improper and such testimony was irrelevant.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Kennedy, Holland & De Lacy and *E. J. Shoemaker*, for appellant.

Frost, Hammes & Nimtz and *Frederick L. Wolff, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and RAPER and TEWELL, District Judges.

RAPER, District Judge.

The plaintiff, Ruth M. Jensen, appellee, bases her right of action upon the allegations that the defendant, Omaha & Council Bluffs Street Railway Company, a corporation, appellant, prior to July 17, 1932, had maintained a pole, about 14 inches in diameter, between the curb and sidewalk on the east side of Twenty-second street a few feet north of the intersection of said street and sidewalk with the paving on Burt street in Omaha, and that at some period before that date the defendant removed the pole and negligently permitted the hole, about 23 inches deep and 14 inches in diameter, thereby made to remain open and uncovered, which hole became obscured by growing

vegetation, and plaintiff being unaware of said hole, without fault on her part, stepped into said hole on July 17, 1932, and sustained severe injuries. The defendant answered by general denial. The cause was tried to a jury and verdict returned for plaintiff. The defendant appeals, relying principally upon four alleged errors: First, that the evidence is not sufficient to sustain the verdict; second, that the verdict is so grossly excessive as to show it was the result of passion and prejudice; third, that the court erred in giving instruction No. 3; fourth, that the court erred in admitting improper and prejudicial evidence offered by plaintiff in rebuttal.

As to the first proposition, it is admitted that the defendant company, in the summer of 1925, removed its tracks and poles from Twenty-second street and Burt street near the scene of plaintiff's accident. It is plaintiff's claim that, in removing its lines, it took up the pole at the place in question and neglected to fill the hole where the pole stood. The defendant contends that it never had a pole at that place and never removed any pole at that place, and it is further the contention of defendant that there was not sufficient evidence introduced to sustain a finding that the hole into which plaintiff stepped resulted from the removal of a pole by defendant in 1925.

The plaintiff called only two witnesses who attempted to fix definitely the location of the pole which resulted in leaving the hole. Mr. Richards testified he had lived on Burt street since 1920 (he does not state how near he lived to the place in question); that he is a night watchman and works from 5:30 in the evening until 5 in the morning; that the defendant company removed its tracks and poles at Twenty-second and Burt streets about 1925; that there were red poles on each side of the street that supported the trolleys; that there was a pole on the northeast corner of Twenty-second and Burt streets, and that the pole was taken away by men using equipment upon which appeared the name Omaha Street Railway Company. He was then asked this question: "Mr. Richards, do you

know whether or not the hole, after the pole was removed on the northeast corner of Twenty-second and Burt streets, was ever filled?" To which he answered: "It was filled after the lady got hurt." "Q. How long has that hole been there, if you know? A. It has been there ever since they took the pole down until the lady got hurt."

Mr. Harry B. Symes, who has lived at the southwest corner of the intersection of Twenty-second and Burt streets since 1905, and is in the fuel business, was asked if he knew where the hole in controversy was, and answered, "Yes." Then was asked: "Do you know whether there was ever a post in it? A. Yes. Q. If you can, please tell, just tell where it was and what it was, just describe the post. A. Well, it was a red post, it was not as tall as some of the larger poles are, just to hold the guy wires over the top." He further stated that the post was used to hold the wires in position on the turn; that is, this was close to the turn there and it served to complete that turn and hold the wires in position, and the wire from the pole was attached to the trolley line. He did not know what became of that particular pole; the post was removed about eight years ago; he saw gangs removing the poles but did not watch all of the poles being removed. Then he was asked: "Was the pole that stood where the hole in controversy was located removed at the same time as you described? A. They were removed, but I did not watch any particular one being pulled out at any time, but I know they were all taken away." He did not notice the hole until later. On cross-examination he stated he could not give the exact location of the pole nor the distance from either curb; that there is a Nebraska Power Company pole there now, and that pole has been changed.

It was definitely proved by the evidence that the hole in question was 36 feet north of the north curb of Burt street on the east side of Twenty-second street in the parking. The Nebraska Power Company's pole is 24 feet north of the north curb of Burt street, and the hole was 2 feet north of this pole. Defendant's proof shows that the only

pole they removed in that particular locality was 50 feet north of the north curb of Burt street. Mr. Jacoby, superintendent of the electric lines department of the defendant company, testified that the company kept a permanent record of the location of their poles over the entire system and a map was received which had been made in 1910 and had been kept up ever since; that he has been in the employ of the defendant since July, 1911. This map, as he pointed out, showed that the only pole of the company at the place in question was located approximately 50 feet north of the corner on the east side of Twenty-second street (this pole was designated on the map as pole 136), and that there had been no other pole in that location since 1910, as far as the record shows and to his personal knowledge since he has been with the line department. He further testified that the pole the company removed was wood, and unpainted; that the company painted only iron posts red. Mr. Woodworth, line foreman of the defendant company, testified that from the map and from his recollection there were no other poles of defendant at the intersection of Burt and Twenty-second streets except the one numbered 136. There is some other testimony referring to the location of the pole, but it is so indefinite as to be valueless. Mr. Symes comes nearer giving a definite location of the pole that was removed than any of the plaintiff's witnesses, but he is not very definite. This case was tried in April, 1933, nearly eight years after the company's tracks and poles were removed. After careful consideration of all the testimony bearing on that question, we feel that there is not sufficient evidence to show that the hole in question was left by the defendant when its tracks and poles were removed, and this results from the lack of plaintiff's evidence rather than from the testimony of defendant's witnesses.

The second assignment, that the verdict is so excessive as to show that the verdict was the result of passion and prejudice, will not be further referred to inasmuch as the case is to be reversed. It is well, however, to state that,

under the evidence, the verdict seems large. The evidence as to plaintiff's future suffering and loss of earnings is not very definite.

Instruction No. 3 gives the measure of damages for loss of earnings and for pain and suffering. The instruction stated that, if the jury found for plaintiff, they should award her such damages as will adequately compensate her for her injuries received and which she has proved and established by a preponderance of the evidence, and goes on to state that the jury should "award her such sum as will adequately compensate her for such time lost as a beautician, and which she has shown by a preponderance of the evidence that in all probability she would have earned had she not received her said injuries," and further it is stated that she should be awarded compensation for her pain and suffering endured, "and that it is reasonably established will in all probability be endured by her as a result of her said injuries." Similar language was used in an instruction as to probable future damages, in *Burkamp v. Roberts Sanitary Dairy,* 117 Neb. 60, and was held to be erroneous. The court said: "This was error in so far as it permitted the jury to allow damages for pain which the plaintiff will 'probably suffer in the future.' This language is too indefinite and conjectural. The only future pain and suffering which the jury is entitled to consider is such as the evidence shows with reasonable certainty he will experience."

In *Chicago, R. I. & P. R. Co. v. McDowell,* 66 Neb. 170, this rule is laid down: "In an action for personal injuries compensation can be recovered for only such future damages as are shown with reasonable certainty to be consequent thereon."

After the defendant had rested its case, the plaintiff offered in rebuttal a witness who had during that day made observations as to the location of certain poles at Twenty-second and Cuming streets, Twenty-second and Izzard streets, and Sixteenth and Webster streets. The purport of his testimony was to show that at those places

defendant's poles were set closer together and to the street corners than defendant's witness, Jacoby, had testified about the location of their poles at Twenty-second and Burt streets, the place in question. There was no showing that the construction of defendant's line at those places was the same as defendant had employed in 1925, nor that such places were similar to the place in question, nor was such testimony in rebuttal of defendant's testimony. It does not seem that such testimony was admissible under any theory. The purpose was to give the jury to understand that, because the company eight years later had some poles closer together and nearer the corner at other places on their line than defendant claimed at the place in question, therefore defendant's pole that had been removed must have been closer to the corner than defendant's witnesses had stated. Clearly it was not proper rebuttal evidence and was prejudicial.

Because of the errors above stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

EDITH H. KIRKPATRICK, EXECUTRIX, ET AL., APPELLEES, V. CHOCOLATE SALES CORPORATION ET AL., APPELLANTS.

FILED JULY 17, 1934. NO. 29122.

1. Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. "Personal injuries arising out of and in the course of employment as defined by section 48-152, Comp. St. 1929, do not cover workmen, 'except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen.'" *Perry v. Johnson Fruit Co.*, 123 Neb. 558.
2. ———: ———: APPEAL: TRIAL DE NOVO. On appeal to the supreme court in a workmen's compensation case a trial *de novo* is required.
3. ———: ———: CONSTRUCTION. The workmen's compensation law is liberally construed to give effect to its purposes.

4. ———: ———: COMPENSABLE INJURY. "In compensation cases an injury is received in the course of the servant's employment when the latter is engaged at the work which the master employs him to perform or in some duty incidental thereto. *Speas v. Boone County*, 119 Neb. 58." *Struve v. City of Fremont*, 125 Neb. 463.
5. **Evidence.** "An ultimate fact, fairly and reasonably inferable from facts and circumstances proved, may be taken as established. *Perry v. Johnson Fruit Co.*, 123 Neb. 558." *Struve v. City of Fremont*, 125 Neb. 463.
6. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. Dependents of a division superintendent of a business corporation whose duties required him to travel *held* entitled to compensation where he was fatally injured while starting on a trip in performance of the duties of his employment.

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

Brown, Fitch & West, for appellants.

Morsman & Maxwell, contra.

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. Ralph Dane Kirkpatrick was employee. Edith H. Kirkpatrick, executrix of the estate of Ralph Dane Kirkpatrick, deceased, his widow, Edith H. Kirkpatrick, and his daughter, Lida M. Kirkpatrick, are plaintiffs. Chocolate Sales Corporation, employer, and American Mutual Liability Insurance Company, insurance carrier of employer, are defendants. The employee was struck by an automobile December 7, 1932, in Omaha, while crossing Twenty-fourth street at St. Mary's Avenue, and as a result died December 19, 1932. At the time of the accident he was division superintendent of his employer. Duties of his employment required him to travel. About 8 o'clock p. m. December 7, 1932, he left his home in Omaha, went to his office and there performed

services for his employer. His salary at the time was in excess of $500 a month. Plaintiffs allege that while the employee was in the service of his employer, going for a taxicab to take him to a railway station where he intended to board a train for Lincoln, he was struck by an automobile and fatally injured. The items included in the entire claim are: Hospital and medical expenses, $238.10; expenses of burial, $150; weekly compensation, 350 weeks at $15 a week; attorneys' fees $500.

Defendants admitted the employment, injuries and death, but denied that the accident arose out of and in the course of the employment.

The compensation commissioner dismissed the proceeding, and plaintiffs appealed to the district court where their claim was allowed with the exception of attorneys' fees. Defendants appealed to the supreme court.

The question presented by the appeal is whether the accident resulting in the employee's fatal injuries arose out of and in the course of his employment, within the meaning of the workmen's compensation law. The decision depends on the sufficiency of the evidence to prove a case in favor of plaintiffs. Defendants invoke the following provision of the workmen's compensation law:

"Without otherwise affecting either the meaning or interpretation of the abridged clause, 'personal injuries arising out of and in the course of employment,' it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, sec. 48-152.

It is argued that the accident did not arise out of and in the course of the employment and that the allowance of compensation is not sustained by sufficient evidence. Testimony and former cases are discussed by defendants in support of this position. In a recent case it was said:

"Personal injuries arising out of and in the course of

employment as defined by section 48-152, Comp. St. 1929, do not cover workmen, 'except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen.'" *Perry v. Johnson Fruit Co.*, 123 Neb. 558.

On appeal to the supreme court in a workmen's compensation case a trial *de novo* is required. *Mullen v. City of Hastings*, 125 Neb. 172. The workmen's compensation law is liberally construed to give effect to its purposes. *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347. In *Struve v. City of Fremont*, 125 Neb. 463, the following rule was adopted:

"In compensation cases an injury is received in the course of the servant's employment when the latter is engaged at the work which the master employs him to perform or in some duty incidental thereto. *Speas v. Boone County*, 119 Neb. 58."

"An ultimate fact, fairly and reasonably inferable from facts and circumstances proved, may be taken as established." *Struve v. City of Fremont*, 125 Neb. 463.

The employment, the nature of the employee's duties, the salary, the accident and resulting death are shown without dispute. The employee was not a day laborer with regular hours in an industrial plant. He was a division superintendent; had three detail men under him in the Omaha office; was required to travel; called at all the jobbing places in Nebraska; frequently called on Frank E. Gillen, a candy manufacturer and customer at Lincoln. Shortly before the accident, the employee had returned from a business trip. At his home in Omaha, on the evening of the accident, he said goodbye to his wife and stated he was going to Lincoln. His purpose to do so December 7, 1932, is definitely shown. On that date another employee took him to the Omaha office about 8 o'clock p. m. where he performed duties for his employer. Later, the same evening, he called his wife by telephone

and said: "Well, goodbye, I am going now." Asked: "When will you be back?" he said: "Tomorrow noon." Afterward he was struck by an automobile near a taxicab station. From that place, except for the accident, he had time to take a Burlington train for Lincoln at 10 o'clock p. m. Gillen was a witness at the trial; testified he was a customer upon whom the employee called practically once a week before he was promoted to division superintendent; afterward called quite frequently; called most any time from 8 o'clock in the morning until 5 o'clock p. m.; made special trips to Lincoln to see him; called more frequently in the morning. Evidence of these facts is undisputed. There is nothing in the record to indicate he started to Lincoln for his own pleasure or business. If he started on the business of his employer and was accidentally injured on the way, deviation from the most direct route, if implied from circumstances, would not necessarily defeat a recovery. *Keebler v. Harris,* 120 Neb. 739. It may fairly and reasonably be inferred from competent evidence not contradicted that the employee was injured on his way to Lincoln and that the fatal accident arose out of and in the course of his employment, within the meaning of the workmen's compensation law and the principles stated in the cases to which reference has already been made. The findings on appeal are the same as the findings of the district court.

Rulings in admitting evidence are challenged as erroneous, but they need not be reviewed, because the conclusion reached on the trial *de novo* depends alone on evidence properly admitted.

Plaintiffs did not take a cross-appeal from the disallowance of attorneys' fees in the district court and consequently that ruling is not open for consideration. For services in the supreme court plaintiffs are allowed for attorneys' fees $250.

AFFIRMED.

OLSON CONSTRUCTION COMPANY, APPELLANT, V. COMMERCIAL BUILDING & INVESTMENT COMPANY ET AL., APPELLEES.

FILED JULY 17, 1934. No. 28933.

Damages. On hearing *de novo*, this court determines: (1) That plaintiff failed to conform to its contract to properly decorate and paint certain portions of the building constructed by it, to the damage of the defendant, Commercial Building & Investment Company, in the sum of $370; (2) that by failure of plaintiff to complete said building within the time specified by the contract such defendant building company was damaged in the sum of $1,350; (3) that by failure of plaintiff to construct the second and third floors as required by its contract the defendant building company was damaged in the sum of $4,200, and, as contemplated by the terms of the contract, is entitled to a credit for that sum as an equitable deduction from the contract price.

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

Sanden, Anderson & Gradwohl, for appellant.

Chambers & Holland, C. J. Campbell, Hall, Cline & Williams and *Max G. Towle, contra.*

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

EBERLY, J.

The nature of this case is a suit in equity. The Olson Construction Company sued to foreclose a mechanic's lien for a balance due for construction of a commercial building, and encountered a conventional cross-petition for damages caused by faulty construction filed by the Commercial Building & Investment Company, which will hereinafter be referred to as the building company. The pleadings made up more than 50 pages of the transcript, and the evidence adduced at the trial consists of three large volumes embracing 1,335 pages. To abstract either the pleadings or the evidence would unduly extend this opinion. At the end of the trial occupying several weeks the court found for the plaintiff in the sum of $4,724.96,

balance due by the terms of its contract for the construction of the building, which amount included claimed extras. But the trial court also found for the defendant building company in the sum of $5,920 and directed that such defendant recover the difference between said accounts, or the sum of $1,195.04, with interest at 7 per cent. A motion for a new trial was filed by plaintiff, and from the order overruling the same it appeals. The defendants, including the building company, filed no motion for new trial, and neither have they perfected a cross-appeal.

The sole matters presented for our consideration relate to the correctness of the judgment of the trial court in favor of the defendant building company for the following items: Owner's loss of rent on the first floor of the building in the sum of $250, and on the second and third floors in the sum of $1,100, due to failure to complete the building on or before May 1, 1930, as required by the contract; damages for failure to comply with terms of the contract relating to the painting of the "waiting room, etc.," $370; damages for failure to properly complete construction of the second and third floors, $4,200. But, in many respects, these questions as here presented will have to be determined from disputed evidence, detailed from the witness-stand by witnesses appearing and testifying in person before the trial court. A number of witnesses, properly to be designated as expert witnesses, so testified at length. The trial court saw them, heard them, and observed them when testifying. Preponderance of evidence is not necessarily determined by the number of opposing witnesses.

Where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one view of the facts rather than the opposite. *Magill v. Magill,* 114 Neb. 636; *Peterson v. Winkelmann,* 114 Neb. 714; *Enterprise Planing Mill Co. v. Methodist Episcopal Church,* 100 Neb. 29; *Greusel*

v. Payne, 107 Neb. 84; *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Jones v. Dooley,* 107 Neb. 162.

The first item of counterclaim permitted by the trial court is referred to in its decree in the following language:

"That the plaintiff when painting and decorating the waiting room, etc., in the said building, did not permit the plastering to dry sufficiently before applying the paint and did not perform the work in a proper and acceptable manner; and in consequence thereof the work did not stand up, but almost immediately became blotched and unsightly and not up to the requirements of the plans and specifications; that by reason of the premises the owner was damaged by the plaintiff in the sum of $370 and that the owner is entitled to recover such sum from the plaintiff upon his cross-petition."

We find the evidence fully sustains this determination and the same is approved.

The next item for consideration is $1,350 in damages, allowed for failure to complete the building within the time as specified by the contract. That the building was not completed within the time specified is conclusively established. The actual damages occasioned thereby are amply proved. However, appellant claims that it was entitled to certain extensions of this time and that the building was completed within such time if credit is allowed for extensions to which it was entitled. Obviously, the contract provisions govern. The form of contract is one issued by the American Institute of Architects, being, "The standard form of agreement between contractor and owner for construction of buildings, * * * when a stipulated sum forms the basis of payment." Among its provisions are the following: (a) "That the contractor and the owner * * * agree as follows * * * and shall do everything required by this agreement, the general conditions of the contract. * * * (b) The work to be performed under this contract shall be * * * completed May 1, 1930."

The following appear in "The general conditions of the contract":

"Art. 1 * * * (f) All time limits stated in the contract documents are of the essence of the contract."

"Art. 15. Changes in the work. The owner, without invalidating the contract, may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change."

"Art. 18. Delays and extension of time. If the contractor be delayed at any time in the progress of the work by any act or neglect of the owner or the architect, or of any employee of either, or by any other contractor employed by the owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the contractor's control, or by delay authorized by the architect pending arbitration, or by any cause which the architect shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the architect may decide. No such extension shall be made for delay occurring more than seven days before claim therefor is made in writing to the architect. In the case of a continuing cause of delay, only one claim is necessary."

While a real dispute appears in the evidence as to the extent of the delays occasioned by the owners, and as to whether certain delays were occasioned by causes which would entitle the contractor to an extension of time, there is no dispute that the contractor wholly failed to conform to the provisions of article 18 above quoted, and never made an application for an extension of time as therein required, nor has due waiver thereof been established by competent proof.

In the decision of a similar question the following language was employed by this court in *Carter v. Root*, 84 Neb. 723, 731, viz.: "We come now to the second ques-

tion presented: Is the defendant herein entitled to recover damages for the delay in the completion of said building? There was a delay of 150 days. The contract itself provided for some contingencies which might operate to delay the completion of the building, such as the act, neglect, or default of the owner, or the architect, or of any other contractor, or delays occasioned by fire, lightning, earthquake, or cyclone or abandonment of work by employees. It was stipulated that the time given for the completion of the building might be extended for a period equal to the time lost by reason of any or all of the causes above mentioned, but that no such allowance of time should be made unless a claim therefor in writing was presented by the plaintiff to the architect. Such contracts are legal and enforceable. Courts have generally held that provisions requiring written notices for additional time must be complied with. *Chapman Decorative Co. v. Security Mutual Life Ins. Co.*, 149 Fed. 189; *Curry v. Olmstead*, 26 R. I. 462; *Dermott v. Jones*, 23 How. (U. S.) 220; *Feeney v. Bardsley*, 66 N. J. Law, 239; *Davis v. La Crosse Hospital Ass'n*, 121 Wis. 579; *Consaul v. Sheldon*, 35 Neb. 247. Plaintiff herein failed to give notice that additional time was required. The reason that a notice in writing is required is because the contract provides therefor. * * * In the absence of a written demand for additional time or waiver thereof, the plaintiff cannot be relieved from damages if such delay was caused by any of the agencies, the existence of which entitled him to additional time upon his written notice."

Further, "Where the contract so provides the builder must give notice to the owner or the architect of delays arising from stipulated causes, or of his claim for additional time by reason of such delays, or he will not be excused or entitled to additional time, unless such formality is waived." 9 C. J. 782.

And again: "Where the contract so provides, the determination of whether the builder's delay was occasioned by any of the causes stated in the contract and without

fault on the part of the builder, and if so, what additional time would be just and reasonable, must be made by the architect or engineer." 9 C. J. 782, 783.

It is quite obvious, in principle, in view of the explicit agreements of the parties on the subject of "extra time," that the conclusion announced by the trial court as to damages occasioned by delay in the completion of the building is the conclusion which the evidence considered *de novo* compels. Total failure of the contractor to comply with the terms of the contractual provisions quoted, which constitute a prerequisite to its right to relief, under the facts in the case, excludes its claims without reference to their merits otherwise.

The most important matter of dispute between the parties relates to the subject of the construction of the second and third floors. The trial court determined they were improperly constructed, and allowed $4,200 as damages therefor. The following provisions of the contract of the parties, it is thought, have a bearing on the questions to be determined:

"Art. 17. Deductions for uncorrected work. If the architect and owner deem it inexpedient to correct work injured or done not in accordance with the contract, an equitable deduction from the contract price shall be made therefor."

"Art. 19. Correction of work before final payment. The contractor shall promptly remove from the premises all materials condemned by the architect as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and reexecute his own work in accordance with the contract and without expense to the owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.

"Art. 20. Correction of work after final payment. Neither the final certificate nor payment nor any provision in the contract documents shall relieve the contractor of responsibility for faulty material or workmanship and,

unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of substantial completion."

We have before us as our fundamental guide in the settlement of this controversy a contract in writing. The general rule appears to be that where parties have entered into a contract or agreement which has been reduced to writing, in the absence of fraud or mistake, parol evidence is not admissible to contradict, vary, alter, add to or detract from the terms of the instrument. *Norfolk Beet Sugar Co. v. Berger,* 1 Neb. (Unof.) 151; *State v. Board of County Commissioners of Cass County,* 60 Neb. 566; *Sylvester v. Carpenter Paper Co.,* 55 Neb. 621; *Delaney v. Linder,* 22 Neb. 274; *Agnew v. Montgomery,* 72 Neb. 9.

A party who relies upon custom or usage, either to show performance by him or nonperformance by the other party to the contract, must plead the same.

Within the "general conditions" of the controlling contract we find the following provision: "Art. 2. * * * The contract documents are complementary, and what is called for by any one shall be as binding as called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work."

In the event of an omission from an instrument which is supplied by implication or presumption of law, parol evidence is not admissible to supply the same. *Driver v. Ford,* 90 Ill. 595; *Union Special Sewing Machine Co. v. Lockwood,* 110 Ill. App. 387; *Warren v. Wheeler,* 8 Met. (Mass.) 97; *Blake Mfg. Co. v. Jaeger,* 81 Mo. App. 239; *Thompson v. Ketcham,* 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

As to the actual conditions of the upper two floors in controversy, the following facts may be said to be fairly established by the evidence, viz.: When the concrete used on the second floor was being poured, the struts or supports of the steel pans involved were rested upon the

ground underneath, and hot water running from these pans and concrete work above fell upon the ground on which such supports rested, with the resulting effect that this ground and the supports of the pans gave way and the beams above were bent or bowed, and the concrete floor being poured necessarily settled, thus requiring the pouring of more concrete in order to bring it to level, and extra cement was poured in an attempt to bring this floor to proper level. Upon the completion of the work, and after the cement had set and hardened, an instrument survey was made and it was found to be out of level 2 41/64 inches, and also to contain many depressions or pockets in which variations were found of an inch in a square of ten feet. In these particulars this second floor was not constructed in a good and workmanlike manner, though it may be said that an absolutely true and dead level floor was not required in the specifications of the architect. Further, such second floor was to a greater or less extent permeable to water, and water accumulating from ice and snow falling from the wheels and bodies of automobiles stored on the second floor came through this second floor and fell upon the first floor, and upon the merchandise and people occupying the same. To prevent this it was necessary to immediately remove the water that so fell upon the second floor either by sweeping or by some other means, the drains placed in the concrete surface of the floor being insufficient to take care of such water; though it may also be said that waterproof flooring was not contemplated or provided for in the plans and specifications. Further, the construction of the third floor was similar to that of the second floor, being of integral concrete and designed and provided in the plans and specifications as an integral cement floor. Likewise this third floor was permeable to water, was out of true level, and contained many pockets or depressions in which the water tended to gather and to leak through unless immediately swept to the drains or conducted to the water rack, or otherwise removed from the building. The lack of level of the two

floors in controversy and the existence of pockets and depressions in various parts of the same, in which the deviation was an inch or more, rendered such floors more or less unsightly upon close inspection and therefore less valuable than if they had been constructed on a substantial level. No final certificate of acceptance was ever issued by the architect in charge of the construction.

The terms of the contract in suit contemplate that what is not the result of good workmanship will be replaced by what will conform thereto. The language of the contract quoted, viz., "an equitable deduction from the contract price shall be made therefor," if this right on behalf of the owner is waived, implies that such "equitable deduction" shall equal the actual cost of the strict compliance foregone. Then at a more convenient season the owner may procure to be done that which the contractor should have properly performed in the first instance.

As to the cost of supplying the defects in the second and third floors, the testimony of architect Wilson on cross-examination is enlightening, viz.: "Q. And what was your suggestion then as to correction by surfacing the floor? A. If you were to attempt to get a dead level floor on the present construction you would have to do it by either a fill of an inch and a half or two inches of concrete over the present structure, or add an asphaltic material such as unicrete in a thickness of not less than a quarter to half an inch at the thinnest point, and varying in thickness to bring the floor to a perfect dead level. Q. Now, I believe you suggested an inch in thickness in your thinnest place? A. An inch of cement?—I said an inch and a half or two inches; at this time that might be the average thickness. * * * Q. Mr. Wilson, as an architect, do you have an opinion as to the approximate cost of such surfacing per square foot? A. Yes, sir. Q. You may state what your opinion is. A. About ten cents a square foot for a cement surfacing, and about eighteen or twenty cents for the unicrete. Q. And how many square feet are there on each of these floors? A. About 21,000 square feet. * * *

Q. Then the cheaper, the ten cent per square foot, in your opinion would be the better? A. I think it would be from the standpoint of a wearing purpose. Q. Mr. Wilson, will you explain the process that would be necessary in preparing these floors for such a surfacing, what would have to be done to them in repairing them for such a surface? A. For a cement surfacing? Q. Yes. A. They would have to be roughened and chipped enough in order to secure a proper bond for the topping. Q. And how would that be done, what would be the most feasible and practicable way? A. It would have to be done by the use of an air hammer or a type of hand chiseling in order to get some roughened surface to secure a good bond for the topping. Q. Wouldn't that work be of such a character to necessitate the vacation of the floors for use while it was in process? A. Only that part of the floor that is actually being worked on. Q. It could cause a considerable noise and disturbance and a considerable amount of dust, wouldn't it? A. Some. Q. And while the surface was actually being placed that part would have to be vacated, of course? A. Yes, sir. Q. In your opinion what time would it take to surface these floors in that manner? A. Oh, it would take two or three days to each floor, I would think. * * * Q. How long after such surfacing of these floors would it be before they would be ready for use again? A. By using a quick setting cement they could be used in 24 hours. * * * Q. Mr. Wilson, what effect would this additional weight have upon the live carrying capacity of the floors? A. It would reduce the live carrying capacity. Q. Can you estimate what percentage it would be reduced? A. No, sir; I couldn't estimate that. It would be a small percentage."

Accordingly, this court determines that the defendant building company is entitled to an equitable deduction from the contract price in the sum of $4,200 because of the failure of plaintiff to conform to the terms thereof in the construction of the two floors in controversy.

It follows that the judgment of the trial court as heretofore made and entered, being in all respects correct, is

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. CHEYENNE COUNTY, DEFENDANT.

FILED JULY 17, 1934. No. 29036.

1. **Taxation**: CONSTITUTIONAL PROVISIONS. Provisions of a state Constitution in relation to taxation are not construed as grants of power, but rather as limitations on the taxing power of the state.
2. ———: LEGISLATIVE POWER. In this state we are committed to the view that the taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself.
3. ———: ———: LIMITATIONS. In the proper construction of constitutional provisions, limitations or restrictions upon the power of taxation can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language.
4. ———: CONSTITUTIONAL PROVISIONS: CONSTRUCTION. The provisions of our state Constitution, on which defendant relies, should be given a fair and reasonable interpretation to ascertain the true intent as to their scope, and then should be strictly applied and enforced so that the limits they define shall not be unduly enlarged or extended.
5. **Licenses**: GASOLINE TAX. The tax imposed by chapter 66, Comp. St. 1929, as amended, is an excise tax, to which section 2, art. VIII of our Constitution, has no application.
6. ———: ———. In this state a county is not a "municipal corporation," as that term is employed in section 7, art. VIII of the Constitution, and therefore the tax imposed on counties by chapter 66, Comp. St. 1929, as amended, is not inhibited thereby.

Original proceeding by the state against the county of Cheyenne. *Judgment for plaintiff.*

Paul F. Good, Attorney General, and *Daniel Stubbs,* for plaintiff.

R. P. Kepler, for defendant.

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

EBERLY, J.

This is a civil action instituted in this court by the state of Nebraska under the provisions of chapter 66, Comp. St. 1929, as subsequently amended, against Cheyenne county for taxes upon certain gasoline which, it is alleged, that county "received, imported, and unloaded" for its use into the state of Nebraska. In this connection the statute referred to defines as a dealer: "Any person * * * corporation, state, county, municipality, or subdivision of either thereof, who imports or causes to be imported into the state of Nebraska * * * such motor vehicle fuel as herein defined, any part of which is for use, distribution, sale or delivery in the state of Nebraska." Comp. St. 1929, sec. 66-401.

Section 66-405, Comp. St. 1929, as amended, imposes a tax of four cents a gallon on each gallon of gasoline imported for use by a dealer as above defined. It is substantially agreed by the parties that the county of Cheyenne purchased, received, imported and used certain gasoline in the form of motor vehicle fuels at the times and in the amounts set forth in plaintiff's petition, and that the tax fixed and determined by section 66-401 and section 66-405, Comp. St. 1929, as subsequently amended, if valid, has not been paid; that the defendant, Cheyenne county, purchased the motor vehicle fuels solely for use in the construction and maintenance of its highways, and it was not purchased for resale or distribution to any other person.

On the basis of these facts, the defendant county, as its sole defense, challenges the validity of the statute, so far as applicable to counties, as being in contravention of section 2, art. VIII of the Constitution, which provides: "The property of the state and its governmental subdivisions shall be exempt from taxation;" and likewise repugnant to section 7, art. VIII of the Constitution, which provides, in

part: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." The questions here presented involve a challenge to the taxing power of the state. The proper solution of them necessitates the due consideration and proper application of certain fundamental principles.

It is axiomatic that provisions of a state Constitution in relation to taxation are not grants of power, but are limitations on the taxing power of the state. *State v. Donald,* 160 Wis. 21.

In this state we are more specifically committed to the view that "the taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself." *State v. Lancaster County,* 4 Neb. 537. See, also, *Mercantile Incorporating Co. v. Junkin,* 85 Neb. 561; *Courtright v. Dodge County,* 94 Neb. 669.

And the proper construction of these constitutional limitations necessarily requires the due application of the principle that limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language. *Lane County v. Oregon,* 7 Wall. (U. S.) 71; *State v. Parker,* 32 N. J. Law, 426; *Hill v. Roberts,* 142 Tenn. 215; *Vertrees v. State Board of Elections,* 141 Tenn. 645; *Eyre v. Jacob,* 14 Grat. (Va.) 422.

The conclusion is that the language employed in the provisions of our state Constitution, on which the defendant relies, should be given a fair, reasonable interpretation to ascertain the true intent as to their scope, and then should be strictly applied and enforced so that the limits they define shall not be unduly enlarged or extended. The inhibition of section 2, art. VIII of the Constitution, as quoted, is limited to "the property of the state and its governmental subdivisions." This court is committed to the view that our "state gasoline tax" here involved is an excise tax and not a property tax. *Burke v. Bass,* 123 Neb. 297. See, also, *Bowman v. Continental Oil Co.,* 256

U. S. 642; *Monamotor Oil Co. v. Johnson,* 78 L. Ed. U. S. 706.

The generally accepted rule of construction appears to be that state "constitutional provisions relating to property taxes do not apply to excise taxes." 61 C. J. 155. See, also, 1 Cooley, Taxation (4th ed.) 348; *Hunt v. Callaghan,* 32 Ariz. 235; *Drainage District No. 1 v. Richardson County,* 86 Neb. 355; *In re Estate of Rudge,* 114 Neb. 335; *Harkreader v. Turnpike Co.,* 101 Tenn. 680; *Trenton v. Humel,* 134 Mo. App. 595; *City of Ardmore v. State,* 32 Pac. (2d) (Okla.) 728; *City of Louisville v. Cromwell,* 233 Ky. 828; *Portland v. Kozer,* 108 Or. 375.

It follows that defendant's claim of exemption from payment of the gasoline tax may not be sustained under section 2, art. VIII of our Constitution.

We cannot accept defendant's contention that the gasoline tax law is in contravention of the constitutional inhibition that "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." Const. art. VIII, sec. 7.

Section 26-101, Comp. St. 1929, provides: "Each county * * * shall be a body politic and corporate, by the name and style of 'The County of ————,' and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction," etc. But this court has held that identical language was insufficient to constitute a "municipal corporation." *State v. County Commissioners of Douglas County,* 47 Neb. 428.

In *State v. Board of County Commissioners,* 109 Neb. 35, Flansburg, J., in delivering the opinion of this court, says, in part: "It must be remembered that a county does not possess the double governmental and private character that cities do. It is governmental only, and in that capacity acts purely as an agent of the state. The funds raised by taxation in the county are subject to the direction and control of the legislature for public use in that county, and the property of the county, acquired by funds raised through taxation, is property of which the state can

direct the management and disposition, so long at least as it acts for the benefit of the public in the taxing district. *City of Edwardsville v. County of Madison,* 251 Ill. 265; *Reclamation District v. Superior Court,* 171 Cal. 672; *Board of Commissioners v. Lucas,* 93 U. S. 108; *State v. St. Louis County Court,* 34 Mo. 546; *Dunne v. County of Rock Island,* 283 Ill. 628; *Harris v. Board of Supervisors,* 105 Ill. 445; *Heffner v. Cass and Morgan Counties,* 193 Ill. 439; *Erskine v. Steele County,* 87 Fed. 630; 15 C. J. 536, sec. 220."

In *Bliss v. Pathfinder Irrigation District,* 122 Neb. 203, this court, in discussing the essential difference between a public corporation and a municipal corporation, made the following observations: "Corporations are generally classed as public and private. While a municipality is a public corporation, it does not follow that every public corporation is a municipality. In 1 Dillon, Municipal Corporations (5th ed.) 58, sec. 31, the term 'municipal corporation' is defined as follows: 'A *municipal corporation,* in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.' A like definition is found in 43 C. J. 65."

The definition in 43 C. J. 65, thus referred to with approval, is as follows: "A municipal corporation is a legal institution formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate with corporate name and continuous succession and for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state. The foregoing definition presents the logical and practical view of a municipal

corporation. It is a brief formula embracing the essential elements and excluding other kindred bodies called quasi corporations. It expressly includes: The body of individuals; the sanction of the sovereign; the definite public purpose; the necessary powers; the charter; and the primary incidents of name and succession. These are the elements generally recognized as essential to a municipal corporation. It impliedly excludes parishes, counties, townships, and districts, which are almost municipalities and yet are deficient in some of the essential attributes of a municipal corporation; while it expresses the complex nature of the corporation, whereby it acts as a municipium, and also as a local agency for administering and enforcing the laws of the state."

This approved and accepted definition excludes counties from the scope of the term "municipal corporations," as employed in section 7, art. VIII of the Constitution, which conclusion is reinforced by the conceded fact that, in Nebraska, "a county does not possess the double governmental and private character that cities do" (*State v. Board of County Commissioners, supra*), which is one of the essential attributes of a municipal corporation. It therefore follows that, viewing the constitutional provision under consideration as a limitation of or exemption to the sovereign power of taxation, and giving the term "municipal corporations" employed therein a fair, reasonable interpretation in the light of the principle that such restriction or limitation can never be raised by implication but the intention to impose them must be expressed in clear, unambiguous language, counties are not embraced therein, are not municipal corporations, and are not entitled to the benefits of the restriction and limitation provided by section 7, art. VIII of the Constitution. See *City of Ardmore v. State*, 32 Pac. (2d) (Okla.) 728.

Judgment will therefore be entered in favor of the state and against the defendant county, as prayed.

JUDGMENT FOR PLAINTIFF.

ROSE, J., dissents.

RAY THURSTON, APPELLANT, V. EUGENE CARRIGAN ET AL., APPELLEES.

FILED JULY 17, 1934. No. 28961.

1. **Automobiles.** A motorist unacquainted with a street in a city may assume that a paved street is safe for travel, and if the pavement ends, which he cannot observe until in too close a proximity to stop his car, and the street beyond the end of the pavement is rough and such as to interfere with and make travel hazardous, he may not be guilty of gross negligence in continuing his course.
2. ———: NEGLIGENCE. In determining questions of alleged negligence, it is the province of the courts to take a series of facts and circumstances conceded or proved, and to declare what are the rights of the parties arising out of them.
3. ———: GROSS NEGLIGENCE. A rate of speed which would amount to gross negligence in one case might, amid different surroundings and dissimilar circumstances, fall far short thereof. *Sheehy v. Abboud*, 126 Neb. 554.
4. ———: INJURY TO GUEST: GROSS NEGLIGENCE. The record examined and shows at most a failure to exercise the care of a reasonably prudent person, but not showing gross negligence, such as to give a guest the right to recover under section 39-1129, Comp. St. Supp. 1931.

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

Weaver & Giller and *C. J. Thurston*, for appellant.

Kennedy, Holland & De Lacy and *Thomas J. Kennedy*, *contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and RAPER and TEWELL, District Judges.

RAPER, District Judge.

This is an action by Ray Thurston, by his father and next friend, against Olin E. Harris, owner of an automobile, and against Eugene Carrigan, the driver of the car, to recover damages sustained by Ray Thurston, on account of personal injuries, caused by the alleged gross negligence of the driver of the car in which plaintiff was riding as an invited guest.

Plaintiff's amended petition alleges that on April 2, 1932, about 9 p. m., he was riding as an invited guest in the rumble seat of a car belonging to Olin E. Harris, which was by permission of Harris being driven by Eugene Carrigan for the purpose of taking Olin Gibbs, a nephew of Harris, and others on a treasure hunt. Plaintiff alleges that he was sitting in the middle of the rumble seat with a young lady guest on each side; that Eugene Carrigan was driving, and a young lady sitting next to the driver and Olin Gibbs on the right side of the front seat; that said Carrigan was driving the car south on Tenth street in the city of Omaha by the 3100 block at an excessive, reckless and grossly negligent and unlawful rate of speed of about 50 miles an hour, when he encountered that part of said street which is unpaved and upon which double tracks of the street railway continue south, and that the driver failed to see a drop of 12 inches from the end of the pavement to the road or, if he did see said drop, he negligently drove his car into said drop and negligently failed to apply the brakes before or immediately after running into said depression, and continued on the ties and road for about 150 feet, where he negligently tried to turn the left front wheel to the right and out of said tracks, and as he did so he negligently jumped out of the car and abandoned the controls, and the car turned completely over and plaintiff was pinned under the right rear fender and rumble seat and severely and permanently injured; that plaintiff was not in position where he could observe the speedometer, and did not realize how fast the car was traveling, and did not observe the depression in time to warn the driver of same.

The defendants in separate answers admit that Carrigan was driving the Harris car at said time and place, and that the occupants of the car were on a treasure hunt, and that the accident happened at said time and place, and that plaintiff sustained some injuries. The defendants deny that Carrigan was guilty of any negligence in driving the car and deny the allegations of plaintiff's petition ex-

cept the admissions. The defendants allege that Tenth street is paved up to Spring street with brick, which pavement was smooth and two street car tracks are located thereon, but that, commencing at the intersection of Spring street and south thereof, the pavement ceases abruptly and there is a drop off from the end of the pavement, and that for a short space prior to the drop off the street car tracks are paved with cobble stones, but that portion outside the tracks is not paved; that there was no light at the intersection of Spring and Tenth streets, and because of absence of lights and the darkness of night it was impossible for the driver of the car to see that the paving ceased and that there was a drop off at that point. He was driving with his left wheels between the rails of the west car track. The roadway partially in Spring street and beyond was rough and constituted a dangerous trap which was not observable to oncoming motorists, although using due care; and defendants allege that, as the direct and proximate result of the condition of the street, when the car Carrigan was driving dropped off the end of said pavement and struck said rutty and rough pavement, it was caused to overturn, although the defendant Carrigan used his best endeavors to stop the car and prevent it from overturning, and defendants allege that the said accident was not in any wise the result of any negligence on the part of said Carrigan, but was the result of the condition of the highway, which the city of Omaha had negligently allowed so to remain. Defendants further allege that the plaintiff observed the manner in which the car was being driven; that he acquiesced therein and made no protest; and that, if the car was being driven as plaintiff alleges (but which defendants deny), the conduct of plaintiff in acquiescing and in not protesting amounted to negligence on his part, and to a voluntary assumption of the risks attendant thereon. The plaintiff replied by general denial and alleged that plaintiff had no right to and did not attempt to direct and govern the movement and conduct of the driver of the car.

Trial was had, and all of the parties in the car (except Delores Nichols), including the defendant Carrigan, were called by plaintiff as witnesses, and also the defendant Harris and some others who observed the car shortly before the accident. At the close of plaintiff's testimony, the defendants separately moved for a directed verdict in their favor or a dismissal of plaintiff's action, for the reason that the evidence affirmatively shows that the defendant Carrigan was not guilty of gross negligence within the meaning of the guest statute, and was not guilty of any negligence. The court sustained these motions and dismissed plaintiff's action. Motion for new trial was entered, which was overruled, and plaintiff appeals.

The evidence presents very little dispute in the facts. It is shown that the owner of the car, Olin E. Harris, had a nephew Olin Gibbs, who lived out of town, visiting him, and that the nephew and Eugene Carrigan planned to go on a treasure hunt, and that Carrigan drove the car because the nephew was not familiar with the city, and Harris supposes he consented to that arrangement. Carrigan was 22 years old and had been driving automobiles for five years. Six young people in the car left the Central High School about 9 o'clock in the evening of April 2, 1932, on a treasure hunt, in a Chevrolet sport roadster with the head lights burning. Eugene Carrigan was driving, Fern Corkin sitting next to him, and Olin Gibbs on the right side of the front seat, the plaintiff sat in the middle of the rumble seat, Jane Stevens sat at plaintiff's left and a young lady, Delores Nichols, was seated at plaintiff's right. They were driving south on Tenth street which had smooth brick pavement which extended to or close to the intersection of Spring and Tenth streets. At that place there was a drop from the brick pavement. For a few feet beyond the brick pavement the street between the west car tracks has cobble stones for paving, and beyond that, between the rails and on the west of the rails, there is no paving. The cobble stones and ties made a very rough and bumpy roadway. The car was being

driven with the left wheels between the rails of the west street railway tracks (there were double tracks). It does not appear that the driver or any of the occupants of the car knew of the condition of the paving at the intersection of Tenth and Spring streets. There was no street light at the intersection and it was quite dark there, and the drop off could not be observed until very close. Only one witness, a Mr. Larsen, testified directly to the speed of the car as it came down Tenth street. He fixed the speed at about 50 miles an hour. He had observed the car for a couple of blocks as it came down Tenth street. Three or four other witnesses who were walking along Tenth street near the intersection testified that the car was going so fast that they knew something would happen because they knew that the pavement ended at Spring street. None of the occupants of the car was impressed with the fact that the car was being driven at an excessive speed. Plaintiff testified that he did not observe the speedometer and did not notice the speed of the car. He was talking and visiting with his companions, and had confidence in the driver. The car appeared to be running smoothly, without any swaying, and he did not know of any peril or danger until the car hit the drop off at the end of the pavement, and could not say that the brakes were applied, as he did not notice any lessening of speed or screech of brakes or anything to indicate that brakes were applied before the pavement ended. Mr. Larsen testified that he noticed the brakes were not applied. Some other witnesses, including the occupants, took no notice of the application of the brakes. None of the occupants could say whether the brakes were on before the car left the pavement, except the defendant Carrigan, who said he did apply brakes before leaving the pavement but that after the car left the pavement the rough stones and ties on the track seemed to lessen the efficiency of the brakes. The car ran about 120 feet past the end of the pavement, when the driver, thinking he could turn the car out of the railway track, attempted to turn it to the right, but the car turned over

when the wheel struck the rail. Plaintiff's father testified that, after the accident, Carrigan told him that when the wheel struck the rail he let go of the steering wheel and jumped out. Carrigan denies that he jumped out, and stated that he was thrown out when the car started to turn over. The car turned completely over, turned end for end and was badly damaged. Plaintiff was pinned under it and suffered severe injuries. An ordinance of the city of Omaha limited the speed of motor vehicles at that place on Tenth street to 30 miles an hour. There is no allegation or evidence as to the age of the plaintiff, nor what had been his experience in riding in automobiles or observing their speed. It may be assumed that he was a minor because the action was brought by his father as next friend.

The only issue presented by the briefs is whether the facts disclose sufficient evidence on the alleged gross negligence of the defendant Carrigan to require submission of the case to a jury.

The leading case on the guest statute is *Morris v. Erskine,* 124 Neb. 754, which defines gross negligence under that statute, and which states: "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty."

In a later case, *Gilbert v. Bryant,* 125 Neb. 731, the definition in the *Morris* case was followed, and Judge Rose in the opinion, to further elucidate that definition, quoted from an opinion in *Shaw v. Moore,* 104 Vt. 529, 86 A. L. R. 1139, and in the *Gilbert* case it was held: "In the law providing that an unintoxicated motorist shall not be liable in damages to a guest except for 'gross negligence,' that term indicates a degree of negligence greater than want of ordinary care or slight negligence but not necessarily extending to wanton or wilful or intentional disregard of the guest's safety." In that case the rule was announced that, "In an action against a motorist for injuring a guest, the issue of gross negligence should be submitted to the jury, where the pleadings and proof are sufficient to sup-

port a verdict in favor of plaintiff." In the *Morris* case it was decided that the existence of gross negligence must be determined from the facts and circumstances in each case; and, further, the question of gross negligence is for the jury, where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions.

A study of some of the adjudicated cases in this court construing the facts as applicable to the guest statute may be helpful in applying the facts in the instant case to rules above cited.

In the cases of *Morris v. Erskine, supra, Gilbert v. Bryant,* 125 Neb. 731, *Swengil v. Martin,* 125 Neb. 745, and *Sheehy v. Abboud,* 126 Neb. 554, wherein the guest was permitted a recovery, the imminence of danger was apparent to the driver and he was cautioned by the guest, but persisted in his negligent driving. The facts in each of those cases disclose that the driver was at least heedless of the consequences which might ensue by his reckless operation of the car, which involved, not only the rate of speed, but included other conditions which enhanced the peril and which were open to the driver. In the last above cited case, Judge Chase, speaking for the court, says: "A rate of speed which would amount to gross negligence in one case might, amid different surroundings and dissimilar circumstances, fall far short thereof."

Of course, it is not necessary in all cases that the operator of a car be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered. "Where the known risks are enhanced the degree of care should correspondingly increase." *McClelland v. Scroggin,* 48 Neb. 141. The California court, in defining gross negligence in *Helme v. Great Western Milling Co.,* 43 Cal. App. 416, say it is that entire want of care that raises a presumption of conscious indifferent to consequences. While our court has not given gross negligence such an interpretation in terms, the cases in this court above cited have evidence of facts

which bring those cases within the definition of the California case: The drivers were conscious of the peril.

The driver of the car in this case was not aware of the condition of the street at the intersection. There was no light at that place, and the defect in the street could not be seen until very near the end of the pavement, and there was no sign or warning. One ordinarily has the right to assume that a paved street would continue to be reasonably safe for travel, where from change of grade or lack of light the range of vision along the street could not extend beyond a shadowed or darkened place in the street.

It is rather an unusual condition that, if the defendant was driving at the rate of 50 miles an hour, none of the occupants of the car noticed the speed. But, under the testimony, it will be accepted that the driver was operating at a speed in excess of 30 miles an hour as limited by the ordinance, and about 50 miles an hour, and that he did not apply his brakes at an appreciable time before leaving the pavement, yet under all the circumstances the driver was not guilty of gross negligence. As to the incident of the driver jumping from the car, it does not seem material because, when the left rear wheel struck the street car rail, the car started to turn over, and this result would have ensued whether the driver was thrown or jumped from the car. It may be conceded that Carrigan was negligent in operating the car at such rate of speed, but the law requires a much higher degree of negligence than a lack of ordinary care. Taking all the circumstances and conditions into consideration, there was not sufficient proof to warrant a finding that Carrigan, the driver, was guilty of gross negligence, and the refusal of the trial court to submit the case to the jury is right and the judgment of dismissal of plaintiff's action is

AFFIRMED.

PAINE, J., dissents.

PATRICIA TIGHE, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

FILED SEPTEMBER 21, 1934. No. 28898.

1. Appeal: INSTRUCTIONS: ESTOPPEL. Defendant in a personal injury action, having requested the court to instruct on the question of mutual mistake in the execution of a release by an injured person, was not in a position to object thereto on appeal whether or not issue was supported by evidence or within the pleadings.
2. ———: ———: ———. A party cannot complain that it is error for the court to instruct in accordance with his own request.
3. ———: FAILURE TO INSTRUCT. Failure of court in personal injury action to instruct jury on issue of fraud and deceit in the obtaining of a release *held* prejudicial error where such issue was important and vigorously litigated, and whether jury invalidated release because of fraud or on ground of mutual mistake could not be determined inasmuch as verdict was a general one.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Dressler & Neely and *Hugo J. Lutz*, for appellant.

Mossman, Anderson & Meissner and *John A. McKenzie, contra.*

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

LANDIS, District Judge.

This is an action at law by Patricia Tighe, plaintiff, to

recover damages for personal injuries claimed to have been sustained while riding as a passenger in a bus owned and operated by the Interstate Transit Lines, a corporation, defendant. Verdict was rendered in favor of the plaintiff and from judgment thereon defendant appeals.

One of the issues litigated was whether or not the plaintiff was barred from maintaining the suit on account of a contract of compromise and settlement in the sum of $100, plus medical and hospital expense, which was made with appellee before the commencement of the action. In its answer appellant set up the written contract of settlement as a bar to appellee's cause of action. Appellee, by way of reply thereto, admitted signing the contract of settlement, but alleged fraud and deceit as the sole grounds for avoiding it. In the order overruling appellant's motion for new trial, appellee was given leave to amend her reply by adding thereto: "That the release obtained by the defendant from the plaintiff was obtained under a mutual mistake of fact had by each of the parties as to injuries unknown and also as to the severity of certain injuries which the plaintiff had received; this amendment being made in addition to the facts alleged and set out in the reply heretofore filed."

Instruction No. 4 is as follows:

"The court presents the questions involved to you in two subdivisions, and the first one so presented relates to the claimed settlement shown by the evidence and by the statements of the parties in the answer and reply.

"As to the first the court instructs you that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was a mutual mistake at the time the settlement was made on the part of both parties as to the serious nature of her condition, and that if she had known of the true fact of the serious and more or less permanent condition of herself resulting from said injuries, she would not have signed the settlement papers or have received the said one hundred dollars, and that in good conscience said settlement so effected by reason of a

mutual mistake of the parties should not stand. Should the plaintiff establish the proposition in this instruction presented, and which she is bound to maintain by a preponderance of the evidence, then you will find for the plaintiff as to this department of your inquiry, and then proceed to consider the general claims of the plaintiff as to her injuries received at the time of the accident involved."

Appellant offered instruction No. 7 dealing with the question of mutual mistake and thereby asked the court to instruct the jury upon the law with reference thereto. While the instruction as offered was refused, yet the court thereby was invited to and did instruct as to mutual mistake. No instructions whatever were given by the trial court on the litigated issue of fraud and deceit as avoiding the release. The record reflects in this case, concerning the validity of the contract for compromise, settlement and release, two issues: First, was the release void on account of fraud and deceit practiced by appellant's agents; and, second, was it void by reason of mutual mistake of the parties? The trial court instructed as to mutual mistake as requested by the appellant, but nowhere in the instructions was there any reference to guide the jury on the issue of fraud.

Appellant's complaint as to the court instructing on mutual mistake cannot be sustained. After a request to so instruct appellant is not now in position to object. It is well settled that a party cannot complain that it is error to instruct as he requested. You cannot invite the court to instruct one way, have compliance with your request, and then complain of it.

"A party is estopped to predicate error on the submission of an issue or question to the jury, where the submission was made in compliance with his request; and it is of no importance that the submission was made in a form other than that requested. The principle has been applied where a party, after procuring the submission of an issue, urged that the issue was not supported by the

evidence, or that it was not within the pleadings." 4 C. J. 712. See 2 R. C. L. 238, sec. 198; *Dawson v. Williams*, 37 Neb. 1; *Jonasen v. Kennedy*, 39 Neb. 313; *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105; *Farmers Mutual Ins. Co. v. Cole*, 4 Neb. (Unof.) 130; *Swigart v. Gentert*, 63 Neb. 157; *Farmers Bank of Nebraska City v. Garrow*, 63 Neb. 64.

The serious question raised is the failure of the trial court to instruct the jury upon the issue of fraud and deceit presented by the pleadings and the evidence. In *Kimball v. Lanning*, 102 Neb. 63, the rule is announced: "It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues that are raised by the pleadings and that are supported by the proof." It was held in *Giveen v. Matthews*, 118 Neb. 125: "Where a case is submitted to a jury upon two causes of action, it is error not to instruct the jury clearly and definitely upon each cause of action." In *Blue Valley State Bank v. Milburn*, 120 Neb. 421, it was decided by this court: "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not."

We have the unusual condition reflected in this record of the question of whether the release was obtained by fraud and deceit as an important issue, vigorously litigated all through the trial, and yet the court did not mention it in the instructions to the jury. The jury were called upon to pass upon the validity of the release. Whether they invalidated it because of fraud or on the ground of mutual mistake is not a matter which can be determined inasmuch as the verdict is a general one.

Under the peculiar circumstances of this case it is quite apparent that appellant has not had a fair trial. Prejudicial error had been committed in not properly instructing the jury on an issue presented by the pleadings and evidence. Hence, the judgment is reversed and the cause is remanded for a new trial.

REVERSED.

THEODORE H. WILLIAMSON, APPELLANT, V. INGEBERT J. THOMSEN, APPELLEE.

FILED SEPTEMBER 21, 1934. No. 29000.

Account: PLEADING. In order to state a cause of action on an account consisting of several items, the agreed price or value of each item must be stated.

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

C. P. Anderbery and *William A. Ehlers,* for appellant.

King & Bracken, contra.

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

LIVINGSTON, District Judge.

This is an appeal from the district court for Kearney county where judgment was rendered by confession in favor of plaintiff and against the defendant in the sum of $6.26, on a suit based upon an open account, the balance of plaintiff's claim being disallowed. The cause was originally tried in the county court of Kearney county and appealed to the district court for said county and from the judgment of said district court appealed to this court.

It appears that on or about June 1, 1931, the defendant was the owner of a patented inner tube arrangement to be used in horse collars, and that about said date his son and one Frank J. Decker, as agents representing him, called upon the plaintiff, who was a manufacturer of horse collars under the name and style of A. C. Keller Collar Company, located at Council Bluffs, Iowa. Until about the 20th day of July, 1931, the defendant operated at Minden, Nebraska, under the trade-name of Thomsen Pneumatic Horse Collar Company, and shortly thereafter a corporation was formed under the laws of Colorado under the name of Thomsen Pneumatic Collar Company with headquarters at Denver, where all of the defendant's business was transferred. The plaintiff in his petition seeks to recover his entire account from the defendant

personally and sets out in his petition what appears to be a statement of items without, however, stating the value or the agreed price of the items of merchandise which he claims to have shipped to the defendant. The defendant by his answer admits the first nine items covering the period from June 4, 1931, to July 20, 1931, and alleges payment of all of them except an item of $6.26 under date of June 26, 1931, which he says is unpaid and offers to confess judgment therefor. The other eight items he claims, and it is undisputed, full payment therefor has been made. The last five items covering a period from July 27, 1931, to September 2, 1931, were shipped to Denver, and it is the contention of the defendant that they went to the corporation and that the corporation and not himself is liable. There is no reply. The statement of account as contained in plaintiff's petition is as follows:

"1931

6	4	Inv.	Shipped	to	Minden	3.71	
6	16	"	"	"	".	47.85	
6	22	"	"	"	"	33.86	
6	26	"	"	"	"	6.26	
7	1	"	"	"	"	48.43	
7	3	"	"	"	"	51.28	
7	8	"	"	"	"	67.58	
7	15	"	"	"	"	30.06	
7	20	"	"	"	"	26.34	
7	27	"	"	"	Denver	22.58	
7	31	"	"	"	"	128.95	
8	6	"	"	"	"	88.95	
8	20	"	"	"	"	154.83	
9	2	"	"	"	"	3.63	
					Total	$714.31	714.31
Credits							
6	13	Ck & Dis				3.71	
2	24	Ck				47.85	
6	30	Ck				33.86	
8	17	Ck				223.69	
						309.11	309.11
Amount due							$405.20"

In support of plaintiff's case there were offered invoices corresponding with the several items contained in the account, but there was no evidence offered showing the value of the several items or that there was an agreed price between the parties with reference thereto. No books or other records of accounts were produced by the plaintiff with reference thereto. Plaintiff attempted to testify orally concerning the contents of his books but objection thereto was sustained. It is conceded by both parties that the last seven items, aggregating $455.34, were ordered from and shipped to the company at Denver.

The sole question is the sufficiency of the petition as to the last five items to state a cause of action and whether or not the defendant was personally liable for the shipments, should the petition be considered sufficient for any reason, of plaintiff's goods to the Denver corporation.

The lower court held against the plaintiff on both propositions and entered judgment only for the amount confessed—$6.26. We think the court below on both propositions decided correctly. The failure on the part of the plaintiff to state in his petition the amount and value of the items, upon rejection to proof thereof, is fatal, and when plaintiff received orders, which he filled, from the Denver corporation, he was bound to know, or at least put upon sufficient inquiry to bind him with respect to the fact, that he was not selling or dealing directly with the defendant as an individual at Minden, Nebraska, but with a corporation in the state of Colorado.

We find no error and the judgment of the lower court is therefore

AFFIRMED.

MICHAEL J. FLANNIGAN V. STATE OF NEBRASKA.

FILED SEPTEMBER 21, 1934. No. 29089.

1. **Criminal Law: FORGERY: LIMITATIONS.** An information charging forgery in the language of the statute and using the words "feloniously make, forge and counterfeit a certain promissory note" charges a crime that is not barred by the three-year statute of limitations.
2. ———: CONTINUANCE. It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice.
3. **Forgery: PLEADING AND PROOF: VARIANCE.** An immaterial variance between the purported maker's name as the same appeared in the information and the forged instrument received in evidence upon the trial is not prejudicial. Especially is this true in a case where the defendant testified concerning the instrument and claimed that it was executed in his presence.
4. **Criminal Law: EVIDENCE OF CHARACTER.** Evidence of good character is to be considered by the jury with other evidence and given such weight as the jury, under proper instruction of the court, deem it is entitled to.

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

William Ritchie, Jr., George A. Parman, Jr., and *Michael J. Flannigan, Jr.,* for plaintiff in error.

Paul F. Good, Attorney General, and *William C. Ramsey, contra.*

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

LIVINGSTON, District Judge.

This is a proceeding in error from the conviction of plaintiff in error, Michael J. Flannigan, on an information charging forgery, upon a trial in the district court for Brown county, at the conclusion of which he was sentenced to the state penitentiary for a term of not less than three nor more than five years and fined $100 and required to pay the costs. For convenience the plaintiff in error will be referred to as the defendant.

The charge of forgery in the information was based upon a certain promissory note for $3,000, dated August 15, 1930, due on demand and payable to and held by the Nebraska State Bank of Long Pine, Nebraska, as an asset. The state contended that the name "A. E. Ranbaugh," which appeared as maker, was a fictitious person and that the name was signed to said note by the defendant. The defendant was arraigned on the 27th day of November, 1933, trial was begun November 27, 1933, and verdict of guilty returned November 30, 1933. Motion for new trial and motion for judgment notwithstanding verdict were duly filed, presented and overruled by the court and sentence pronounced by the court, December 20, 1933, whereupon proceedings in error were taken to this court.

On May 23, 1931, the Nebraska State Bank of Long Pine was closed and taken over by the state banking department and the note in question listed as one of the assets of the bank.

The defendant testified that he first met Ranbaugh at a public sale on February 20, 1930, which sale was held at a place 30 or 35 miles south of Ainsworth and Long Pine. He could not remember who introduced them. The next meeting with Ranbaugh was at the bank at Long Pine, August 15, 1930. The defendant testified that he immediately identified this man as Ranbaugh, whom he had met at the sale in February previous. After a brief conversation defendant connected this individual with the Rambaughs who were supposed to be substantial people in that community. Ranbaugh then told the defendant that he had leased a ranch north of Duff onto which he was moving and he wanted a loan of $2,500 or $3,000. Immediately the defendant granted a loan of $3,000, taking the note in question with a chattel mortgage written on the back, signed A. E. Ranbaugh, without investigating the security, paying Ranbaugh the cash. No one was in the bank while the transaction took place nor is the defendant corroborated in any particular. The chattel mortgage, or a copy thereof, was never filed. The defendant

never made any demand for payment, nor did he make any investigation at Duff or elsewhere about the maker of the note until some time after the bank closed. He at no time sought to investigate the security although the bank closed about nine months later.

The state introduced as witnesses the county clerk of Rock county and other officers of said county, including the postmaster at Duff and other citizens of that community, all of long residence in that county and enjoying a very wide acquaintance, all of whom testified that they never knew any such person as A. E. Ranbaugh or Rambaugh. This testimony is in no manner contradicted. The state also produced an expert witness on handwriting who examined the maker's signature on the note in question and writing of the defendant, admitted to be genuine, and, after giving his reasons at length, testified that in his opinion the name of the maker, A. E. Ranbaugh, on the note in question was written by the defendant. The defendant produced some witnesses who had some experience in examining handwriting but did not qualify as experts, who gave the opinion that the defendant had not written the maker's signature on the note.

There are numerous assignments of error made by defendant. However, but four are considered entitled to consideration. These are: (1) The use of the word "counterfeit," in describing the crime in the information; (2) alleged abuse of discretion in denying a continuance; (3) there is a fatal variance between the information and the evidence adduced by the state and upon which the conviction rests; and (4) instruction No. 11 given by the court on evidence relating to the good character of the defendant was erroneous and prejudicial.

The information follows the language of the statute which uses the word "counterfeit" in describing the crime of forgery. Comp. St. 1929, sec. 28-601. See *Rownd v. State,* 93 Neb. 427; *Cooper v. State,* 123 Neb. 605; *State v. Leekins,* 81 Neb. 280; Comp. St. 1929, sec. 29-110. The

information charged the crime of forgery and the crime charged does not bar in three years.

No error was committed by the denial of the continuance. *McDermott v. Manley,* 65 Neb. 194; *Home Fire Ins. Co. v. Johnson,* 43 Neb. 71.

There was no fatal variance between the information charging forgery and the note alleged to have been forged. Comp. St. 1929, secs. 29-1501, 29-1502, 29-1503; *Marshall v. State,* 116 Neb. 45; *Goldsberry v. State,* 66 Neb. 312; *Bunge v. State,* 87 Neb. 557. This is especially true where the defendant testified to the alleged transaction in which the note was by him declared to have been executed and he recognized the instrument.

The court's instruction No. 11 on good character is in proper form and has been on several occasions approved. *Garrison v. People,* 6 Neb. 274; *McCormick v. State,* 66 Neb. 337; *Sweet v. State,* 75 Neb. 263; *Lillie v. State,* 72 Neb. 228.

Complaint is made that the court erred in overruling the challenge to juror Lammers, who disclosed in his *voir dire* examination that his wife and brother were depositors in the Flannigan bank, on the ground that the juror was related within the fifth degree, within the fourth subdivision of section 29-2006, Comp. St. 1929. This cause for challenge has no application in the case at bar. The parties to the case at bar are the state of Nebraska on the one hand and Michael J. Flannigan on the other, and no such relationship can be said to exist between the said juror and either of the parties to this cause.

The record conclusively shows that the defendant had a fair trial and all of his rights fully protected and there is ample evidence to sustain the conviction.

It therefore follows that the judgment of the lower court is

AFFIRMED.

MICHAEL J. FLANNIGAN V. STATE OF NEBRASKA.

FILED SEPTEMBER 21, 1934. No. 29194.

Criminal Law: NEW TRIAL. In a criminal case, a motion for a new trial, based on newly discovered evidence, must be filed at the same term of court in which the verdict is rendered.

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

William Ritchie, Jr., George A. Farman, Jr., and *Michael J. Flannigan, Jr.,* for plaintiff in error.

Paul F. Good, Attorney General, and *William C. Ramsey, contra.*

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

LIVINGSTON, District Judge.

This is an appeal from the district court for Brown county asserting error in the judgment of that court in overruling a motion for new trial based upon newly discovered evidence in the case of *Flannigan v. State, ante,* p. 640, on error in this court. For the purpose of argument the two cases were submitted together.

The error complained of in the instant case is that the lower court erred in overruling a motion for new trial filed after the adjournment of the term at which the verdict was rendered, based on newly discovered evidence. That such motion must be filed during the term is fixed by statute, which has been before this court on a number of occasions. Comp. St. 1929, sec. 29-2103. See *Bradshaw v. State,* 19 Neb. 644; *Hubbard v. State,* 72 Neb. 62; *Fouse v. State,* 83 Neb. 258; *Evers v. State,* 87 Neb. 721; *Simmons v. State,* 111 Neb. 644.

The judgment of the lower court is

AFFIRMED.

MARTHA BROOKS ET AL., APPELLANTS, V. KIMBALL COUNTY, APPELLEE.

FILED SEPTEMBER 21, 1934. No. 28915.

1. **Deeds:** CONSTRUCTION. Where grantors by warranty deed convey to a county a block of ground, the deed reciting a consideration of one dollar and containing the following language, "The conditions of this deed is, that the county commissioners of said Kimball county shall erect and maintain a county courthouse on said block," and with no express right of reverter contained in said instrument, and the county commissioners erect on said block a courthouse, which is maintained by the county from 1893 to December 26, 1928, *held*, the deed imposed a condition subsequent which has been substantially complied with by said county and the county is vested with the fee simple title to said real estate.
2. **Statutes:** COMMON LAW. *Held*, section 49-101, Comp. St. 1929, adopts the common law of England and not the statutory law of England.

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

G. P. Kratz, for appellants.

Roland V. Rodman, Orville C. Wisdom and *John H. Kuns, contra.*

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

MESSMORE, District Judge.

This is an action in equity brought to determine the title to real estate, for an adjudication for damages for waste committed thereon by defendant below, appellee herein, while in the possession thereof, and asking judgment for the reasonable rental value of the real estate since the time defendant's title ceased, for interest, costs and attorney's fees. The court below found for the defendant.

The amended petition of plaintiffs below, appellants herein, alleges the necessary subject-matter in a case of this nature for the construction of a deed and forfeiture

of title and for the other relief prayed for, as above noted.

The defendant in answer thereto denies every allegation of said petition not expressly admitted; admits that Martha Brooks, one of the plaintiffs, was the legal guardian of plaintiff Frank D. Masner (L. R. Eastman was later substituted as guardian of said minor on July 26, 1933); that she brings this action as such guardian on behalf of herself and her ward; that Kimball county is a county established under the laws of Nebraska, a body corporate and politic, capable of suing and being sued; that on June 20, 1892, and prior thereto, one William Yannayon was the owner in fee simple title absolute and in possession of block 5, Yannayon's addition to the town of Kimball, in Kimball county; admits that William Yannayon died testate in 1899, without issue, leaving Sarah Yannayon, his widow, as his sole and only legatee and devisee; that Sarah Yannayon died in 1923, testate, without issue, leaving Martha L. Masner, her grandniece, and a grandnephew as her sole and only legatees and devisees; that Martha L. Masner is one and the same person as the plaintiff, Martha Brooks; that the defendant entered into possession of said block 5, Yannayon's addition, on or about the 20th day of June, 1892.

For the purpose of this opinion the affirmative defense, as stated in the answer of defendant to the amended petition of plaintiffs, need not be set out.

The evidence discloses that Kimball county became a separately organized county November 1, 1888, and in 1892 William Yannayon, a resident of the county at that time, deeded to the county the premises above described; that subsequent to the receipt of the deed the county proceeded to build a courthouse on the real estate described. For the purpose of this opinion it is necessary to set out the warranty deed showing the conveyance to the county by William Yannayon of the real estate in question, to wit:

"Warranty Deed

"Know all men by these presents:

"That William Yannayon and Sarah Yannayon of Kimball county, and state of Nebraska, in consideration of the sum of one & no/100 dollars, in hand paid by the county of Kimball of Kimball county, and state of Nebraska, do hereby sell and convey unto the said the county of Kimball and state of Nebraska, to wit: All of block five, Yannayon's addition to Kimball, Nebraska. The conditions of this deed is that the county commissioners of said Kimball county shall erect and maintain a county courthouse on said block. Together with all the tenements, hereditaments, and appurtenances to the same belonging, and all the estate, right, title, interest, claim or demand whatsoever of the said William Yannayon and Sarah Yannayon of, in, or to the same, or any part thereof.

"To have and to hold the above described premises, with the appurtenances, unto the said the county of Kimball.

"And we hereby covenant with the said the county of Kimball, that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same, that they are free and clear of all liens and incumbrances whatsoever. And we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

"And the said Sarah Yannayon hereby relinquishes her right of dower in and to the above described premises.

"Signed this 20th day of June A. D., 1892.

"William Yannayon
"Sarah Yannayon

"In Presence of S. Wooldridge.

"The state of Nebraska }
"Kimball county } ss

"On this 20th day of June A. D. 1892, before me duly elected a clerk of the district court, Kimball Co. Nebr., and qualified for and residing in said county, personally came William Yannayon and Sarah Yannayon to me known to be the identical persons described in and who executed the foregoing conveyance as grantors and

acknowledged the said instrument to be their voluntary act and deed.

"Witness my hand and seal the day and year last above written.

"S. Wooldridge,
(Seal) Clerk of District Court."

Said instrument was entered on numerical index and filed for record in the clerk's office of said county on the 20th day of June, 1892, at 2 o'clock p. m., and recorded in book D of deeds on page 242.

There appears in the record a stipulation that any demand made by the plaintiffs against defendant for title to and possession of the premises involved in this action and for damages for the removal of the buildings and improvements therefrom would have been refused by defendant herein, if made.

Plaintiffs introduced in evidence all the records from the county court of Kimball county necessary to show that Sarah Yannayon was the sole and only heir and devisee of William Yannayon, who died testate, a resident of Missouri, on January 19, 1899; also all the records from said county court necessary to show the probate of the will of Sarah Yannayon, the petition for probate of her will setting forth that the devisees under her will were the parties who are the plaintiffs in this action, and that the said Sarah Yannayon departed this life on the 18th day of September, 1923.

The record further sets forth the deposition of C. F. Robertson, a lawyer and banker, 70 years of age, residing in Forreston, Illinois, formerly a resident of Kimball county from 1884 to 1893, and who held the office of county commissioner of said county in 1892 and 1893. He testified that the county commissioners were looking for a site upon which to build a courthouse for the reason that the county had inadequate quarters for the transaction of its business, and William Yannayon offered to deed the real estate in question in this case to the county, provided the commissioners would build and maintain a

courthouse thereon, with the understanding that when it was no longer used for that purpose it would go back to the grantor, and that said grantor was to receive nothing as pay for the block except that he was to get it back, if the county ever abandoned it as a courthouse site. The offer was accepted, William Yannayon and his wife, Sarah, conveying the premises to Kimball county by the deed hereinabove set out. The courthouse was built in 1892 or 1893 at a cost of approximately $10,000.

Martha Brooks, one of the plaintiffs, testified that she was raised on a farm nine miles southwest of Kimball in the home of Sarah Yannayon, her greataunt; that she was a sister of Frank D. Masner; that Sarah Yannayon had no children of her own; that she had overheard her aunt tell witness' mother several times that whenever Kimball county did not maintain the land for a courthouse it was to come back to her aunt, and that she had several conversations with her aunt to the same effect. These conversations occurred about 16 years ago.

There is considerable testimony offered by plaintiffs in an effort to prove the allegations of their amended petition regarding the value of the premises in question and damages for the destruction and removal of the buildings therefrom, but which is not necessary to be set out for the purposes of this opinion.

The defendant placed in evidence a petition to submit to the electors of the county the question of the construction of a courthouse, a petition by certain persons to accept a courthouse site, and articles of agreement between Kimball county and one John Biggs with reference to the acceptance of the completed structure.

Clara Masner was called as a witness for defendant. She was a niece of Sarah Yannayon and the mother of Martha Brooks and Frank D. Masner, plaintiffs. She testified that she lived with her aunt two years prior to her aunt's death and that she never heard any statement made to her by her aunt, in the presence of her daughter, wherein her aunt stated that whenever the county ceased to use the

courthouse site for county purposes it would come back to her, that she knew nothing about the courthouse site reverting to any person until after the death of her aunt, and that she gathered from a newspaper article.

Exhibit E, offered by defendant and received in evidence, is a communication, dated May 31, 1892, from William Yannayon, contractor and builder, addressed to the board of county commissioners of Kimball county, agreeing to donate to said county lots 1, 2, 3, 4, 5, 6, 7 and 8, block 1, Yannayon's addition to the town of Kimball, if the said board will locate and cause to be erected thereon the county courthouse.

Exhibit F, offered by defendant and received in evidence, is a similar offer from William Yannayon to the board, offering block 5, Yannayon's addition to Kimball, for the same purpose, and was filed March 28, 1892, by S. Wooldridge, county clerk.

John Pantenburg, called as a witness for plaintiffs in rebuttal, testified that he heard a conversation between Mr. G. P. Kratz, attorney for plaintiffs, and Mr. J. T. Jefferson to the effect that the piece of ground was to go back to the people who gave it to them, if they never used it for a courthouse or were done with it, Mr. Jefferson having previously testified that he was commissioner and assessor in 1891 and 1892 and that he did not remember if anything was said with reference to what would be done if the county would cease to use the block for a courthouse site.

This is the substance of the evidence material to a decision of this case.

The defendant county erected a new courthouse on a different site and the county officers moved into it in December, 1928. The old courthouse building was sold to one Guy Flemming, a wrecker, in January, 1929.

It is conceded by all the parties to this litigation that section 76-109, Comp. St. 1929, governs the construction of instruments in relation to real estate and the duty of the courts in respect thereto, which is as follows: "In the

construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

This court has passed on this section a great many times. In the case of *Eiseley v. Spooner,* 23 Neb. 470, involving a rent lease, this court established the rule as follows: "In the construction of an instrument conveying real estate, it is the duty of the court to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

In the case of *McCulloch v. Valentine,* 24 Neb. 215, it was held: "It is a rule in the construction of deeds or wills, that the intention of the grantor or testator, as manifested by the words of the writing in connection with surrounding circumstances, must be carried into effect, provided in so doing no rule of law is violated or sound policy disturbed"—citing *Pool v. Blakie,* 53 Ill. 495; *Stokes v. McKibbin,* 13 Pa. St. 267.

This court held in *St. James Orphan Asylum v. Shelby,* 60 Neb. 796, speaking of a will: "The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of a testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid."

This court held in *Arthur v. Arthur,* 115 Neb. 781, construing section 58, ch. 43, Laws 1866, enacted by our territorial legislature, and in force July 1, 1866, setting forth the same statutory enactment as contained in section 76-109, Comp. St. 1929, and previously in section 5594, Comp. St. 1922, that the law has been the same with reference to the construction of instruments from the time of the territorial legislature and government, and

that there has been no change in this statute except for a comma that did not change the meaning of the same in any particular, citing *Albin v. Parmele*, 70 Neb. 740, wherein it was held: "The first thing to be done is to ascertain, if possible, and unvexed by legal technicalities, the intent of the testator as expressed, or attempted so to be"—and several other cases following the same line of decision.

Plaintiffs contend that the fee, if any, granted to the defendant county is a base fee, that is, a fee which has a qualification annexed to it and which must be determined whenever the annexed qualification requires. The proprietor of such a fee has the right of an owner in fee simple until his estate is determined, or that it is a qualified fee, one which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end, and that there is a possibility of a reverter in the instrument; that when the property was abandoned by Kimball county for the purpose of erecting and maintaining thereon a courthouse a possibility of reverter existed.

In analyzing the instrument itself, one will note that it lacks an express right of reverter, that there is no indication of any kind or nature, in so far as the meaning of the words in the deed from William Yannayon to Kimball county is concerned, that would indicate that under any circumstances he desired to regain title to the premises either for his own use or for the use of his heirs or assigns. All the circumstances at the time of giving the instrument indicated that he proposed to give to the county a site upon which to erect and maintain a courthouse; that he owned some property in the immediate vicinity of the property granted, which would naturally be enhanced in value, and again he might have been inspired with some degree of civic pride. The documentary exhibits such as the offers of different sites would indicate that Mr. Yannayon desired to do something for his county, at least that thought could be readily and easily drawn

from all the circumstances and conditions existing at the time of the execution of the instrument and from the very instrument itself as an expression of the intent of the grantor as to what he most desired.

The English statute, 1 Vict. 1837, created possibilities of reverter and rights of entry for conditions broken and rendered them devisable. 8 and 9 Vict. statutes provided such rights were assignable or alienable. Appellants contend that no decision has held that the English statute of wills is not applicable in Nebraska. While we are convinced that such statutes are unnecessary and inapplicable to our conclusions in this case, yet we quote section 49-101, Comp. St. 1929, as follows: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." In *Farmers & Merchants Ins. Co. v. Jensen,* 58 Neb. 522, wherein Chief Justice Harrison referred to the section of a prior statute which is now section 49-101, *supra,* it was held: "In terms and ordinary import the foregoing appears to be of the 'common law of England' and not of the statutory laws or of the former as modified by the latter." We believe that this statement, terse and concise as it is, reflects the statute, in that this state adopted the common law of England and not the statutory law of England. We find no other cases cited otherwise changing this conception as expressed by Chief Justice Harrison.

We construe this deed to be an outright grant by William Yannayon to Kimball county of the real estate in question, perhaps with a condition attached to it, which is a condition subsequent, that would require performance on the part of the county commissioners of that county, and which condition the commissioners did perform in erecting the courthouse on the block in question and maintaining it from about 1892 or 1893 to about December, 1928, which was a substantial compliance with the condition

subsequent and sufficient, we believe, to transfer to the county for all time to come the fee title to the real estate in question. Without any further or other expression in the deed it clearly shows it is without even the possibility of a right of reverter and at the most that is all that could exist in so far as the heirs of Sarah Yannayon are concerned.

In *Mead v. Ballard,* 74 U. S. 290, the supreme court of the United States held: "A grant of land, 'said land being conveyed upon the express understanding and condition' that a certain institute of learning then incorporated 'shall be permanently located upon said land,' between the date of the deed and the same day in the succeeding year, is a grant upon condition, a condition subsequent." Such permanent location was made and the condition was thus fulfilled, when the trustees passed a resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation. And this, notwithstanding that the building erected in pursuance of the resolution was afterwards destroyed by fire and the institute subsequently erected another building on another piece of land. The condition was that the permanent location of the institute on the land should be made between the date of the deed and the same day in the succeeding year; if it was done within that time plaintiff's right to reverter was gone. This deed contained the right of reverter. The court held that it was a substantial compliance with the condition subsequent.

In *Maddox v. Adair,* 66 S. W. (Tex. Civ. App.) 811, the court held: "(1) Where a grantor conveys realty on condition that, on the grantee's failure to establish and maintain thereon a seminary of learning, it shall revert, and he does not object to the school established as not being that provided for by the deed, he cannot insist on a forfeiture, after the discontinuance of the school, on the ground that the grantee failed to establish the school required by the condition. (2) Where a grantor conveys

realty to be used for school purposes, in order to increase the value of adjacent property, on condition that, on the grantee's failure to establish and maintain the school, the premises shall revert, and a school is maintained until grantee has disposed of his adjacent property, he cannot claim a forfeiture after discontinuance of the school, as the purposes of the condition were fulfilled. (3) The condition of the deed having been complied with, and the grantee's title perfected, the grantor cannot complain of the abandonment of the property and the intrusion of a trespasser." The deed in this case recited a consideration of $100 and contained general covenants of warranty and was in the usual form, except that it provided for the premises to revert to the grantor. As indicated by the syllabus, no part of the consideration was paid. By its terms the deed conveyed an estate on a condition subsequent. The title passed to the grantee subject only to the condition. The law is well settled that such conditions will be strictly construed and substantial compliance with the conditions will prevent a forfeiture. A construction necessary to prevent a forfeiture will be adopted, unless it is clear such is not the intention of the parties. Citing *Post v. Weil,* 115 N. Y. 361.

In *Hunt v. Beeson,* 18 Ind. 380, that court held that there had been a substantial and sufficient compliance with the conditions of a deed, where the purpose of making the conveyance had been to secure the erection of a tanyard and such tanyard had been maintained for a period of 24 years. It was pointed out that the grantor had properly received the expected benefits and the court refused to decree a forfeiture.

In *Bryan v. Louisville & N. R. Co.,* 157 C. C. A. 98, 244 Fed. 650, the court held that when the railroad line was maintained as agreed for a period of forty years, there was a sufficient and substantial compliance with the terms of the covenant.

In *Texas & P. R. Co. v. Marshall,* 136 U. S. 393, the

grantee in a deed had agreed permanently to establish its eastern terminus on the property and did so locate its terminus thereon and maintained it for a period of eight years, when it became necessary by reason of the expansion of the railroad system to remove a part of its offices. The court held there was a substantial compliance with the terms of the contract and that even the use of the word "permanent" did not mean forever or lasting forever.

Some mention was made in this case with reference to the receipt by the trial judge of a brief from the clerk of the district court for Kimball county, which brief was prepared for the use of said clerk and given by him to the trial judge before the trial of this case. Counsel for appellants asked for a copy of the brief from opposing counsel, which request was denied. Counsel for appellants, without reflecting in any way on the court or without seeking to find any particular fault with the court's action, hints in his brief that the court was guilty of some misconduct. It was quite evident that the court had the brief and probably read it before the trial. It might have been a kindly and courteous act for opposing counsel to furnish appellants' counsel with a copy of the brief. We do not, however, believe the court was guilty of any misconduct nor appellants' rights prejudiced in any way by the court's use of the brief in question, under the circumstances.

We do not analyze other phases of the case called to our attention, for we deem them unnecessary for determination in this opinion.

We believe the court below was right in its findings in favor of defendant below, appellee herein, and for the reasons given by it on the insufficiency of the evidence to establish the claim set forth in plaintiffs' amended petition; that the construction of the deed in question, based on the sections of the statute quoted above and the decisions in reference thereto, was right, noting the instrument carried no express right of reverter, and that, if

anything, it might be interpreted as a condition subsequent, which has been, as shown by the authorities, substantially complied with.

AFFIRMED.

PROKOP CASTEK, APPELLANT, V. JOSEPH TULLY ET AL., APPELLEES.

FILED SEPTEMBER 21, 1934. No. 28980.

1. Appeal: PARTIES. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf*, 110 Neb. 223.
2. ———. The failure to have all the affected parties before the appellate court may alone be sufficient to prevent a determination of the issues raised by appeal.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Appeal dismissed.*

George W. Wertz and *L. F. Otradovsky*, for appellant.

W. I. Allen, contra.

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

THOMSEN, District Judge.

In a foreclosure of a mortgage on farm lands, the court appointed Frank W. Shonka, Jr., receiver to manage, rent, and take charge of the lands, except 40 acres on which the house and buildings are located. This latter land was assigned to the exclusive use of the mortgagor. By order of the court the receiver rented the property, of which he had charge, to the defendant Joseph Tully, the mortgagor, and later, without such order, made a lease for a definite term to Anton Mastny, Jr. Later, after the moratorium act, section 20-21,159 et seq., Comp. St. Supp. 1933, became a law, an application made by the defendants pro-

duced an order extending the time of the defendants' occupancy of all the land, under the conditions provided in such law, to March 1, 1935. The receiver made a report of his acts and doings and was discharged, and the lease made by the receiver to Mastny was canceled. In the meantime Mastny refused to abide by an interim order, was made a party to the action, entered a special appearance which was overruled, answered to the merits of the assignments against him, and ultimately by the final decree was barred of all rights under the lease. The appeal raises the validity of the order canceling Mastny's lease. It also brings up the question of the constitutionality of the moratorium act.

Though neither the receiver nor Mastny is appealing, their rights may seriously be affected by a reversal. Both the validity of the lease made by the receiver without order of the court and a determination of the validity of the order canceling the lease must necessarily be involved in a decision. A decision unfavorable to the constitutionality of the moratorium act might incidentally restore the lease and Mastny's obligations thereunder. In so far as the receiver is concerned, at least his right to compensation, or the amount thereof, and allowance of expenses, might be altered by a change in the decree. A receiver is entitled to be heard as to whether a decree affecting his rights should be changed. *Illinois Trust & Savings Bank v. Kilbourne,* 76 Fed. 883; *Haigh v. Carroll,* 197 Ill. 193; *Polk v. Johnson,* 167 Ind. 548. Neither of these persons is made a party to the appeal. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223; *Reilly v. Merten,* 125 Neb. 558; *Bliss v. Farmers Grain & Stock Co., ante,* p. 147. See, also, under former error proceedings, *Willits v. Harlan County,* 2 Neb. (Unof.) 865; *Hendrickson v. Sullivan,* 28 Neb. 790; *Richardson v. Thompson,* 59 Neb. 299; *Collins Mfg. Co. v. Seeds Dry Plate Co.,* 55 Neb. 576.

The failure to have all the affected parties before this court is alone sufficient to prevent a determination of the issues raised by appeal.

APPEAL DISMISSED.

JOHN AHERN ET AL., APPELLANTS, V. RICHARDSON COUNTY ET AL., APPELLEES.

FILED SEPTEMBER 29, 1934. No. 29386.

1. Counties and County Officers. "County commissioners possess no powers except such as are expressly granted, or are incidentally necessary to carry such powers into effect." *Hamlin v. Meadville*, 6 Neb. 227.
2. ———: POWERS: ISSUANCE OF BONDS. "Counties have no authority at common law to issue bonds. They are quasi corporations, mere governing agencies, charged with certain objects of necessary local administration." *Hamlin v. Meadville*, 6 Neb. 227.
3. ———: ———: ———. "The power to issue commercial paper must be conferred by statute. And such power must be exercised in the manner prescribed." *Hamlin v. Meadville*, 6 Neb. 227.
4. ———: ———: ———. The proposed proceedings of the board of county commissioners of Richardson county in the construction of the proposed interstate bridge, including the issuance of revenue bonds, are not in conformity with law, and, under the circumstances involved, are wholly unauthorized; and plaintiffs are entitled to the injunction sought.

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

Bayard T. Clark, for appellants.

J. H. Falloon, John C. Mullen and *F. A. Hebenstreit, contra.*

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

EBERLY, J.

This is a suit in equity brought by John Ahern and

Roselle Ahern, as taxpayers of Richardson county, against Richardson county and certain county commissioners thereof, seeking an injunction to enjoin defendants from constructing a certain bridge over the Missouri river at or near Rulo, Nebraska. Issues were joined, trial had to the court, and evidence was introduced. At the conclusion of the hearing a decree was entered on August 31, 1934, for defendants. This decree included specific findings, which may be summarized as follows: That the county of Richardson is the owner of a franchise which was conferred by an act of congress on John C. Mullen and others, which had been duly assigned to the county of Richardson on February 14, 1934; that within one year from the passage of the act granting the franchise, John C. Mullen and others, as grantees of such franchise, had commenced the actual construction of the bridge and approaches; that Richardson county, as holder of the franchise, has the right thereunder to construct a bridge across the Missouri river at or near Rulo, Nebraska, between Richardson county, Nebraska, and Holt county, Missouri; that for the purpose of securing funds with which to construct this bridge such county has the right to make application to the reconstruction finance corporation of the United States, and, in the event such loan is made, to issue therefor "revenue bonds" payable only from the tolls of such bridge when completed, and which bonds would not be an obligation on the taxable property of Richardson county; and that such county has a right to secure the payment of said revenue bonds by executing a mortgage to the reconstruction finance corporation on said bridge.

The proposed proceedings of the corporate authorities of Richardson county were approved by the district court, and the injunction denied. Plaintiffs appeal, and the cause comes before this tribunal for trial *de novo*.

It is quite obvious that the legal effect of the act of congress of March 4, 1933, was to vest in the grantees thereof a franchise; that is, a special privilege conferred

by the government upon individuals which does not belong to the citizens generally, of common right. 26 C. J. 1008. This franchise constituted property. *Monongahela Navigation Co. v. United States,* 148 U. S. 312; *Gulf and Ship Island R. Co. v. Hewes,* 183 U. S. 66; *Wilmington Railroad v. Reid,* 13 Wall. (U. S.) 264.

It will be noted that the grantees of this act of congress, as expressly set forth therein, are John C. Mullen, John H. Hutchings and William Shepherd, their heirs, representatives and assigns.

A grant to a grantee or assigns has been held sufficient to authorize an assignment without further consent of the sovereign executing such grant. *Ft. Smith Light & Traction Co. v. Kelley,* 94 Ark. 461; *Commercial Electric Light & Power Co. v. Tacoma,* 17 Wash. 661; *City of Wheeling v. Chesapeake & Potomac Telephone Co.,* 82 W. Va. 208. See, also, 26 C. J. 1038.

And it is also true that, in the absence of restrictions contained within the statute of its creation, a right to sell a franchise has been held to include the right to mortgage it. *Willamette Mfg. Co. v. Bank of British Columbia,* 119 U. S. 191.

We are therefore quite of the opinion that the proceedings disclosed by the evidence were sufficient to transfer to Richardson county all rights originally vested in John C. Mullen and others in the franchise, as well as to the results of the work performed thereunder.

However, the rule also obtains that, in the absence of provisions to the contrary, franchises are granted subject to existing laws. *Chesapeake & Ohio R. Co. v. Miller,* 114 U. S. 176.

The terms of the franchise act do not purport to confer any additional powers upon the grantees therein named or upon their assigns. Therefore, the question presented by this record must be determined in the light of the powers vested in the county of Richardson under the laws of the state of Nebraska, and whatever limitations are

therein expressed, or necessarily implied, must be complied with.

It is obvious that in Nebraska counties are not municipal corporations. *State v. Cheyenne County, ante,* p. 619.

Also, we are committed to the view that, "Counties and county boards can only exercise such powers as are expressly granted by statute, and such grant of power must be strictly construed." *State v. Lincoln County,* 18 Neb. 283. See, also, *Brooks v. MacLean,* 95 Neb. 16.

In line with this general principle, "The rule is well settled that, in the absence of statutory authority therefor, express or implied, the fiscal agents of a county cannot issue commercial paper so as to charge the county, and where such authority is given to fiscal agents it must be pursued strictly or the county cannot be held for the payment thereof. 15 C. J. 611. See, also, *Stewart v. Otoe County,* 2 Neb. 177.

It is also well established that, "In the absence of authority conferred expressly or by necessary implication by Constitution or by statute, counties or parishes have no power to issue bonds." 15 C. J. 611.

As disclosed by the record before us, there is no contention that Richardson county possesses the necessary funds to defray the cost of this proposed improvement, either in the form of cash in its treasury or in appropriate levies of taxes. The necessary funds are to be raised wholly by sale of the revenue bonds plus the moneys donated by the federal government.

The county board has a general supervision over the public roads, with power to establish and maintain them as provided by the statutes. Comp. St. 1929, sec. 39-301.

In 1895 there was enacted by the legislature chapter 45 of the session laws of that year, which now appears as sections 39-834 to 39-838, Comp. St. 1929, authorizing any county to issue bonds to construct or aid in the construction of a highway wagon bridge across any boundary stream of the state of Nebraska. However, the right of a county board to issue such bonds is, by the terms of the

enactment, made dependent on the three-fifths affirmative vote of the electors at a general or special election held for the purpose of authorizing the same.

In 1927 there was enacted chapter 184 of the session laws of that year, entitled "An act providing for the construction of interstate bridges; * * * enabling any county * * * to aid in the construction of such bridges," etc. It now appears as sections 39-1601 to 39-1609, Comp. St. 1929. It provides, in part: "Any county * * * shall have the authority to aid the state in the construction or purchase of any interstate bridge. Whenever the governing authority of any such county * * * by resolution shall determine to exercise such authority, then the governing authority of any such county * * * shall be authorized to enter into an agreement with the department of public works to aid the state in the construction of any such bridge, and for such purpose such county * * * shall have authority to issue and sell bonds: Provided, the governing authority of such county * * * shall first submit to the electors thereof the question of the issuance of such bonds." Comp. St. 1929, sec. 39-1609.

Also, section 11-401, Comp. St. 1929, provides: "Any county * * * is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county board of such county * * *, not exceeding ten *per centum* of the assessed valuation of all taxable property in said county * * *: Provided, the county board * * * shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county * * * in the manner provided by law, for submitting to the people of a county the question of borrowing money."

In the instant transaction none of these statutory provisions have been followed or in any manner complied with by the corporate authorities of Richardson county.

It thus appears that one of the uniform requirements of our statutes pertaining to this subject is that public property shall not be encumbered, nor shall the taxpayer

be adversely affected by the issuance of the obligations of the county in the form of bonds or commercial obligations, without prior affirmative approval expressed at an election duly held. This bridge franchise, and the property created by the county's grantor which is essential to the exercise thereof, are public property now owned by the county. The electors of Richardson county have in no manner approved the issuance of the proposed revenue bonds, nor have they consented to the charging of any of the property owned by the county for the payment thereof. It is admitted that there is no express authority for the proposed proceedings, and certainly such authority cannot be implied.

We are committed to the following principles as announced by this court in *Hamlin v. Meadville,* 6 Neb. 227:

"County commissioners possess no powers except such as are expressly granted, or are incidentally necessary to carry such powers into effect.

"Counties have no authority at common law to issue bonds. They are quasi corporations, mere governing agencies, charged with certain objects of necessary local administration.

"The power to issue commercial paper must be conferred by statute. And such power must be exercised in the manner prescribed."

See, also, *Walsh v. Rogers,* 15 Neb. 309; *Oakley v. Valley County,* 40 Neb. 900; *State v. Babcock,* 21 Neb. 187; *State v. Lincoln County,* 18 Neb. 283.

It follows that the proposed proceedings of the board of county commissioners of Richardson county in the construction of the proposed interstate bridge, including the issuance of revenue bonds, are not in conformity with law, and, under the circumstances involved, are wholly unauthorized; and that plaintiffs are entitled to the injunction sought. Thus, we conclude that the district court erred in its denial of the injunction, and the judgment is therefore reversed and the cause remanded, with directions to enter decree as prayed in plaintiffs' petition.

REVERSED.

INTERSTATE AIRLINES, INC., APPELLANT, V. THOMAS F. ARNOLD, APPELLEE.

FILED OCTOBER 4, 1934. NO. 29003.

1. Witnesses. It is within the discretion of the trial court in an action at law to admit evidence showing the interest of a witness in the result of the litigation for whatever bearing such evidence may have on his credibility or on the weight of his testimony.
2. Corporations: INCORPORATION: COLLATERAL ATTACK. Collateral attack on the legal existence of a duly organized and acting corporation may not be permissible for the purpose of adjudging two of the corporate promoters jointly liable as partners for the negligence of one of them alone.
3. ———: LIABILITY. A partnership or corporation owning an airplane is not liable for damage to property of a third person, while the airplane is being wrongfully and negligently operated by a partner or a corporate officer exclusively for individual purposes of the operator without authority from or knowledge or consent of the owner.
4. Trial: INSTRUCTIONS. Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal do not require a reversal of the judgment on the verdict.

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

Byron W. Hunter, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

ROSE, J.

Plaintiff, Interstate Airlines, a corporation carrying United States mail by airplane, commenced this action against Thomas F. Arnold and Norman P. Cahow, defendants, to recover from them $1,700 for damaging an airplane. It was stated in the petition that, while plaintiff's Pitcairn airplane was parked on the north side of the

Rapid Airlines' hangar apron on the night of January 29, 1931, a Stinson airplane of defendants crashed into the former as the result of Cahow's negligence, causing the damage alleged; that Cahow knowingly violated regulations of the federal department of commerce requiring starting blocks under the Stinson's wheels, a licensed mechanic or pilot in charge, and equipment for night flying; that after starting the motor Cahow intended to fly the airplane at night; that defendants at the time were joint owners and operators of the Stinson airplane; that any operating act of one of them was with the knowledge and consent of the other.

In an answer by Arnold, unadmitted allegations of the petition were denied, and he specifically alleged that defendants were not joint owners and operators of the Stinson airplane at the time of the alleged accident January 29, 1931. Arnold pleaded further that he was not the owner of the Stinson plane at the time of the accident nor then responsible for its operation; that Cahow was not then the agent, servant, employee or partner of Arnold nor the latter's representative in any other capacity creating a liability for damages to plaintiff's plane; that the X U Airways was then the owner of the Stinson plane; that Cahow, without authority and without the knowledge or consent of Arnold, started the motor at night, when the Stinson plane was not equipped for night flying, intending to use it for his own individual pleasure or business in violation of federal regulations relating to the operation of airplanes, thus causing the damage. Details of these defenses were pleaded in the answer.

The reply was a general denial. The action was twice tried. Cahow did not make any defense. Plaintiff recovered a judgment against him for $1,500. Upon the first trial the district court held that the evidence was insufficient to support a verdict against defendant Arnold and dismissed the action as to him. Plaintiff appealed. Upon a review of the record the supreme court ruled that the lower court erred at the first trial in refusing to

admit in evidence a copy of an instrument relating to the transfer of the Stinson airplane from defendants to the X U Airways, and also erred in refusing to submit to the jury the issue as to the joint liability of defendants for damages to plaintiff's airplane. The judgment was reversed as to defendant Arnold and the cause was remanded for further proceedings. *Interstate Airlines, Inc., v. Arnold,* 124 Neb. 546.

On the same cause of action there was a retrial in the district court, Arnold alone defending. The jury rendered a verdict in his favor and from a second judgment of dismissal as to him plaintiff again appealed.

One of the assignments of error challenged the verdict as contrary to the evidence. There was convincing proof of the following facts: December 11, 1930, defendants, Arnold and Cahow, entered into a written conditional sale contract with Lawrence Enzminger to purchase from him the Stinson airplane for $5,500, payable as follows: $500 upon execution of the agreement; $2,000 February 1, 1931; $3,000 in five bimonthly instalments of $600 each beginning April 1, 1931. The seller retained title, ownership and right of possession until receipt of payments in full, but the purchasers were permitted to use the plane when operated by a satisfactory pilot approved by the seller. The conditional sale contract contained the following provisions:

"It is further understood and agreed that the purchasers intend to form a corporation under the laws of Nebraska to be known as X U Airways, Inc., and to assign their interest in the within contract to said corporation, and the seller agrees to accept said assignment and to carry out the within contract with said corporation upon the payment of the $2,000 due on or before February 1, 1931, and thereafter all liability hereunder shall be that of said X U Airways, Inc."

The payments were eventually made. There was evidence tending to prove that the X U Airways was incorporated January 9, 1931, and that to it Arnold and

Cahow, January 19, 1931, assigned all their interest in their contract to purchase the airplane; that no written or oral partnership agreement was made at any time; that there was no joint liability of Arnold and Cahow for the latter's negligence in damaging plaintiff's airplane; that Cahow, without the knowledge or consent of Arnold, started the motor at night, when the Stinson plane was not equipped for night flying, intending to use it for his own personal business or pleasure in violation of federal regulations while operated by a pilot not approved by the seller; that no one was authorized by the seller to fly the plane by night; that the accident occurred after both Arnold and Cahow had assigned their interest in the contract of purchase to the X U Airways. The jury obviously gave credence to competent evidence of the facts outlined, notwithstanding the testimony of plaintiff's witnesses. The entire record has been considered from every standpoint and the conclusion is that the verdict is not contrary to the evidence but is amply supported by it.

In view of the result reached on the sufficiency of the evidence to sustain the dismissal of the action as to Arnold, the assignments of error are based largely on technical grounds. It is argued that the trial court erred in overruling objections to evidence that plaintiff recovered a judgment against Cahow for $1,500 on the same cause of action. He was the principal witness called and examined by plaintiff. His testimony on the issue of joint liability was at variance with that of his codefendant Arnold. Cahow's negligence was shown by undisputed evidence and his liability to the extent of $1,500 was adjudicated. If plaintiff should prevail on the issue of joint liability as pleaded in the petition, the adjudicated liability of Cahow would be extended to and borne by Arnold or by both. The former was therefore vitally interested in the result of the litigation and it was within the discretion of the trial court to admit proof of the judgment for whatever bearing it had on the credibility of Cahow as a witness or on the weight of his testimony.

An instruction assailed by plaintiff as erroneous directed the jury, in effect, that X U Airways was a legal corporation January 9, 1931, and if it was the owner of the Stinson airplane at the time of the accident, Arnold was not personally liable for the damage to plaintiff's plane. Plaintiff contends there was a failure to comply with constitutional and statutory provisions relating to the manner of selecting directors, to the issuance of stock and to notice. The articles of incorporation were adopted, registered, certified by the secretary of state and notice published. Both Arnold and Cahow agreed to transfer to the corporation their interest in the contract to purchase the Stinson plane and did so. The corporation exercised its franchise to accept the transfer. There is no proof of bad faith or fraud in the organization of the corporation or in its corporate acts. The state has not attacked it. Under the circumstances its incorporation and corporate acts were not open to collateral attack by plaintiff. For the purposes of this case it was a legal corporation as stated in the instruction of the trial court. *Thies v. Weible*, 126 Neb. 720.

Conceding, however, contrary to competent evidence, that the corporation had no legal existence and that Arnold and Cahow were partners, the jury were still at liberty under the evidence and the instructions to find in favor of Arnold. He had no part in the negligence of Cahow, a wrong-doer on his own individual account. When Cahow's negligence caused the damage, he was, according to competent evidence, acting solely in furtherance of his own individual business or pleasure and was not performing any service for, or in the interest of, the partnership or Arnold. The jury were justified in finding that Cahow acted without authority from any legitimate source in violation of regulations without the knowledge or consent of Arnold. A partnership or corporation owning an airplane is not liable for damage to property of a third person, while the airplane is being wrongfully and negligently operated by a partner or a corporate officer

exclusively for individual purposes of the operator without authority from or knowledge or consent of the owner. See cases cited in 22 A. L. R. 1402; 45 A. L. R. 481; 68 A. L. R. 1054.

Plaintiff contends also that the district court failed to comply with the mandate to admit at the second trial the document erroneously excluded at the first trial and did not submit to the jury by a proper instruction the issue of partnership and joint liability of defendants. The excluded document was admitted in evidence at the second trial. The instructions directed the jury to find for plaintiff, if defendants were jointly liable, and this fairly included the issue of partnership when the charge is considered as a whole, as it should be. The issues of fact and the law applicable thereto were clearly submitted by the entire charge and the jury were permitted to find for plaintiff on the evidence adduced. Harmless error criticized in instructions considered separately does not require a reversal. Prejudicial error in giving or refusing instructions or in other rulings has not been found upon a review of the entire record.

AFFIRMED.

E. H. LUIKART, RECEIVER SOUTH OMAHA STATE BANK, APPELLEE, V. WILLIAM N. JAMIESON, APPELLANT.

FILED OCTOBER 4, 1934. No. 29004.

Set-off. "Mutuality of demands is necessary to entitle a defendant to a set-off, and the respective demands must be between the same persons and in the same capacity." *Bank of Crab Orchard v. Myers*, 120 Neb. 84.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Webb, Kelley & Lewis and *S. Arion Lewis*, for appellant.

S. L. Winters, F. C. Radke and *Barlow Nye, contra.*

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

GOOD, J.

This is an action on a promissory note. As a partial defense, defendant pleaded three items of set-off. The trial court refused to submit to the jury for their consideration two of the items. From an adverse judgment, defendant has appealed.

The South Omaha State Bank was adjudged insolvent in 1931, and plaintiff was appointed receiver to wind up its business affairs. Prior to insolvency of the bank, defendant was a customer of the bank. At the time the receiver was appointed he was indebted to the bank upon his promissory note for $1,500. He also had three accounts in the bank. One was an account as administrator of the estate of Delia Jamieson, deceased; another was a personal checking account, and the third a personal savings account. In his answer he alleged that there was $500 of his individual money that was deposited in the administrator account, and that he was entitled to have this item allowed as a set-off against his promissory note. He also claimed a small amount for the savings account. The record discloses without substantial controversy that at defendant's request the receiver credited upon his note the amount of the savings account and the balance that was standing in his checking account, and in this action plaintiff asked judgment for the amount of the note less the credit.

The only real controversy presented by this appeal is as to whether defendant was entitled to the 500-dollar set-off out of his account as administrator. It may be observed that he had presented to the receiver and had allowed a claim in his favor as administrator for the entire amount of the account, and has received one dividend thereon. Two other dividends have been declared, but he has refused to accept them.

From the evidence it appears that in April, 1931, $1,835.04 was deposited in defendant's personal account which should have been in his account as administrator.

Later this item was transferred to his account as administrator. There is evidence tending to show that $500 of this deposit represented private funds of the defendant. He claims that this was never withdrawn from the account, and that he is therefore entitled to set off this $500 against his promissory note. The evidence shows that in July, 1931, and subsequent to this deposit, all of the funds in his account as administrator had been withdrawn from the bank, leaving an overdraft of $27.68. Thereafter certain deposits were made by him in that account. It is conceded that the deposits, made subsequent to overdraft, represented funds belonging to the decedent estate. It appears that if defendant had $500 of his money in the administrator account it was withdrawn and presumably used for the benefit of the estate. None of his individual money remained in his account as administrator. It may be that the estate was indebted to him for the $500. The deposit subsequently made in the account was the money of the estate and could only be withdrawn by the administrator of the estate. Until the money in this account was withdrawn, it remained the property of the estate.

If, in his capacity as administrator, defendant had funds to his credit in the bank, and if the county court had allowed a claim in his favor against the estate, he could, as administrator, have drawn a check, payable to himself as an individual, and could have cashed it. Had he done so, the money represented by the check would have then been transferred from the decedent estate to the defendant. Until the transfer was made, the fund, represented by the bank deposit, remained the property of the estate and not that of the defendant as an individual. The situation presented by the record is quite similar. The estate may have been indebted to him, and it is possible that he could, as administrator, have drawn a check upon his account as administrator, payable to himself as an individual, and could have cashed the check. Had he done so, the fund, represented by the check, would have been transferred to him as an individual. That transfer was never made.

The fund remained the property of the estate.

In *Bank of Crab Orchard v. Myers,* 120 Neb. 84, it was held:

"Mutuality of demands is necessary to entitle a defendant to a set-off, and the respective demands must be between the same persons and in the same capacity.

" 'A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff.' *Simpson v. Jennings,* 15 Neb. 671." See, also, *State v. Weston Bank,* 125 Neb. 612.

It is clear that the money in the account as administrator was an account held by defendant in a trust capacity. His liability to the bank was an individual liability. They were not mutual accounts. They were not demands between the same persons and in the same capacity. We think the court properly refused to submit to the jury this item of the set-off.

The record appears to be free from error. Judgment AFFIRMED.

STATE, EX REL. CHARLES MARASCO, APPELLANT, V. HARRY MUNDELL, APPELLEE.

FILED OCTOBER 4, 1934. NO. 29006.

1. **Fines:** IMPRISONMENT. Where judgment in a criminal action requires imprisonment of defendant until fine is paid, issuance of execution to collect the fine is not a prerequisite to such imprisonment.
2. ———. Judgment in a criminal action imposing a jail sentence and fine, and remanding defendant to custody of the sheriff to carry out the sentence and judgment, is equivalent to a judgment requiring defendant to be confined in jail until the fine is paid.

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

Lovely & Lovely and *William P. Nolan,* for appellant.

Ralph J. Nickerson, contra.

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

GOOD, J.

This is a habeas corpus proceeding, in which relator appealed from a judgment denying him relief.

The record shows that relator and one Oddo were each charged in an information, consisting of three counts, each charging a violation of the liquor law. Oddo pleaded guilty to one count, and relator pleaded guilty to all three counts. Oddo was sentenced to pay a fine of $100. Relator was sentenced "to pay a fine of five hundred dollars ($500) and that he be imprisoned in the county jail of Sarpy county 30 days and * * * pay one-half the costs of this prosecution taxed at $107.45. Said defendants are remanded to the custody of the sheriff to carry out this sentence and judgment." The minimum penalty for the offense to which relator pleaded guilty is $500 fine and 30 days in jail. Comp. St. 1929, sec. 53-116.

Relator has served more than the 30 days in jail and contends that his further imprisonment is unlawful, in that the judgment did not require his confinement in jail until his fine and costs were paid, and that he could not be lawfully imprisoned for nonpayment of the fine unless execution had first been issued and returned unsatisfied and his body seized and placed in jail for the nonsatisfaction of the execution. It is the state's contention that the judgment, while not in the exact language of the statute, is equivalent to a provision requiring relator to be confined in jail until his fine and costs are paid.

Section 29-2203, Comp. St. 1929, provides: "Whenever a fine shall be the whole or part of a sentence, the

court may order that the person sentenced shall remain confined in the county jail until the amount of such fine and costs are paid." There is another provision by which the fine may thus be satisfied by one day in jail for each three dollars of the fine. Comp. St. 1929, sec. 29-2412.

It is conceded by relator that had the court sentenced him to be confined in the jail until his fine and costs were paid he would not be entitled to his discharge until he had served the full 30 days and one additional day for each three dollars of the fine and costs imposed upon him. If the judgment pronounced, in effect, requires this, then relator was not unlawfully deprived of his liberty, and is required to either pay the fine and costs imposed or remain in jail one day for each three dollars of such fine and costs. No execution would be necessary if the court, in its order, had directed the imprisonment of defendant until the fine and costs were paid. *Luther v. State,* 85 Neb. 674.

Section 26-1403, Comp. St. 1929, provides: "He (the sheriff) shall have charge and custody of the jail, and the prisoners of the same, and is required to receive those lawfully committed, and to keep them himself, or by his deputy jailer, until discharged by law."

Section 47-105, Comp. St. 1929, *inter alia,* provides: "The sheriff * * * shall have charge of the county jail of his proper county, and of all persons by law confined therein, and such sheriff * * * is hereby required to conform, in all respects, to the rules and directions of the district judge."

While the sentence and judgment pronounced are not in the precise form required by statute, it is significant that the language of the judgment is that relator was remanded to the custody of the sheriff to carry out the sentence and judgment. The only way the sheriff could carry into effect that part of the judgment imposing a fine was to keep the relator confined in the jail until he had either paid the fine or remained there for a suffi-

cient time to satisfy the fine at the rate of three dollars a day. The judge who heard this cause is the same one who pronounced the judgment in the criminal action.

We are of the opinion that it was the intention of the trial court that relator should be confined in the county jail until his fine and costs were paid or otherwise discharged. Relator has not paid his fine; nor has he served a sufficient time to discharge it. He is not entitled to his discharge.

The conclusion reached renders it unnecessary to consider other questions raised in the briefs. Judgment

AFFIRMED.

MARGARET B. SHOTWELL, APPELLANT, V. FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES.

FILED OCTOBER 4, 1934. No. 29273.

1. **Evidence:** HYPOTHETICAL QUESTIONS. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.
2. **Contracts:** VALIDITY: MENTAL CAPACITY. The question whether one long addicted to the use of alcohol, who had recently given it up, and become a chronic addict of narcotics, was incapable of making a valid contract depends upon whether, at the time of executing the contract, his understanding was so deficient that he had no knowledge of the consequences of his act.

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

George B. Thummel and *Richard Mackey,* for appellant.

Johnsen, Gross & Crawford, contra.

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

PAINE, J.

This is an appeal from orders of the district court for Douglas county, overruling motions of the plaintiff for a

new trial, and for judgment notwithstanding the verdict.

This action is founded upon a claim, filed against decedent's estate, upon a nonnegotiable promissory note for $50,000, which recites, "For value received." The claim was rejected in the county court, and, upon appeal to the district court, a trial was begun to a jury, but a judgment was entered at the close of claimant's evidence, discharging the jury and rejecting the claim.

This court reversed such ruling, holding, among other things, that a *prima facie* case means a case which has proceeded upon sufficient proof to that stage where it will support a finding if evidence to the contrary is disregarded, and that such a case must be submitted to the jury, and not decided as a matter of law.

Upon a retrial in the district court, the evidence of the expert, Jay Fordyce Wood, of Chicago, taken at the first trial, was read to the jury without objection, although he had died since the first trial. The evidence of Margaret C. Shotwell, daughter of claimant, as taken at the first trial, was also read to the jury by Mr. Thummel, because said witness was ill and under a doctor's care, the defendants making no objection thereto. The reading of the evidence of these two witnesses, and the introduction of the exhibits contained therein, closed the claimant's evidence in chief. Then followed the defendants' evidence, the claimant's rebuttal, and the surrebuttal evidence. The jury returned a verdict for the defendants, and claimant appeals.

It is insisted that the court erred in submitting to the jury an issue admitted in the pleadings, and in submitting another issue upon which there was an utter absence of proof.

In the first opinion in this case, found in 126 Neb. 377, will be found a copy of the note, together with a full discussion of the evidence of the claimant as given at the first trial, which evidence will not be set out here. The defendants introduced no testimony at the first trial, and the defense in the second trial was based upon the allegation of

paragraph two of the objections filed in the county court, reading as follows: "That the deceased, William W. Hoagland, was of such physical and mental condition at the alleged time of the transaction upon which the claim was based as to be incapable of entering into said alleged transaction."

The evidence of the widow in support of this allegation may be summarized briefly as follows: She married the deceased in 1902 at Loveland, Colorado, when he was 32 years old, and he gradually began to drink until after about ten years he drank very frequently. Even before the marriage he was in a hospital for inebriates. That during the year 1923 he was drunk so continuously that he was incapacitated for any kind of work for seven months. He would come home with a supply of whiskey and gin and other hard liquors, and go to bed and drink almost continuously in bed, sometimes remaining as long as three weeks. When he finally became nauseated, a doctor would be called and administer sedatives. This continued intermittently until 1929, since which time he had drunk only twice to her knowledge. During the last four years he was continually taking dope and narcotics. She testified that for some time before his death Dr. Christie took breakfast with Mr. Hoagland every morning, and afterwards they went upstairs and he gave him a treatment.

Margaret C. Shotwell, the daughter of the plaintiff, was a witness for her mother at both trials, and the widow, Mrs. Hoagland, was asked this question, No. 399: "Now, there has been some reference by Miss Margaret C. Shotwell, calling Mr. Hoagland 'Uncle Will.' Is there any relationship between the Hoagland family and the Shotwell family? A. There is no relationship. Margaret called Mr. Hoagland Uncle Will because she had one of those childlike crushes on Mr. Hoagland that made her call him so."

Mrs. Hoagland testified that deceased was confined to his bed most of the time after October 10, 1931, and did not

leave the house after November 18, 1931, which was two days before the note was dated. A maid testified that, when she followed her usual custom of taking a cup of coffee to Mr. Hoagland in his bedroom in the morning, as she went in on the morning of December 9, 1931, he was lying on the bed dead, with a gun in his hand. Mrs. Hoagland testified that after his death she found various packages of pills and tablets, bottles of medicine, hypodermic syringes, and needles in large quantities in his bedroom, somewhat hidden from sight. She testified that on the 20th of November, 1931, being the date on which the note, upon which the claim was founded, was written, in her opinion he was unable to transact any business.

Dr. Burton W. Christie testified that he was the attending physician, and for some months before deceased committed suicide he would give him a half grain of morphine in the morning, another half grain at noon, and the same at night; that giving him this narcotic was the only way he could control him; that he was a chronic alcoholic and drug addict, suffering from Korsakoff's psychosis; that this disease shows itself in a deterioration of memory.

At the close of the evidence the court gave the jury 11 instructions. The jury returned a verdict for the defendants, signed by all 12 members of the jury. Two instructions given the jury are particularly attacked by the plaintiff. Instruction No. 2 reads as follows: "Defendants enter a general denial of said claim, and further allege that at the time alleged in the claim the deceased, William W. Hoagland, was in such a physical and mental condition that he was incapable of entering into the alleged transaction, and further allege that the note upon which claim is based shows upon its face that it has been altered, and defendants pray that the claim be disallowed."

This court has also examined the other instruction objected to by the claimant, and find no prejudicial error in the giving of either of them.

The claimant insists that the judgment in this case must stand or fall upon the testimony of Dr. George Neuhaus,

and that the hypothetical question asked was not supported by the evidence. Dr. Neuhaus was called by the defendants as an expert in nervous and mental diseases. He was a graduate of Bellevue Medical Hospital in New York, and had taken postgraduate courses twice in the University of Belgrade, twice at Harvard Medical School, once at Phipps Psychological Clinic at Johns Hopkins, and also had postgraduate work in Chicago. He had been assistant professor in nervous and mental diseases at Creighton Medical School since 1922. The hypothetical question asked him by the attorney for the defendants was more than four pages long, and ended with these words: "Assuming all those facts, I am asking you if he had such memory, judgment, intelligence and understanding relative to that transaction as would enable him to understand the nature and effect of his act in connection therewith." He answered that the deceased was not competent to judge. Many minor defects are pointed out in this long question, and it is insisted that the question did not correctly reflect the testimony of the defendant, and told Dr. Neuhaus that Hoagland had been an habitual drunkard for a period of over 39 years, but the question went farther than this general statement, and outlined in detail his drinking habits during all of those years, such details being based on the facts as given in the testimony of the widow and Dr. Christie, who attended him.

The court has carefully examined this question. It is the rule in Nebraska that if a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. *Malcolm v. Evangelical Lutheran Hospital Ass'n,* 107 Neb. 101; *Landis & Schick v. Watts,* 82 Neb. 359; *Herpolsheimer v. Funke,* 1 Neb. (Unof.) 471. In our opinion, the hypothetical question did not mislead the jury in any way. The truth of the facts stated in such a question is for the jury. If the jury find that the facts assumed are not proved, they could disregard the opinion of the expert. When opposing

counsel desires the opinion of the expert upon additional elements omitted from the question, he can bring them out by cross-examination.

Dr. Neuhaus, who clearly qualified as an expert, testified that Mr. Hoagland was not competent to judge the nature and effect of his act at the time of signing the note, because alcohol, taken in large quantities over a long period of time, produces organic changes in the brain, which are permanent. The evidence of this expert furnished support for the verdict of the jury.

The question whether one long addicted to the use of alcohol, who had recently given it up, and become a chronic addict of narcotics, was incapable of making a valid contract, depends upon whether, at the time of executing the contract, his understanding was so deficient that he had no knowledge of the consequences of his act. Annotation 36 A. L. R. 620; *Hauber v. Leibold,* 76 Neb. 706; *Conley v. Nailor,* 118 U. S. 127. We do not agree with the claimant's argument that only a sham defense was interposed in this case. Even though this court might not have arrived at the same conclusion as the jury, still there is ample evidence to support the verdict which binds all parties in this case.

Finding no reversible error, the judgment for the defendants, entered upon the verdict of the jury, is hereby

AFFIRMED.

ETTA TYLER, APPELLEE, V. ESTATE OF MARY A. MCDOUGAL, APPELLANT.*

FILED OCTOBER 4, 1934. No. 28847.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *On rehearing, former opinion modified and judgment of district court reversed.*

*See former opinion, 126 Neb. 534.

Harry R. Ankeny and *Raymond B. Morrissey*, for appellant.

Armstrong & McKnight, contra.

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

CARTER, District Judge.

This case has been previously heard by the court and an opinion adopted. *Tyler v. Estate of McDougal*, 126 Neb. 534. Subsequently a rehearing was granted and the case is now before the court after a second hearing.

We are convinced that the law of the case as set forth in the four paragraphs of the syllabus in the former opinion is correct and it is adhered to in this opinion. However, certain parts of the opinion have been justly criticized by the attorneys for appellee and proper corrections will therefore be made.

Appellee contends that the incompetent evidence detailed in the former opinion was stricken by the trial court. The trial court did make the following order before arguments were heard: "The conversation testified to by Mrs. Tyler which she said took place in Mr. Westwood's office before the sale when Mrs. McDougal and Mr. Westwood were there will be stricken out as being incompetent and the witness was incompetent to testify to said conversation." The record discloses that such a conversation was held after the sale as well as before. The holding of this court is that the conversation mentioned was inadmissible upon objection being made, whether held before or after the sale. The trial court evidently intended to strike out of the record this conversation no matter when it was held, but the order made did not have that effect.

The former opinion contains the following statement: "The record discloses that Lewis C. Westwood could have related most of the facts in establishing this claim if a proper claim did in fact exist. He was not called as a witness, though the evidence discloses that he was present

in the courtroom when the case was tried." It has been called to our attention that the record discloses that Lewis C. Westwood was the attorney for Mrs. McDougal and, upon objection being made, his testimony as to his conversation with Mrs. McDougal would be incompetent. Under these circumstances the two sentences quoted draw an inference that should not be considered in arriving at a correct conclusion and the same will be treated as stricken from the former opinion.

In the last paragraph of the first opinion, we say: "This court is committed to the rule that the evidence, to establish a parol contract in this class of cases, must be clear, convincing, unequivocal and satisfactory, and that such evidence must be referable solely to the contract as made." The above rule is the one applicable in a suit for the specific performance of an oral contract with a deceased person, but is not the correct rule in proving a claim against an estate. A preponderance of the evidence is all that is required in the case at bar and our previous opinion is incorrect in so far as it varies from this rule.

Irrespective of the corrections made herein, the evidence is insufficient to sustain the judgment. There is no competent evidence in the record tending to show the amount of the purported loan. Neither does the evidence support the finding of the trial court that the amount of the purported loan was $500. For this reason and the reasons set out in our former opinion, the judgment of the trial court is reversed and the cause remanded.

REVERSED.

REILLEY BROTHERS, APPELLANT, V. DORIS THOMPSON ET AL., APPELLEES.

FILED OCTOBER 9, 1934. No. 28948.

Contracts. Where a printed contract, when signed by one party, contains blank spaces, and material terms, authorized by the

signer and agreed to by the other party, are not inserted in such blanks, as promised, the writing is inoperative, and the party signing the same is discharged of any duty thereunder.

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

Dryden, Dryden & Jensen, for appellant.

Minor & Minor, contra.

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

PER CURIAM.

This is an action of replevin, brought to recover possession of a Chevrolet coach. The jury found that the right of possession was in the defendant, Doris Thompson; that the value of the car was $400; that the interest of the defendant in the car was $207.50; and a judgment was entered in accordance with said verdict. Plaintiff appeals.

The plaintiff claimed the right of possession under a conditional sales contract in writing, made at Alton, Illinois, bearing date June 27, 1932. The defendant, Doris Thompson, alleged in her answer that she was induced to sign the contract through the fraud of plaintiff's agent, and for that reason elected to rescind, and had offered to return the automobile to plaintiff upon return to her of $207.50, paid on the purchase price of the car.

The evidence shows that the plaintiff, Reilley Brothers, was engaged in the business of selling automobiles at Alton, Illinois, and that, at the time of making the contract in question, it held a balance of $200 in money that had been paid to it for the purchase price of a used car that the plaintiff had sold for one Aldinger. On Sunday morning, June 26, 1932, Aldinger appeared at plaintiff's place of business with the defendant, and informed the plaintiff that the $200 held by it for him could be used by the defendant in the purchase of a new car. Negotiations between the plaintiff and defendant resulted in the auto-

mobile involved herein being delivered to the defendant that morning. A Mr. Martin paid the sum of $7.50 in cash for the defendant, and thereupon she received credit for the sum of $207.50 upon the purchase price of the automobile. The defendant agreed to pay the balance of the purchase price, including finance charges, by paying the sum of $38.20 each month for 12 months. Pencil notations of certain data to be used in filling out the blank spaces in a printed form prepared for use in making out a written conditional sales contract were made by plaintiff's agent upon a similar printed form, and the defendant signed one of these sales contracts in blank. On Monday, the next day, Miss Benecke, an office employee, filled out the blank spaces in the conditional sales contract, under which the plaintiff claims right of possession, above the defendant's signature, by using the pencil notations made by the salesman on Sunday.

The defendant testified that she had a sick sister in Kearney, Nebraska, and on Tuesday she left Alton for Nebraska in the car she had bought on Sunday.

The plaintiffs testified that defendant never informed them that she desired to take the car out of Illinois, and that she gave her address as 2221 College avenue, Alton, Illinois, and stated that she was an employee of the Alton State Hospital, and by an investigation they found she had left its employ some time before, and had left the street address given as her residence, and they could not find where she had gone, and turned it over to a finance company for investigation.

The defendant testified that she told the agent and Mr. Reilley that she was going to Nebraska, and the agent agreed to insert permission in the contract to that effect, which was not done, and Mr. Reilley absolutely denies any such conversation.

According to the defendant's testimony, an agent of some finance company called upon her before the first monthly payment of the unpaid portion of the purchase price became due, and demanded possession of the auto-

mobile on behalf of the plaintiff, and informed her that the finance company had refused to finance the purchase of the car by her. To this agent, she claims, she offered the car upon the payment to her of $207.50. Later she drove the automobile to Kearney, and turned it over to the law firm of Minor & Minor. This firm wrote the plaintiff a letter, dated July 27, or one month after the date of the purchase of the automobile for the defendant, and thereby informed the plaintiff of the whereabouts of the automobile. This letter requested the plaintiff to advise what disposition the plaintiff desired in the matter. After demand for and refusal of possession, this action was brought, and the automobile taken by the plaintiff under a writ of replevin.

The plaintiff bases its right to recover possession under a clause in the conditional sales contract to the effect that the defendant bound herself not to remove the automobile from the county in which she then resided, without the written consent of the plaintiff, under penalty of forfeiture of all right to possession of the car and the amount she had paid upon the purchase price.

Defendant first testified that the conditional sales contract was filled out by the agent, Mr. Temple; that she then asked him if the contract gave her the right to take the car to Nebraska, and Mr. Temple said "Yes," and that she then signed the contract, relying upon his statement that it was in accordance with the oral agreement they had just made, but later it developed that she was mistaken in this; that what really happened was that a form of the sales contract was partially filled out in pencil by Mr. Temple, and that then a form of the same contract, but in blank, was handed to her, and she signed her name to such blank contract; that this was on Sunday, and that on the following day the stenographer of Reilley Brothers, appellant, using the penciled form of contract which was not signed, proceeded to fill out the contract which she had signed in blank, and that is the contract, exhibit A, so that defendant first saw the contract, exhibit A, when

it was produced at the first hearing in the county court.

Instruction No. 7, which plaintiff insists is wrong, reads as follows: "You are instructed that if defendant satisfies you by a preponderance of the evidence that plaintiff and defendant made an oral agreement for the purchase of the car in question and that by the terms of said oral agreement defendant was to have credit for $200 due her on the sale of a former car and was to pay $7.50 additional and was to have a new car and was also to have the right to take said car to Nebraska, and that plaintiff was to finance the balance of $458.40 in twelve payments of $38 each, and if defendant further satisfies you by a preponderance of the evidence that plaintiff agreed to reduce said contract to writing and did present to defendant the conditional sales contract in question and falsely and fraudulently represented to defendant that said terms orally agreed to were in said conditional sales contract, and that defendant relied upon such representations and signed said contract and that said contract did not give the defendant the right to remove said car from the state of Illinois and that she upon discovery of such omission rescinded the sale and offered to release the car to plaintiff upon return to her of payments made, then your verdict must be for defendant."

While the instruction is open to slight criticism in its statement of the facts as they actually occurred, yet we do not believe such minor defects constitute reversible error.

"Where a party is induced to refrain from making an examination of a paper given him by another through misrepresentation as to its purport, it would be an extreme case that would warrant a court in holding that there was an assent to the contents of the document before such contents were in fact known." *Lotter v. Knospe,* 129 N. W. 614 (144 Wis. 426).

Our court has held: "A party is not chargeable with negligence in signing a contract that does not express the true intent of the parties, when there is nothing on the face of such contract from which an ordinarily prudent

man would reasonably be expected to discover a fraudulent misstatement of a material fact by the other party, who reduced such contract to writing." *Shurtleff v. Pick & Co.*, 103 Neb. 414. See, also, *Mardis v. Miller*, 241 Fed. (Neb.) 470.

It is elementary that, where a contract is reduced to writing, parol evidence is not admissible to contradict it, or vary its terms. It is also true that a party cannot generally avoid the effect of a written contract by showing that he signed it without reading it, or in ignorance of its terms, but he may avoid it for fraud. The general rule referred to is not applicable in a suit between the original parties to the contract where the defense is that the writing, by reason of fraud, does not embrace the contract actually made. *Ward v. Spelts & Klosterman*, 39 Neb. 809.

"The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent * * * and creates an agency in the receiver to do so in the way contemplated by the maker." *Montgomery v. Dresher*, 90 Neb. 632.

In Restatement, Contracts, by the American Law Institute, sec. 442, it provides: "Where a written contract, or a writing apparently intended to be a written contract when completed, contains blank spaces, and words authorized by one party thereto are inserted by the other in the spaces, the writing as altered is operative." And, again, in the same section: "A material, fraudulent, and unauthorized insertion in a blank space made by one party discharges any duty of the other party under the writing." And the converse is true.

In the case at bar, the jury have apparently determined that in filling in the blank contract signed by Miss Thompson the salesman fraudulently failed to keep a promise he made her to insert therein that she would be permitted to remove the automobile to Nebraska. Under the authorities cited, this in itself would discharge her from the contract, and require the plaintiff to place her

in statu quo by refunding the money she paid on the alleged oral contract. In this connection we are faced with the dilemma that, if the parties are placed *in statu quo,* then the plaintiff would have deposited with it the sum of $200, not payable in cash, but held to be applied on the purchase of a new car. This arises by reason of the fact that they sold a car for $400 and made no charge for the sale under the agreement that they would pay the owner $200 in cash and hold the balance to be applied on the purchase of a new car from them. We find that the judgment entered by Judge Hostetler provides: "That the defendant have the return of said car and her damages herein sustained in the amount of $10.08; that if said car cannot be returned, that the defendant have and recover of and from the plaintiffs, the value of her interest in said car, to wit: The sum of $207.50 and her damages herein sustained in the amount of $10.08, and that the defendant have and recover of and from the plaintiffs the costs of this action at $63.75."

In case the plaintiff corporation has carefully stored this car, and can now return it to the defendant in accordance with this judgment, the question of the repayment of the $200 held by them will not arise, and in case they have disposed of the car, they will be required to pay this $200 in cash, and lose the chance of a new sale, which cannot seemingly be avoided under the judgment.

There was direct conflict in the evidence. The jury heard the testimony of Mr. Reilley and Mr. Temple, the salesman; they then found against the plaintiff company, and in favor of Miss Thompson, the defendant, on the issues joined and under the instructions of the court. The evidence might not impress the members of this court the same as it did the jury, but the verdict will stand, as there appears no prejudicial error in the record.

AFFIRMED.

A. L. MILLER, APPELLEE, V. BANNER COUNTY, APPELLANT.*

FILED OCTOBER 9, 1934. No. 28918.

1. Appeal. "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." *Citizens Ins. Co. v. Herpolsheimer*, 77 Neb. 232.
2. ———. The findings of a court in a law action tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be set aside when there is evidence to support them.
3. Paupers: EMERGENCY OPERATION: LIABILITY OF COUNTY. In an emergency requiring an operation to save the life of a pauper, the surgeon should, if reasonably possible, attempt to communicate with the proper corporate authorities charged with the care of the poor, but if an arbitrary refusal is given, or if such corporate authorities be noncommittal, the necessary services may be rendered notwithstanding, and the law imposes an obligation upon the county to pay the reasonable value of such services.
4. Domicile. An unemancipated minor child whose father is dead takes the settlement of the mother by derivation.
5. Paupers. Evidence examined, and *held* to establish that Clarence Hooley was a pauper within the meaning of the poor laws of this state; that his settlement as such was in the county of Banner as a member of his mother's family who there resided; and that the same amply sustains the judgment of the district court.

APPEAL from the district court for Banner county: ISAAC J. NISLEY, JUDGE. *Judgment of district court reaffirmed.*

William H. Heiss, for appellant.

Roland V. Rodman and *John H. Kuns, contra.*

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

EBERLY, J.

This proceeding against Banner county is a prosecution

*See former opinion, *ante*, p. 1.

of a claim for services as physician and surgeon performed by plaintiff and appellee for one Clarence Hooley, alleged to be a pauper. This claim was originally filed with the board of county commissioners of Banner county. It was rejected by them and the claimant appealed to the district court for Banner county. Here a jury was waived, and, in a trial to the court, evidence was introduced, on consideration of which findings and judgment for plaintiff were entered. From this determination, and the order of the trial court overruling its motion for a new trial, Banner county appeals.

This record thus presented on appeal involved the application of two principles of procedure long adhered to in this jurisdiction, viz.: "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232. And, also, "The findings of a court in a case tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be set aside when there is evidence to support them." *Citizens Ins. Co. v. Herpolsheimer, supra.* See, also, *Callahan v. Callahan,* 7 Neb. 38; *Faulkner v. Simms,* 68 Neb. 299; *Commercial Nat. Bank v. Ruff,* 110 Neb. 302; *Bodge v. Skinner Packing Co.,* 118 Neb. 179.

At the time of the trial Clarence Hooley was 19 years of age. His father was dead. Some time after his father's death, his mother married a man by the name of Murphy, who, in 1929, deserted her and his whereabouts thereafter are unknown. In 1930, after the desertion of the mother by Murphy, the mother and her family, of which Clarence was a member, were residing in Gering, Nebraska. In October of that year the entire family embarked in a Ford automobile and started for Oregon, intending to there establish their new home. They proceeded as far as Cheyenne, Wyoming, and then turned back by reason of a

storm. Mrs. Hooley and her family then stopped in Kimball, Nebraska, and afterwards they started north and had reached Banner county when a storm again overtook them. The family, including Clarence, sought refuge in an abandoned sod house. Later the owner thereof, in a spirit of charity, gave them permission to live in this sod house without paying rent.

The family continued to occupy this place as their home until in April, 1932. After the family settled down in Banner county in 1930 they worked at husking corn for various neighbors, and at other farm employment, and thus managed to support themselves until about Christmas time. After Christmas the family were in regular course given county aid through commissioner Blake of Banner county. The family appeared to be able to support themselves during the summer, when there was work, but during the winter months it was necessary for them to receive aid, which Banner county supplied.

During this time Clarence Hooley worked at various places. He brought his wages home to the family, deducting only enough for necessary expenses, and he stayed at home when he was out of work. Commissioner Blake interested himself in the family, and personally took Clarence out in 1932 to secure employment. Later the boy got a job with one George Everson for a salary of $5 a month and his board and room.

It appears reflected in the evidence that the Hooley or Murphy family had neither credit nor means during the time they lived in Banner county, and each winter the county furnished the family with aid. When a sister of Clarence Hooley became ill in the winter of 1932 the county of Banner furnished medical aid for her. During the period that followed the occupancy of the abandoned sod house by the family, Clarence worked intermittently wherever employment was available; sometimes for wages, and sometimes for board and lodging. He returned home during seasons of nonemployment.

It also appears that Clarence Hooley had several at-

tacks of appendicitis, the first of which occurred when he was working for commissioner Blake of Banner county. On this occasion Mr. Blake brought him back to the family home where he remained until he had recovered. The second attack occurred in the spring of 1932, and he was taken by Mr. Everson, his employer, to the office of Dr. A. L. Miller, claimant, in Kimball, Nebraska, on April 1, 1932. The doctor examined him and diagnosed his ailment as appendicitis, and then called up county commissioner Blake regarding the matter. The evidence of the doctor is that commissioner Blake replied that "he knew the boy;" that "the county had been taking care of the family;" and that "he was only one of the commissioners, but if the boy needed attention he would have to be taken care of."

The case turned to the worse, and in the early morning of the following day Clarence was again brought to Dr. Miller, and placed in the hospital at Kimball. At that time the boy had developed a ruptured appendix and an immediate operation was an absolute necessity. The following conversation then occurred between Dr. Miller and commissioner Blake:

"Q. And where did that conversation take place? A. In my office. I called him on the telephone, both him and Mr. Johnson (another county commissioner of Banner county). Q. And what was your conversation with Mr. Blake at that time? A. I told him the boy was brought back to the hospital, * * * and he had a ruptured appendix; he was very ill and he would have to be operated on. Mr. Blake said, 'He has to be taken care of; you go ahead and take care of him the best you can.' I told him he was the county commissioner up there and I felt the boy lived in Banner county, it was their charge and that the hospital and doctor wasn't able to carry the entire load. I was expecting to operate on him and send them the bill."

The doctor also called county commissioner Johnson, and the following conversation took place:

"Q. And what course of action—you mentioned about calling Mr. Johnson, the county commissioner? A. Yes, sir. Q. What was your conversation with him? A. I told him about the boy being in on the day before and he was brought back this morning; that he converse with Mr. Blake and I wanted the county to O. K. the bill. He said, 'Well, he is over in Blake's neighborhood,' and he thought maybe the boy could pay his own bill. Before we operate on him, I would have to wait until the commissioners met. And I told him that somebody would be paying for a funeral bill at that time, if you are going to wait for the commissioners to meet, the boy would be dead, and I would operate on him and give him the necessary medical attention."

While the boy was in the hospital the Hooley family moved to Kimball county with commissioner Blake's assistance. Further, it may be said that at this time, in addition to necessary clothing, the possessions of Clarence Hooley amounted to the sum of $3.10.

Thereupon Dr. Miller removed the ruptured appendix and thereafter cared for Clarence with such success that he fully recovered. Then the doctor submitted his itemized bill for these services performed as a claim against Banner county. This bill recited:

"Kimball, Nebraska. April 19, 1932. The county of Banner, to Kimball Hospital and A. L. Miller, M. D. Dr. To care of Clarence Hooley and Board of Health. April 2, 1932 to April 18—16 days hospital at $4.50—$72; operating room—$10; anesthetic and dressings—$15; Dr. Miller's fee for operation—$75 (this is one-half the usual fee)."

This claim the board rejected, and the district court allowed.

In the present instance we have a case of an emergency, where an immediate operation was necessary for the saving of human life. No county physician appears in the picture, and the county board has wholly failed to provide the essentials of the necessary care that common humanity

requires. Obviously, under these circumstances, the rule our statutory provisions imply and the history of poor relief in all jurisdictions sustains governs, viz., that in cases of emergency a physician should, if reasonably possible, attempt to communicate with the proper corporate authorities charged with the care of the poor, but if an arbitrary refusal is given, or if such corporate authorities be noncommittal, the necessary services may be rendered notwithstanding, and the law imposes an obligation upon the county to pay the reasonable value of such services. *Newcomer v. Jefferson Township,* 181 Ind. 1; *County of Christian v. Rockwell,* 25 Ill. App. 20; *Dykes v. Stafford County,* 86 Kan. 697; *Robbins v. Town of Homer,* 95 Minn. 201; *Board of Supervisors v. Gilbert,* 70 Miss. 791; *Trustees of Cincinnati Township v. Ogden,* 5 Ohio, 23; *Eckman v. Township of Brady,* 81 Mich. 70; 48 C. J. 537, 539.

In the present case it is no objection that the services were rendered in the adjoining county of Kimball. *Randolph v. Town of Greenwood,* 122 Ill. App. 23; *Rock Island County v. Arp,* 118 Ill. App. 521.

The only real questions presented by this record are: (1) Was Clarence Hooley a pauper? (2) Did he have a settlement as such in Banner county?

The rule of the common law of England is laid down by Blackstone as follows: "In legitimate children, though the place of birth be *prima facie* the settlement, yet it is not conclusively so; for there are settlements by parentage, being the settlement of one's father or mother." 1 Cooley's Blackstone (3d ed.) 361.

So, the rule appears generally accepted that an unemancipated child whose father is dead takes the settlement of the mother by derivation. 48 C. J. 485; *Bozrah v. Stonington,* 4 Conn. 373; *Torrington v. Norwich,* 21 Conn. 543; *Treasurer & Receiver General v. City of Boston,* 255 Mass. 499; *Stillwell v. Kennedy,* 5 N. Y. Supp. 407; *Burrell Township v. Pittsburg Guardians of the Poor,* 62 Pa. St. 472; *Bethel v. Tunbridge,* 13 Vt. 445.

The authorities also sustain the principle that the absence of Clarence Hooley from home, as required by his work, was wholly ineffectual to affect his "settlement," as that term is employed in the poor laws, and it continued as a member of his mother's family in Banner county.

It can hardly be contended that Clarence Hooley, in view of his entire history, when suffering from this attack of appendicitis, was not a "pauper" within the meaning of the poor laws of our state. This term may be defined as follows: A pauper is a person who shall be unable to earn a livelihood in consequence of any bodily infirmity, who is without means, and who is without kindred of sufficient ability to support him.

In other words, we are satisfied, in view of the findings of the trial court, that the present case was one of emergency, and that Clarence Hooley was a pauper having his settlement in Banner county.

The judgment of the trial court allowing the claim in suit is therefore correct, and the same is

AFFIRMED.

JESSIE P. GRANDY, APPELLANT, V. HENRY A. MERCHANT, APPELLEE.

FILED OCTOBER 9, 1934. No. 28951.

1. **Physicians and Surgeons.** In an action against a licensed dentist for malpractice, the presumption is that he performed his professional duties with the requisite degree of skill and care, in the absence of evidence to the contrary.
2. ———. Evidence examined, and *held* insufficient to require the submission of the question of negligence to the jury.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Edith Beckman, for appellant.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and RAPER and TEWELL, District Judges.

RAPER, District Judge.

The plaintiff, appellant, brought this action against Henry A. Merchant, defendant, appellee, who is a licensed Omaha dentist. In substance the petition alleges that in March, 1931, the defendant removed an old bridge from the plaintiff's lower left jaw, and installed a new one, which she alleges was too high and did not fit her jaw and caused her pain and discomfort, and that in order to remedy that defect the defendant carelessly and unskilfully drilled and cut off the crown and cusp of the two sound healthy upper left bicuspid teeth, thus exposing the pulp or sensitive nerve substance of said two bicuspid teeth, which caused much pain and made mastication difficult, and that such condition is permanent. The defendant answered by general denial, and specific denial of malpractice or negligence in treating plaintiff. At the close of plaintiff's testimony the court, on motion of defendant, discharged the jury and dismissed plaintiff's action. She appeals.

The plaintiff testified that in 1930 defendant did some work on the teeth in her right jaw, and examined the left side of her mouth, and advised that a bridge in her lower left jaw should be removed. About two months after that she again went to defendant who removed the old bridge. At that time the left side had not been giving her the least bit of trouble. This was about January or March of 1931. At that time he ground off the lower left tooth and made a one-tooth bridge, but this bridge was high, and he put a whirling machine in her mouth and ground her upper teeth. She felt like she had lost part of her teeth; they felt unnatural when she chewed, and it pained her very much, sort of tender and could not take hot or cold water or anything in her mouth without experiencing sharp shooting pains that hit the two tender nerves. At a later visit she complained to the doctor and told him he

had cut off those two upper teeth, and he said there was a knob on the tooth and "I took the knob off;" that the teeth pained her right after he worked on them; they were sensitive to heat and cold and she could not masticate at all with them and they pained constantly so she could neither sleep nor eat. She engaged to return again to Dr. Merchant, but did not go. She was next treated in September, 1932, by Dr. Lohr, a dentist in Washington, D. C., who put in a crown and a bridge and built these two cusps up that were cut off and filled these two teeth, since which time she has been relieved somewhat, but never during a waking moment has she been free from pain and some times it is very intense and they hurt when she chews hard victuals.

Plaintiff offered in evidence the deposition of Doctor Vernon J. Lohr, a dentist in Washington, D. C., to whom plaintiff went after the treatments by the defendant. Dr. Lohr testified he had cared for plaintiff's teeth for the past ten years, and examined her teeth in 1926 and 1927, but could not recall what treatments he then gave; that he did some work on plaintiff's teeth about September 8, 1932; in the upper right first and second bicuspids he found and filled one new cavity and two old worn out gold inlays. In the upper left first and second bicuspids he found one new cavity and one old filling with decay around it, which he prepared and inserted two gold inlays; found in the upper left central and upper left lateral two medium sized cavities in which he placed white fillings. In the lower left jaw the second bicuspid and first molar were missing. He restored these teeth on a bridge and put a gold inlay in the first bicuspid. On the right side the first molar was missing. This he restored with a bridge, and put a gold inlay in the first bicuspid. He found that the upper left first and second bicuspids were dressed down. He said the cusps had been shortened, and in placing the inlays in the teeth he restored the part of the cusp that had been removed with gold. He was asked, "Do different doctors use different methods of grinding teeth and cutting them

to fit bridges?" He answered, "Practically every dentist has a different technique for preparing cavities for bridge work." Asked as to condition of the health of plaintiff's upper left jaw, he replied, "I found pockets and some absorption on the process brought about, perhaps, by tartar, cavities, malocclusion, loss of contact, excessive use of alcohol, or many other minor causes."

Dr. A. F. Tyler, an Omaha physician and X-ray specialist, was called as a witness by plaintiff. He offered X-ray films of the bicuspid teeth in question, one of them taken September 18, 1931, and the other on March 1, 1930. In reading the film of September 18, 1931, he described the conditions: "The second bicuspid has a filling in the crown and has a little absorption of the bone along the margin of the gum or just under the margin of the gum," and as far as he could tell from the X-ray it is a natural condition, and as far as he could see from the film the end or bottom of the tooth did not show any cutting or grinding on either the first or second bicuspid. On comparing the films he thought the film of September 18, 1931, shows a slight change in the cusps of the first upper left bicuspid as compared with the film taken in March, 1930; that is, it looks like it might have been worn off a little more than it was in March, 1930, the second bicuspid looks the same in both films, the films do not show either one of them cut off, nor do they show that the cusps are worn down to the nerve or to the pulp of the teeth. He does not think a little wearing of the enamel would produce pain. He further states that it is quite common in refilling teeth or any other work on teeth to grind off part of the cusps, and that such is an every day experience with dentists.

Taking the view of plaintiff's testimony that the defendant ground off the cusps from both the bicuspid teeth, and that she suffered pain, that fact of itself is not proof that the defendant was guilty of negligence.

There is nothing in the testimony of Doctors Lohr and Tyler that indicates there was any material change in the

second bicuspid. The first bicuspid, according to their testimony, showed signs of having been dressed down or worn down, but if both teeth were dressed down, the cutting did not extend through the enamel; neither the pulp nor nerve was exposed. Neither of these expert witnesses testified that plaintiff's teeth had been unskilfully or negligently treated by defendant. Dr. Lohr says each dentist has his own technique in such conditions, and Dr. Tyler says that it is a common practice for dentists to grind down the cusps of teeth when fitting bridges.

The rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable to practitioners of dentistry. 21 R. C. L. 386, sec. 31.

"In an action against licensed, skilful physicians and surgeons for malpractice, the presumption is that they performed their professional duties with the requisite degree of skill and care, in absence of evidence to the contrary.

"To make a case for damages in an action for malpractice, the burden is on plaintiff to prove actionable negligence that was the proximate cause of an injury pleaded." *McGuire v. Rix*, 118 Neb. 434.

Appellant asserts her right to have the jury pass on her claim, because the result shows of itself that defendant negligently "ground off" the two bicuspid teeth. Appellee insists that the doctrine of *res ipsa loquitur* does not apply and that, in the absence of expert testimony that defendant's treatment of the teeth was negligently done, plaintiff did not establish even a *prima facie* case. As stated by Judge Redick in the opinion in the case of *Tady v. Warta*, 111 Neb. 521, expert testimony is not necessary where the treatment is so outrageous as to furnish of itself an almost conclusive inference of negligence.

In this case, plaintiff's testimony only shows that there was some grinding or dressing down of the teeth, and that thereafter they became painfully tender and susceptible to heat and cold. Such facts do not of themselves establish

negligence, and the testimony of Dr. Lohr and Dr. Tyler shows clearly that the treatment was such as is usually and frequently given by dentists in fitting teeth to bridges. Appellant says it is not an easy matter to obtain testimony from one dentist against another and infers that her two expert witnesses were quick to explain with matter to soften or entirely retrieve admissions or statements that might be prejudicial to other dentists. It is highly improbable that Dr. Lohr, who has treated her teeth for 10 years at Washington, where plaintiff was employed in government service, would stultify himself to exonerate an Omaha dentist from a charge of negligence, if there was in fact such negligence. Plaintiff's complaint against the testimony of these witnesses and dentists generally does not strengthen her case. Furthermore, the evidence shows there were cavities that had to be filled, and that plaintiff's upper left jaw bone had pockets and some absorption on the process, but in giving cause of such troubles, Dr. Lohr does not include the dressing down of the cusps on the teeth. Such diseased condition of the jaw bone may be the cause of discomfort and pain which plaintiff says she suffers.

The judgment of the district court is

AFFIRMED.

Heard, on reargument, before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and YEAGER, District Judge.

PER CURIAM.

This cause was argued during the January, 1934, term and assigned to Honorable John B. Raper, district judge, for the preparation of an opinion. The court ordered a reargument of the cause during the September, 1934, term, and upon reargument the opinion submitted by Judge Raper has been adopted and is filed herewith as the opinion of this court on reargument.

EVA L. HAMMOND ET AL., APPELLEES, V. ANDREW FROST, APPELLANT.

FILED OCTOBER 9, 1934. NO. 28997.

1. Bills and Notes: INNOCENT HOLDERS. Indorsee purchased note in due course as innocent holder for value before maturity. Later, at various times, the note, in gradually reduced amounts, was renewed by maker. Last renewal on printed bank form named bank as payee. Plaintiffs and defendant plead bank had no right or interest in or title to such renewal note, and, further, that original payee was owner of both the renewal note and one for which the renewal was exchanged at the time of renewal. Only original payee indorsed the renewal note. Evidence showed all renewal notes were procured by payee for indorsee. *Held*, that bank's failure to indorse did not affect status of indorsee as innocent holder for value in due course; that a renewal note is not payment of the original; that indorsee, having acquired status of innocent holder at time of purchase of original note, such character of innocent holder was retained by him in all subsequent renewals.
2. ———: ALTERATION. Agent of indorsee indorsed payments received as applying on principal. Later she crossed out words showing such application so that payments might apply to interest. *Held*, erasure not a material alteration so as to void the note.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

Donald E. Devries and *Cook & Cook, contra.*

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

THOMSEN, District Judge.

This is a suit on a note for $1,900, dated December 13, 1920, signed by the defendant Frost with defendant Gurney as indorser. The plaintiffs are the successors of an innocent purchaser for value. The action is divided into two causes—one for reformation of the note, and the other for judgment. The note is made payable to, but not indorsed by, the First National Bank of Fremont, Ne-

braska. The petition alleges that mistakenly the bank's name remained as payee in place of that of defendant Gurney; that the bank has no interest in the note; and asks that the note be reformed to accord with these facts. The answer admits the ownership in Gurney and that the bank had no interest in the note or right or title thereto.

The note is the last of a series of renewals. The first note was given February 10, 1914. It had its origin in a land transaction between Gurney and Frost.

Gurney negotiated for and ultimately acquired land in the Rio Grande valley, Texas. Gurney had never seen the land, so defendant Frost and two others, the former a practical farmer, went there. After the inspection Frost reported to Gurney that he "liked it very much and he had agreed to buy" either 80 or 40 acres. An inference may be drawn from one part of the testimony that Frost's inspection of the land was partly an inducing cause for Gurney's completing the trade with the owners of the Rio Grande property. Frost bought a tract from Gurney, giving notes therefor. One infers also that a year or two later when Gurney abandoned the project and lost his investment, it was perhaps caused by Frost's dissatisfaction with his part of the land. Frost's dissatisfaction arose by reason of two causes—insufficient water for irrigation purposes, and political difficulties between the United States and Mexico, the land being on the border; Gurney describing it as in the nature of a state of war existing between the two countries. The ultimate result was that Gurney agreed to restore all the notes which Frost had given and to cancel his contract. Gurney stated to Frost that one of the notes had been negotiated and that Frost would be required to renew the note from time to time until Gurney would be financially able to take up the whole of the note, in the meantime, on various renewals, reducing the amount. As Frost put it: "He said he was hard up and wanted to know if I would help him out and deduct some every time the notes were renewed." All the notes given by

Frost were ultimately returned to him except the one which had been sold. The latter and all subsequent renewals of it were held by Henry J. Lee. Lee had bought the original before maturity, in the ordinary course of business, for full value, and without knowledge of any defense. This note by successive renewals and payments by Gurney was reduced to the principal sum of $1,900.

The first notes were payable to E. R. Gurney and by him indorsed. The subsequent notes, on the bank's form giving the name of the payee printed as the First National Bank of Fremont, Nebraska, and others in which the name the First National Bank was written were indorsed immediately by Gurney for the First National Bank of Fremont, Nebraska, to Lee, Gurney being then vice-president of the bank. Defendant Frost does not question that Lee was an innocent holder for value in purchasing the first note before maturity and in due course of business. The question which arises comes by reason of the failure to obtain the bank's indorsement on the last of the series of renewals. In this the form was used with the First National Bank of Fremont, Nebraska, printed as the payee. Gurney alone indorsed. Ordinarily, failure to obtain indorsement of payee on note subjects the transferee to all defenses existing between the maker and payee. Comp. St. 1929, sec. 62-320. Does Lee, by such failure, lose his status, once fixed, as an innocent holder for value? The answer is the negative. The time the first note is acquired fixes the character in which the buyer holds it. *Commercial Savings Bank v. Schaffer,* 190 Ia. 1088; *Molsons Bank v. Berman,* 224 Mich. 606; *Stevens v. McLachlan,* 120 Mich. 285; *Hopkins v. Boyd,* 11 Md. 107; *Coleman v. Shortsville Wheel Co.,* 257 Fed. 591; *Beattyville Bank v. Roberts,* 117 Ky. 689; *Harfst v. State Bank of El Campo,* 56 Tex. Civ. App. 31. The converse of the proposition is also true. *Grace v. Strickland,* 188 N. Car. 369, in which it is held that by renewal one cannot acquire the status of an innocent holder in due course and for value

if he did not hold that character when the first note was bought. The chief basis for this rule is that a renewal note, in the absence of an express agreement, is not payment of the original, but only evidence of a continuing obligation. That a renewal note is not payment is well established in Nebraska. *Gilland v. Honeywell*, 103 Neb. 50; *Spear v. Olson*, 104 Neb. 139; *Auld v. Walker*, 107 Neb. 676; *Berwyn State Bank v. Swanson*, 111 Neb. 141; *Nebraska State Bank v. Walker*, 111 Neb. 203; *Exchange Nat. Bank v. Schultz*, 113 Neb. 346; *City Nat. Bank v. Denslow*, 114 Neb. 600.

Defendant Frost says that he never knew Lee held the note. We do not think the point material. However, he had been told that the note had been sold, and the record does not show that Frost would in any way have been affected by whom the purchaser might be. Moreover, Frost's renewals were made for the very purpose of continuing the obligation and keeping it current. In any event, a preponderance of the evidence shows that before the execution of the last note Frost went to Mr. Abbott, an attorney, and consulted him about the whole transaction, and later, when the bank wrote to Frost on behalf of Lee, threatening suit if some arrangement for payment were not made, Mr. Abbott wrote to Gurney insisting upon his paying the note. Mr. Abbott's letter prompted a reply made to Frost directly in which Gurney reiterated his prior promise to pay the note as soon as possible, but stating that "Mr. Lee bought this note of yours in good faith and I think it is your duty both morally and legally to make the note good and to look to me for payment."

Lee, the father of the plaintiffs, died and the plaintiffs became the owners of the note through the settlement of Lee's estate. The payments recorded on the back of the note were made to plaintiff, Eva L. Hammond, who, before her father's death, because of his age, was taking care of her father's affairs. Mr. Abbott, representing Frost, at various times paid to Mrs. Hammond, to apply

on the note, money he had collected from Gurney, and for such payments received Mrs. Hammond's receipts, which he prepared. In those receipts in evidence, he made the payments apply on the principal. Like credits were made on the note by Mrs. Hammond. Later Mrs. Hammond crossed out with a line in ink the words "On prin.," saying she did so because she believed that she had made a mistake and that the payments should have applied on interest only. On this part of the case the defendant Frost contends that an intentional alteration of a credit once applied is such a material alteration as to defeat recovery on the entire note. Cases cited by defendant Frost do not sustain this proposition, and by careful search we have been unable to find authorities to support so broad a statement. The evidence is clear that the indorsement of payments and their application and the subsequent "erasure" were innocently done and without any intent to defraud the maker of the note. Furthermore, the plaintiffs have consented to the application of the payments as on principal instead of on interest, so the defendants have the advantage of Mrs. Hammond's mistake. If an erasure of the character made was done by mistake, it does not have the effect of voiding the note. In 2 C. J. 1213, it is said:

"Although the holder of an instrument has no right to defraud the debtor by erasing credits which have been fairly entered, he may erase credits entered by mistake, and if an instrument appears with credits erased, it is held that this will not vitiate the whole paper, and the most that the party can claim is that he shall be restored to the benefit of the indorsement as originally made." See, also, *Lau v. Blomberg,* 3 Neb. (Unof.) 124, discussion at pages 131 and 132. Nor is it ordinarily classed as a material alteration under the negotiable instruments law. Annotation in 44 A. L. R. 1540 to *Harrington v. Leighton,* 50 S. Dak. 54.

The district court found that because of the facts recited a reformation was not necessary and entered a

judgment for the amount due, with interest. The defendant Frost complains that the judgment should have determined whether or not plaintiffs were entitled to a reformation, but as we view the entire situation we think the court's ignoring the request for a reformation was proper. It may not be every cause or action upon which a court is required to act or in which the plaintiff may require the relief for which he asks. Here the pleadings admit the ownership of Gurney; that the First National Bank of Fremont, Nebraska, had no ownership or interest in the said note. The action for reformation was asked for the purpose of establishing Gurney's ownership of the renewal note and to establish the fact that the bank had no interest in it whatever. The admission of the defendant that Gurney was the owner of the note and that the bank had no interest in it whatever makes the request for reformation to establish these facts unnecessary. Plaintiffs were not required to anticipate the admissions of defendant. The note carries the proper indorsement of Gurney. It found its way into the hands of Lee again before maturity. The fact that Lee held all the requisites of an innocent purchaser of the first note is not disputed in the evidence. This fact establishes the status in which Lee would remain. The fact that Gurney temporarily had the note for the purpose of exchanging for a new one, and for the additional purpose of requiring his indorsement as a guarantee of payment to Lee, might be the motive of Lee's turning the prior note to Gurney and vest the ownership in Gurney temporarily on both that note and the renewal as received. But accepting the fact as the defendant Frost wants it construed, that Gurney was actually the owner of the last renewal note when given, and therefore that it was without consideration, the fact would still remain that Gurney thereafter indorsed it to Lee before maturity in the ordinary course of trade, without any knowledge on Lee's part of any defect or defense, and for value, for under the statute a preexisting debt, which Gurney then would owe to Lee,

constitutes value. Comp. St. 1929, sec. 62-202. See 7 Cent. Dig., Bills & Notes, sec. 933; 3 Dec. Dig., Bills & Notes, sec. 359. The effect would be to reestablish or fortify Lee's status as an innocent purchaser.

This is a trial *de novo*. We have given careful attention to the pleadings and all the evidence and are firmly convinced that the action of the trial court in reaching the conclusion that Frost owes the amount of the note to Lee, an innocent purchaser, that the note was properly indorsed, and that the changes in the indorsements of payment from principal to interest did not affect the status of the note are all correct. The judgment of the district court is therefore

AFFIRMED.

GOOD, J., concurs in the result.

NELLIE DERR, APPELLEE, V. W. S. GUNNELL ET AL., APPELLANTS.

FILED OCTOBER 19, 1934. No. 29009.

1. **Trial.** It is the duty of the trial court to properly submit to the jury the issues presented by the pleadings and the evidence, though not requested to do so.
2. ———: INSTRUCTION: REVIEW. An instruction to which no exception is noted on the record when given may be reviewed on appeal, the former rule requiring such an exception having been changed by statute. Comp. St. 1929, sec. 20-1139.
3. **Appeal.** An instruction misstating an issue and failing to submit to the jury other material issues presented by the pleadings and evidence may be prejudicially erroneous.

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

D. F. Simmons, J. F. Fults and *Perry, Van Pelt & Marti*, for appellants.

Cordeal, Colfer & Russell, contra.

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

ROSE, J.

This is an action to recover $300 which plaintiff, Nellie Derr, alleged she deposited with W. S. Gunnell, one of the defendants, to indemnify him against loss as obligor on a bond in that sum for John Derr's appearance in court to answer a criminal charge.

John Derr, son of plaintiff, appeared in court pursuant to the bond, was tried, convicted and sentenced. His defense was conducted by his attorneys, John Stevens and Wade Stevens, partners, who, with Gunnell, are defendants herein. Gunnell cashed a 300-dollar draft payable to and indorsed by plaintiff and turned the proceeds over to John Stevens.

The petition is lengthy, but alleges in substance that Gunnell agreed to return the deposit of $300 to plaintiff upon termination of his liability on the bond and that he refused to do so for the reason he had delivered the deposit to Stevens and Stevens who also refused upon demand to return it and appropriated it to their own use.

In an answer to the petition Gunnell pleaded that he signed the bond at the request of John Stevens, who furnished the 300-dollar draft as indemnity; that, after liability on the bond terminated, Gunnell cashed the draft and returned $300 to John Stevens at the latter's request; that the entire transaction was between John Stevens and Gunnell and that the latter never at any time received any cash or other thing of value from plaintiff and never had any transaction of any kind with her.

The answer of Stevens and Stevens contained pleas that they procured the bond for John Derr, told his parents, plaintiff and William Derr, the fee for defending their son would be $300; that the parents afterward employed Stevens and Stevens to defend their son for

a fee of $300, the father at the time giving John Stevens a draft for $300, without any agreement to return it or the proceeds thereof to any one; that the attorneys defended plaintiff's son at the trial and afterward retained $278.12 from the proceeds of the draft and returned to the parents $21.88 already paid on attorneys' fees, but the latter sum was rejected and later tendered into court; that plaintiff was estopped by conduct specifically pleaded to deny her employment of Stevens and Stevens who acquired an attorneys' lien on any funds in their hands belonging to her. The replies to the answers were general denials.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $296.81. From a judgment therefor defendants appealed.

Defendants assail the instructions as erroneous and prejudicial on the ground that the issues were not properly submitted to the jury. Though defendants pleaded, and adduced evidence tending to prove, that the draft was given by William Derr to John Stevens without any promise to return it or the proceeds thereof and that the attorneys had a lien thereon for fees, the trial court, in the instruction on the issues, said to the jury:

"Further answering, the defendants Stevens allege that they never at any time have asserted ownership of the draft given to John Stevens by William Derr or the ownership of the proceeds thereof until after the defendants had completed their part in said transaction."

This part of the instruction is at variance with the answer of Stevens and Stevens and with evidence adduced by them. In addition, the defenses of estoppel and of attorneys' lien were entirely omitted from the instruction purporting to state the issues. Employment of the attorneys by plaintiff was an issue with evidence on both sides. Details of an estoppel by plaintiff to deny the employment were pleaded and supported by proof. The claim of the attorneys to the fund in their hands by virtue of a lien was also pleaded and supported by

evidence. These defenses were entirely omitted from the instruction on the issues.

The law is that it is the duty of the trial court to properly submit to the jury the issues presented by the pleadings and the evidence, though not requested to do so. *Blue Valley State Bank v. Milburn,* 120 Neb. 421.

Plaintiff's argument on the errors in the instruction on issues is directed to the points that an exception thereto was not noted on the record and that the instruction was not prejudicial. The law formerly required such an exception for the purposes of an appeal, but a statute changed the rule. An instruction to which no exception is noted on the record when given may be reviewed on appeal. Comp. St. 1929, sec. 20-1139.

The errors pointed out deprived defendants of substantial rights. Issues presented by the pleadings and evidence as defenses were not submitted to the jury. Except for the errors on the face of the record the verdict may have been in favor of defendants. There is no substantial ground for considering the errors harmless. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FRANKLIN EXCHANGE BANK, APPELLANT: G. P. SPENCE, CLERK DISTRICT COURT, INTERVENER, APPELLEE.

FILED OCTOBER 19, 1934. No. 29014.

Banks and Banking: INSOLVENCY: TRUST FUNDS. Funds paid to a clerk of the district court in his official capacity and deposited subject to check in a bank which subsequently failed, *held* not trust funds payable in full from bank assets in the hands of a receiver in preference to claims of depositors generally.

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

F. C. Radke, Barlow Nye and *William J. Garland,* for appellant.

Leon Samuelson, P. E. Boslaugh and *Edmund P. Nuss, contra.*

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

ROSE, J.

In a proceeding by the state of Nebraska to wind up the affairs of the Franklin Exchange Bank, an insolvent corporation, G. P. Spence, clerk of the district court for Franklin county, intervened and presented a claim for an alleged trust fund deposit of $879.06 payable in full from the bank assets in the hands of E. H. Luikart, receiver, who had rejected the claim as one for a trust fund but had classified it as a preferred claim on a par with claims of depositors generally. Upon the trial of an issue raised by an answer in which the receiver denied that the bank held the fund as a trustee, the district court decreed the deposit to be a trust fund payable in full from bank assets in preference to claims of general and preferred creditors and directed the receiver to proceed accordingly. The receiver appealed.

Did the bank receive or hold the fund as trustee for the clerk or for the individual persons for whom he acted in accepting the separate items aggregating the sum of the unpaid deposit? The burden was on the clerk to prove facts establishing the trust relation upon which he relies to restore the money which he received officially under his bond as clerk. It is alleged in the petition in intervention and admitted in the answer thereto that the clerk brought the action on behalf of the *cestuis que trustent* for the purpose of avoiding a multiplicity of suits. The material facts in evidence are not in dispute. They are stipulated and may be summarized as follows: Spence is the duly qualified and acting clerk of the district court. As such he deposited

in the bank before it was closed certain funds that came into his hands officially. His account in the bank was designated, "G. P. Spence, Clerk District Court." In that capacity he had "$879.06 on deposit." The officers of the bank knew the funds represented by the "deposit of 'G. P. Spence, Clerk District Court,' belonged to and were a part of the trust funds of the office." When the bank closed and when the receiver was in charge, the cash on hand was "in excess of the amount of the deposit of 'G. P. Spence, Clerk of District Court.' "

In accepting money belonging to others, the clerk not only acted as a public official but he acted as a trustee for each of the persons whose money he received. He became accountable to each as trustee because he acted for each and assumed that relation. It does not necessarily follow, however, that he extended to the bank the same trusteeship and the same accountability by making bank deposits with knowledge of the bankers. To charge the bank as trustee without a specific agreement to that effect, there must be some circumstance, or condition or transaction which the law recognizes as sufficient to create the relation of trustee and beneficiary, such as a specific deposit to be kept and returned in the exact form received; or a deposit for an exclusive, definitely stated purpose; or a deposit illegally made and knowingly and wrongfully accepted. Throughout the stipulation of facts herein the fund is called a "deposit." There is nothing to show that it was not a general deposit subject to check by the clerk for the purposes of distribution among the beneficial owners. Being subject to check on general funds of the bank, it was not a special deposit to be returned in the form received. There is nothing in the evidence tending to show that the fund was illegally deposited or knowingly and unlawfully accepted in a sense that makes the bank a trustee as a wrong-doer. A statute forbidding the deposit has not been pointed out or found.

It is suggested on behalf of the clerk that the criminal law on the subject of embezzlement of public money by public officers forbids them from creating by bank deposits the conventional relation of debtor and creditor. Comp. St. 1929, sec. 28-550. The stipulation of facts treats the transaction and the fund as a deposit, not as a loan or as an embezzlement. Besides, there is nothing in the record to show that any part of the fund belongs to the public. The real owners of the money are not named. The evidence does not show that the clerk received and deposited any money of the state or of any subdivision thereof. He pleaded that he brought the action on behalf of the *cestuis que trustent*, without naming them. They are not named in the evidence. The pleadings and proof in connection with the embezzlement statute do not show a wrongful deposit. The criminal law cited is inapplicable.

To sustain the trust fund theory, the clerk relies on *State v. Midland State Bank*, 52 Neb. 1. That case is not in point for the following reasons: The funds there in controversy belonged to a school district and were public funds. The court specifically held that the school district treasurer was without power to create with school district funds the relation of debtor and creditor.

On a trial *de novo* the members of the court are unanimously of the opinion that the deposit is not payable in full from assets in the hands of the receiver in preference to depositors generally. The judgment of the district court is therefore reversed and the cause remanded for the specific purpose of allowing the claim of the clerk as classified by the receiver.

REVERSED, WITH DIRECTIONS.

STATE, EX REL. CHARLES H. DRISCOLL, RELATOR, V. HARRY R. SWANSON, SECRETARY OF STATE, RESPONDENT.

FILED OCTOBER 19, 1934. No. 29401.

Elections: CANDIDATES. As to an office created by the Constitution or laws of this state, "No candidate defeated at the primary election shall be permitted to file by petition in the general election next following." Comp. St. 1929, sec. 32-1125.

Original proceeding in mandamus by relator to compel respondent to accept and file a petition to place the name of relator on the official ballot as a candidate at the general election for the office of auditor of public accounts. *Writ denied.*

McCracken, Lawrence & Thomas and *G. E. Price,* for relator.

Paul F. Good, Attorney General, and *Daniel Stubbs, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY and PAINE, JJ., and BROADY and REDICK, District Judges.

EBERLY, J.

This is a mandamus action brought to compel the secretary of state to accept and file a petition for the purpose of placing the name of relator on the official ballot at the general election as a candidate for the office of auditor of public accounts of the state "by petition," and to certify relator's name to the several county clerks as such candidate. The action was commenced in this court. The pleadings in effect admit the controlling facts, and the case is presented at the bar of this court upon motion of respondent for judgment thereon.

It is conceded that on July 5, 1934, a petition was filed, in writing, in the office of the secretary of state to have the name of Charles H. Driscoll, the relator in this action, printed on the official ballot as a candidate for nomination by the democratic party for the office of secretary of state at the primary election to be held August 14,

1934; that said Driscoll filed his acceptance of said application petition in the office of the secretary of state on July 16, 1934, duly verified under oath, stating, in substance, that he affiliates with the democratic party, and that party only; that he will abide by the results of said primary, and, if elected, will qualify and serve as such officer. In compliance with law, and the application so made and relator's acceptance thereof, relator's name was thereupon properly certified to the several county clerks as a candidate for the nomination above referred to, and his name was printed on the official ballot as such candidate at such primary election, which was the primary election at which candidates were nominated for the general election to be held November 6, 1934; that relator was defeated at such primary election.

It is also agreed that on September 19, 1934, there was presented and filed in the office of the respondent a nominating petition in due form, properly executed by 1,092 duly qualified electors of the state of Nebraska, praying that the name of Charles H. Driscoll, the relator, be placed upon the official ballot provided for use at the general election to be held on November 6, 1934, as a candidate for the office of auditor of public accounts "by petition;" and that on September 21, 1934, Charles H. Driscoll tendered to the secretary of state his acceptance of such nominating petition, in due form and by him properly executed; that the secretary of state then refused to accept the petition and acceptance, and refused to certify relator as a candidate "by petition," for the sole reason that Driscoll had been defeated as a candidate for the nomination for secretary of state on the democratic ticket at the primary election held on August 14, 1934.

Thus, the case turns on the question of whether this refusal was justified.

Driscoll voluntarily participated in the primary as a candidate for secretary of state. It is also to be noted that, had he received in this primary the greatest number

of democratic votes for the office of auditor of public accounts, and amounting to more than 5 per cent. of the entire vote cast for the democratic party, by having his name written upon the ballot, he would have been the candidate of that party for that office. Comp. St. 1929, sec. 32-1162. But, it appears conceded that he was a defeated candidate at this primary.

In this condition of the record, the words of his statutory oath, that he "will abide by the results of said primary," are not without force and effect. "To abide" means "to observe and obey, to accept the consequences of." This suggests that as the "primary" act was originally enacted in 1907 (Laws 1907, ch. 52) would not its due enforcement have made relator's oath binding upon him and prevented his becoming a candidate by petition? *Putnam v. Pyle,* 57 S. Dak. 250.

However, the act of 1907 was subsequently amended by attaching thereto a proviso (now appearing as section 32-1108, Comp. St. 1929) in the following terms, viz.: "Provided, no person who has been a candidate for an office at a primary shall be a candidate by petition or certificate of nomination for the office for which he was defeated, at the next general election." Relator insists that this provision is exclusive and renders him ineligible as a candidate for the office of secretary of state, but does not inhibit his candidacy "by petition" for the office of state auditor.

In addition to the provisions of section 32-1124, Comp. St. 1929, respondent relies upon section 32-1125, Comp. St. 1929, which, in part, expressly provides: "No candidate defeated at the primary election shall be permitted to file by petition in the general election next following."

The following authorities on the proper construction of statutes are deemed applicable, viz.: "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." *State v. Heupel,* 114 Neb. 797. See, also,

State v. Marsh, 108 Neb. 267; *State v. School District,* 99 Neb. 338; *State v. Insurance Co. of North America,* 71 Neb. 320.

The court will not read into a statute restrictions or exceptions not made by the legislature. *State v. School District,* 99 Neb. 338; *State v. Marsh,* 108 Neb. 267.

"In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute." *State v. Fink,* 74 Neb. 641. See, also, *Chicago, B. & Q. R. Co. v. School District,* 110 Neb. 459; *Ford v. State,* 79 Neb. 309; *Barker v. Wheeler,* 71 Neb. 740; *State v. Omaha Elevator Co.,* 75 Neb. 637.

Statutes upon the same subject are to be harmonized, if possible, by a fair and liberal construction which will give effect to both. *Dinuzzo v. State,* 85 Neb. 351; *Rushart v. Crippen,* 99 Neb. 682; *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689; *Jackson v. Washington County,* 34 Neb. 680; *Dawson County v. Clark,* 58 Neb. 756.

A statute will not be placed in antagonism with another unless they are so repugnant and inconsistent that one cannot stand unless the other falls. *Dinuzzo v. State,* 85 Neb. 351; *Rushart v. Crippen,* 99 Neb. 682.

Conflicts between statutes will never be considered to exist unless such was the manifest purpose and object of the legislature forced on the court by unambiguous language. 59 C. J. 999; *Kountze v. City of Omaha,* 63 Neb. 52; *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689; *Jackson v. Washington County,* 34 Neb. 680.

Examined in the light of the authorities cited, we find there is no real conflict between the proviso quoted from section 32-1108, Comp. St. 1929, and the proviso quoted from section 32-1125, Comp. St. 1929. Both may be harmonized by construing the latter as supplementary and cumulative to section 32-1108, and as extending and not restricting the prohibition of this section. This construction we adopt and approve.

Relator's candidacy is for an office created by the Constitution of this state, which is to be filled as provided by

the statutes of the state at a "free" election. It follows that this case falls fairly within, and is controlled by, the statutory inhibition, viz.: "No candidate defeated at the primary election shall be permitted to file by petition in the general election next following." Comp. St. 1929, sec. 32-1125.

The contention that the statutory provision under consideration unreasonably and unnecessarily hampers and restricts the constitutional right of electors to exercise the elective franchise, and is therefore void, as amounting to a "hindrance or impediment" to a "free" election (Const. art. I, sec. 22), has been carefully examined. It is not accepted. It is deemed that on principle relator's argument is fairly answered by *State v. Marsh*, 123 Neb. 423.

It follows that the refusal of the secretary of state to accept the nominating petition and relator's acceptance thereof is fully justified by the terms of the controlling statutes when properly construed. The writ is therefore denied.

WRIT DENIED.

CHARLES YOUNG V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1934. No. 29203.

1. **Criminal Law: WITNESSES: ANSWERS: DISCRETION OF COURT.** It is within the discretion of the trial judge to allow or refuse an answer to a question in the narrative, and his ruling will not be reviewed unless that discretion was clearly abused.
2. **Shooting with Intent to Wound: INTENT.** The nature of the act itself and the surrounding circumstances, inclusive of the act of shooting, are evidence from which the intent of the defendant is inferable.

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

Fradenburg, Stalmaster, Beber & Klutznick, for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

PAINE, J.

From conviction upon an information charging an intent to wound, plaintiff in error brings the judgment to this court.

An information was filed against plaintiff in error, hereinafter called the defendant, containing two counts; one charging him with unlawfully, maliciously, and feloniously shooting one Leroy Jones with intent to kill, and the second count charged him with unlawfully, maliciously, and feloniously shooting one Leroy Jones with intent to wound.

When arraigned he entered a plea of not guilty, and the jury returned a verdict, finding defendant not guilty on count 1, but finding him guilty on count 2, and upon the overruling of a motion for a new trial he was sentenced to three years at hard labor.

While the motion for a new trial sets out 20 errors, the defendant in his brief argues but two of these. We will first consider the objection that the court erred in refusing to admit evidence of threats made by the complaining witness against the defendant.

It is found in the evidence: "Q. 513. Had you ever had any conversation with Officer Jenkins before? A. I had a conversation with Officer Jenkins about a pair of gray palm beach pants in my shop. Q. 514. Who did they belong to? A. To Mr. Jones. Mr. Nye: When was that? Q. 515. When was that? A. About the first of June. It was in June. Q. 516. All right, now tell about it. A. He came in—(interrupted). Mr. Nye: Objected to, your Honor, as entirely too vague, uncertain, and immaterial. The Court: Sustained. Defendant excepts. Mr. Caldwell: Defendant offers to show by this answer that the defendant would testify that detective Jenkins came to

the defendant's shop about in the month of May or June, 1933, and told defendant that he, meaning Young, had better keep out of Jones' way, because he, Jones, was going to cause him trouble. Mr. Nye: Objected to as entirely too vague, uncertain, and immaterial. The Court: Sustained. Defendant excepts."

The defendant insists that the shooting was done in self-defense, and that, having heard threats, he was in fear for his bodily safety, and had only acted in self-defense, and that the refusal to allow the admission of this evidence was reversible error. This requires an examination of question No. 516, and the objection to it as too vague, uncertain, and immaterial. The general rule is that the question asked should be specific, and not so indefinite as to fail to put the adverse party on notice of the testimony sought to be elicited. There was nothing in the question to which the objection was sustained which indicated any threat at all. The trial judge is permitted a wide discretion in allowing testimony in the narrative form. It often speeds up the trial of a case very materially to permit it up to that point at which objection is made. When the objection had been sustained in the case at bar, the defendant's counsel did not go further and ask definite, pertinent questions upon which to properly found his offer to prove. Only in the offer to prove is it disclosed that Jenkins told the defendant to keep out of Jones' way. This was simply a conclusion of the defendant that what Jenkins had said was that Jones was going to cause him trouble. Such evidence was purely hearsay, and in the form in which the foundation was laid in question No. 516 there was no error in sustaining the objection to the question and rejecting the offer to prove. This is not saying that, if further questions had been asked, and a clear and definite foundation laid, the matter might not have been admissible. *Pumphrey v. State,* 84 Neb. 636, 23 L. R. A. n. s. 1023, 18 Ann. Cas. 979; *Finnegan v. United States,* 231 Fed. 561; *Roberson v. United States,* 284 Fed. 503.

The other assignment of error urged by defendant's counsel with vigor was that the intent to wound, as charged in the second count, was not supported by any evidence. It is true that the intent of the defendant must be proved to sustain conviction, and it is equally true that intent may be shown by circumstantial evidence, which facts and circumstances include the assault itself. It has been held from the earliest times that every sane man is presumed to intend the usual and probable consequences of his acts. From the evidence the jury could have decided that the defendant shot first, as there is evidence on the part of the state to indicate that it was not until after the first shot had been fired that Jones drew his gun from his pocket. The defendant admitted that he was simply shooting at Jones for the purpose of striking him in the arm to stop him from shooting. The evidence clearly indicates that after Jones had fallen to the sidewalk the defendant shot several more bullets into him until he emptied his revolver, while Jones had only shot three cartridges from his revolver. The question of intent was a question for the jury, and if the defendant pointed his gun at Jones and pulled the trigger, and the bullet hit Jones, the man he pointed it at, and after Jones was down defendant pointed his gun and pulled the trigger and shot several more bullets into him, these acts on his part would seem to the court to establish what his intention was. It can be said in this case that the acts and circumstances are of such a character as to exclude every rational hypothesis except the existence of a specific intent to wound on the part of the defendant. *Krchnavy v. State,* 43 Neb. 337; *Garrett v. State,* 110 Neb. 118; *Swartz v. State,* 121 Neb. 696. For an exhaustive note on intent, see 11 Neb. Law Bulletin, 453.

We have examined the record and, finding no reversible error, the judgment and sentence of the trial court are hereby

AFFIRMED.

SCOTT BRAINARD V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1934. No. 29078.

1. **Criminal Law: MISDEMEANORS: APPEAL.** The provisions of section 29-611, Comp. St. 1929, regulating appeals from inferior courts in misdemeanor cases are mandatory.
2. ———: ———: ———. In order to effect an appeal, a defendant convicted of a misdemeanor in an inferior court must enter into a recognizance that complies substantially with all the conditions of the section.

ERROR to the district court for Kearney county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. L. McPheely and *J. H. Robb*, for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

LIVINGSTON, District Judge.

This is an error proceeding from Kearney county. On August 13, 1933, the county attorney of Kearney county filed a complaint in the county court of said county against the plaintiff in error, Scott Brainard, who for convenience hereafter will be referred to as the defendant, charging him with the offense of intoxication, second offense, and with the unlawful operation of a motor vehicle on a public highway while in a state of intoxication. The defendant was convicted in the county court and was sentenced to 30 days on each of said counts; said sentences to run concurrently, and deprived of his right to operate a motor vehicle on the public highways of the state of Nebraska for one year from the date of said judgment.

An appeal was taken from the said judgment and sentence to the district court for Kearney county; bond was fixed in the sum of $300, and the clerk of the county

court furnished the defendant with a form of bond which form is here complained of as being insufficient.

The appeal in the district court was attacked by the county attorney by motion on the ground that no appeal bond or recognizance was given, and specified alleged omissions making said bond or recognizance wholly void. These particulars are as follows: "(a) It is not conditioned for the defendant's appearance 'forthwith.' (b) It is not conditioned for his appearance 'without further notice.' (c) That it is not conditioned for his appearance 'from day to day.' (d) That it is not conditioned for his appearance 'until the final disposition of such appeal.' (e) That it does not require the defendant 'to abide the judgment of the district court.'" See section 29-611, Comp. St. 1929.

Upon submission of this motion the same was sustained by the district court for said county, and an appeal prosecuted to this court.

It appears conclusively that the bond given by the defendant does not comply with the requirement of the statute and is void.

This section of the statute has been before this court on several occasions and the uniform holding has been that all of its terms must be complied with. *Murray v. State,* 121 Neb. 278; *Killian v. State,* 114 Neb. 4; *Oppfelt v. State,* 117 Neb. 549.

It therefore appears that the lower court committed no error, and its judgment is therefore

AFFIRMED.

WALTER A. SCOTT, APPELLEE, V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 26, 1934. No. 28774.

Insurance: APPLICATION: MISREPRESENTATIONS. Untrue answers, if proved to be knowingly made by the insured, in an application for a disability benefit contract attached to a life insurance

policy, will avoid the contract, where they relate to the physical condition and the personal medical history of the applicant of facts well known to him and material to the risk, and when, if the truth had been told, the contract would not have been issued.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Former opinion withdrawn and judgment of district court reversed.*

William Baird & Sons, Reginald Foster and *George Hoague,* for appellant.

Brogan, Ellick & Shoemaker, W. A. Stewart, Jr., and *Robert B. Hamer, contra.*

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

PAINE, J.

The plaintiff brought action against defendant insurance company on two supplemental agreements attached to two $5,000 life insurance policies, which supplemental agreements each provided for payments of $50 a month if permanent disability occurred. The case was tried to a jury, and a verdict was returned in favor of the plaintiff. The motion for new trial being overruled, judgment was entered on the verdict.

This cause was argued to division No. 1 of this court on January 5, 1934, and an opinion of reversal was entered, and is found in 126 Neb. 514. Motion and brief for rehearing were duly filed. Oral argument for rehearing was allowed to the full court on October 1, 1934.

The defense was based principally upon two untrue statements found in the application for insurance which plaintiff signed, a copy of which is attached to, and made a part of, each policy. Question No. 13 read: "Have you had any serious illness or disease? State fully." Answer: "No." Question No. 15: "Has any member of your family been afflicted with insanity or tuberculosis? Give details." Answer: "No."

The policy provided that it should be incontestable after it had been in force for one year, except as to additional benefits specifically granted in the event of total and permanent disability, and this action was founded upon such supplemental agreement for total and permanent disability, for which an extra premium had been charged.

The facts may be stated briefly, that less than six months prior to the date of signing said application insured's left testicle was removed because it had become tubercular, and that the total and permanent disability alleged, for which payment of $100 a month is demanded, is based upon the fact that his right testicle has now also become tubercular. Insured answered that no member of his family had been afflicted with tuberculosis, while he had only recently suffered the loss of an organ for that very disease. He also made answer that he had not had any serious illness or disease, which was also false. The defense offered is, that he did not make these answers in the application, but that the agent wrote in such answers, unknown to him, and that he did not read the application before signing the same, and should not be made to suffer for the fraud of the agent.

In *Damgaard v. South Dakota Benevolent Society*, 254 N. W. (S. Dak.) 924, the insured certified in her application: "I am in good health. That I have no ailment that I know of that will shorten my natural life." November 1, 1932, policy was issued. December 26, 1932, she died of a heart ailment, with which she had been afflicted for more than a year, and for which she had been taking medicine, and a week prior to signing the application she had been in bed and attended by a physician. Deceased was not in good health, and the representation to that effect was knowingly false. To permit a recovery under all the circumstances shown by this record would be to sanction a fraud.

Let us next consider the case of *Jefferson Standard Life Ins. Co. v. Stevenson*, 70 Fed. (2d) 72: "General motion for directed verdict, followed by timely exception to denial

thereof and appropriate assignment of error, is sufficient to raise question of sufficiency of evidence to support verdict for opposite party on appeal."

The application, made a part of the policy, had the answer that the applicant had not suffered from any disease of the lungs; had not consulted a doctor for any other cause within the past five years. The testimony showed that in July preceding she made five visits to a doctor's office, and he told her she had lung trouble, and advised her to stay in bed and keep the children away from her. The doctor testified that he told the plaintiff that his wife was suffering from pulmonary tuberculosis, which the plaintiff denied on the stand. The court say:

"It was error to refuse to give the peremptory instruction. * * * Whatever her own opinion as to whether she was suffering from a disease of the lungs might have been, her representation that she had not received medical attention within five years was untrue. * * * The answer to the crucial question was not partial or imperfect; it was full and complete."

In *Prudential Ins. Co. v. Ashe,* 266 Mich. 667, the insured's statement to agent was that he was in good health, and he concealed the fact that he had been ill with pleurisy, was being treated for fistula, had finished treatment for lumbago, and had a condition indicating tuberculosis. The court held that such misrepresentation of facts voided reinstatement of life policy.

The United States supreme court has considered a very similar case, *New York Life Ins. Co. v. Fletcher,* 117 U. S. 519, 29 L. Ed. 934. It was stated in the application that the applicant had never had a disease of the kidneys, and had never been seriously ill; while the truth was that he had been afflicted with diabetes, for which he had been treated for some time, and of which he actually died. The defense was that the insured had stated the facts truthfully, and that the agent had falsely written in wrong answers, but the court, in passing upon this case, held:

"It was his duty to read the application he signed. He

knew that upon it the policy would be issued, if issued at all.

"It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity."

The opinion also discussed another view of the case, equally fatal to recovery: Assuming that the answers of the insured were falsified by the agent, as alleged, the fact would at once be disclosed to the insured by the application annexed to the policy delivered to him. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company.

In *Royal Neighbors of America v. Wallace*, 73 Neb. 409, it was held: "An untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy."

In subdivision 4 of section 44-602, Comp. St. 1929, it is provided that all statements made by the insured shall *in the absence of fraud* be deemed representations, and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application. Taken in connection with the next subdivision, 5, which provides that a policy shall be incontestable after it has been in force for a certain length of time, it provides the specific exemption as to total and permanent disability provisions.

It should be clearly kept in mind that the defendant is meeting no attack upon the two life insurance policies of $5,000 each, based upon the application in which the untrue answers appear, but is only seeking to defend against

a recovery upon the total and permanent disability riders attached thereto.

The general rule that statements relating to the health and physical condition of applicants for life insurance are material to the risk, and, if false, are fatal to the policy, is well settled.

In *Empire Life Ins. Co. v. Gee,* 171 Ala. 435, it is said: "We would not be inclined to adopt a construction of the statute which in some, though rare, cases would amount to a practical foreclosure against insurance companies of all remedy for fraud."

In the case of *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, we find a reversal of a judgment for plaintiff, based upon fraud in that the insured denied, in answer to a question, that his parents or sister had ever been afflicted with insanity, which was false, and it is stated that untrue answers in reference to matters of opinion or judgment will not avoid a policy if made in good faith and without intention to deceive, but if such untrue answers are shown to be within the knowledge of the applicant, and are material to the risk, such answers will avoid a policy. In this and other cases it is material to examine the question whether, if a true answer had been made, the policy of insurance would have been written. *Souza v. Metropolitan Life Ins. Co.,* 270 Mass. 189; 4 Cooley's Briefs, 3293; *Stanulevich v. St. Lawrence Life Ass'n,* 228 N. Y. 586.

The following authorities tend to support the position of the court in this case: *Hews v. Equitable Life Assurance Society,* 143 Fed. 850; *Johnson v. American Nat. Life Ins. Co.,* 134 Ga. 800; *Bowyer v. Continental Casualty Co.,* 72 W. Va. 333; *Kaffanges v. New York Life Ins. Co.,* 59 Fed. (2d) 475; *Joseph v. New York Life Ins. Co.,* 219 Ill. App. 452; *Metropolitan Life Ins. Co. v. Jennings,* 130 Md. 622; *Mutual Life Ins. Co. v. Long,* 12 Ohio App. 252; *Seaback v. Metropolitan Life Ins. Co.,* 274 Ill. 516; *Wingo v. New York Life Ins. Co.,* 101 S. E. (S. Car.) 653.

The defense in this case is fraud, and fraud vitiates

everything, and it is not ordinarily the policy of the law to put difficulties in the way of proving it. This suit was brought, not upon the policies, but upon the total permanent disability agreements attached thereto, which, it is alleged, would not have been issued if the medical examination had disclosed the true facts.

There is a grave question whether the motion for a directed verdict should not have been sustained in this case, but, not desiring to be too arbitrary in the matter, we will simply withdraw the former opinion and syllabus in this case, found in 126 Neb. 514, and restate the syllabus to more clearly show our holding, and reverse the judgment of the trial court, and remand the cause for further proceedings.

REVERSED.

ROSE, J., dissents.

CHARLES E. MUSGROVE, APPELLANT, V. ANTON ESKILSEN ET AL., APPELLEES.

FILED OCTOBER 26, 1934. No. 28795.

1. **Vendor and Purchaser**: SALE OF LAND: FALSE REPRESENTATIONS. Misrepresentation of the value or condition of real estate in order to be remedial must have been made under such circumstances that the injured party had a right to rely thereon.
2. **Mortgages**: FORECLOSURE: FALSE REPRESENTATIONS: RECOUPMENT. Where defendants purchased real and personal property from plaintiff, giving notes in part payment therefor, secured by a mortgage on said real estate, in an action to foreclose said mortgage, *held*, under the evidence outlined, that defendants may recoup claim arising in consequence of plaintiff's failure to deliver a part of said personal property and also for damages for false representations made by plaintiff concerning the water plant on said real estate, it appearing that defendants had the right to and did rely thereon; and *held contra* as to the other alleged representations set out, it not appearing that said representations were false, or, if false, that the defendants were entitled to rely thereon.

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

Fischer, Fischer & Fischer, for appellant.

Weaver & Giller, contra.

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

MEYER, District Judge.

This is an action to foreclose a purchase-money mortgage executed by the defendants, covering a 54-acre tract in Washington county, Nebraska, and given to secure nine notes of $1,000 each, eight of which remain unpaid.

Defendants in their answer admitted the execution of the mortgage and notes, but say that they signed them because of the false and fraudulent representations of the plaintiff, and they allege in substance, by way of cross-claim, that they were induced to execute said notes and mortgage for the amounts in them set out and to purchase said property for the sum of $16,000, because of said fraudulent representations. They further allege that after the sale was made plaintiff removed from the premises certain personal property in violation of the terms of their contract of sale; that said real estate was not worth at the time to exceed the sum of $8,000, already paid; that they have been damaged in the amount now claimed by plaintiff under said mortgage, and they ask that their claims be set off each against the other. Plaintiff in his reply denies all allegations of new matter and of fraudulent representation. The fraud alleged consisted in the making of false representations that on said property was a water plant capable of furnishing sufficient water to supply defendants' needs; that the buildings did not leak; that the apple orchard and strawberries produced annually $700 net; that the reasonable and fair market value of the land at the time of sale was $16,000; that said land produced $3,200 during the year 1929; and that the fences, pasture, alfalfa and place generally were in first-class condition.

The trial court found in substance that the plaintiff falsely and fraudulently represented that the returns from

the produce from said premises for the year 1929 amounted to $3,200; that the buildings were in good condition; that the water supply and plant for supplying same were sufficient for defendants' needs; and that the value of said premises was $16,000 at the time of sale. The court further found that said representations were made with the intent to, and did, deceive the defendants; that said premises were not worth to exceed $10,000 at the time of sale; that defendants have been damaged in the sum of $6,000; that plaintiff removed from said premises personal property embraced in his contract with the defendants in the amount of $132; that defendants are entitled to recoup the sum of $6,132 as against plaintiff's claim; that defendants are not indebted on said mortgage in a greater sum than $1,868, together with interest at 6 per cent. from April 19, 1930, or a total of $2,166, for which sum decree of foreclosure was entered. Plaintiff has appealed and the case is here for trial *de novo*.

The evidence discloses that in 1930 the defendant Eskilsen was engaged in the dairy business on an 18-acre rented property near Omaha. Early in April of that year he answered an advertisement for the sale of the property in question, and he and his wife were taken to inspect it by one Bowan, a real estate agent with whom the property was listed. They spent about an hour and a half going over the property, and about a week later, at Eskilsen's request, they went again to inspect the place, staying approximately the same length of time. Eskilsen then considered the matter for a few days, after which the plaintiff and Bowan met with the defendants at their home, where the proposed sale was talked over. Plaintiff first asked $16,500 for the property, and defendant said he would not give over $16,000. On April 19, 1930, the transaction was consummated at that figure in the office of Eskilsen's attorney, who prepared the papers. In payment of $7,000 of the purchase price for said property, plaintiff accepted from defendants a deed to a house in Omaha, some building and loan stock, a mortgage, some stocks and

bonds, and $185 in cash. The notes and mortgage were given to cover the balance and the deed was executed and delivered. Under the arrangement made defendants were not to have possession until the following year. In the meantime the premises were occupied by one Karschner, who held under a lease expiring in the spring of 1931.

The chief question involved has to do with the sufficiency of the evidence to support the decree. We note that the trial court did not make specific findings as to some of the allegations of fraud set out, and we assume the court found these were not supported by sufficient evidence. At any rate, we have examined the evidence as to these allegations carefully, and such is our view.

We next consider the charge that the plaintiff falsely represented that he received $3,200 from said place in 1929. That such statement was made is admitted and Musgrove testified that the representation was true; that he had a 2,200-egg incubator and seven brooder houses on which $800 had been recently spent for repairs, and that he took in around $1,200 from chickens and eggs, approximately $300 from apples, and the balance from corn, potatoes, calves, milk, alfalfa, tomatoes and other farm and truck products; that he had a small patch of corn in 1929 yielding 90 bushels an acre; that he sold garden truck, including sweet corn and tomatoes, to the stores and private customers; that his garden was early, and that he received as high as 25 cents a dozen for corn and $1.25 and $1.50 a bushel for potatoes. As against this testimony, Karschner stated that he did not think the place could have produced $3,200 in 1929, and Krambeck, a neighbor, also testified that nobody could make $3,200 off the place. This evidence is largely speculative and Karschner's opinion was gained during a year when farm products had sharply declined. While $3,200 appears to be a rather large income from such a small acreage, and plaintiff's representations as to what a place had yielded, as distinguished from the mere statement of opinion as to what a place will produce, is ordinarily actionable if false,

yet it is a matter of common knowledge that produce prices were high in 1929. The fact shown that Eskilsen did not take in so much in later years does not, of itself, disprove those representations. Productivity and income from a farm depend upon many factors, among which are ability and industriousness of the farmer; use to which the land is put; rainfall and weather conditions, as well as soil and market conditions. The farm was put to different use when Eskilsen took possession. We do not think the defendants have sustained the burden of establishing the falsity of these representations. Neither does it appear that they relied thereon or that the defendants were misled by such statements. Plaintiff testified that when he was explaining to Eskilsen what he had taken in from chickens, etc., Eskilsen said, "Devil with that kind of stuff, I have milk cows." This statement was not denied, and the defendants admit that they were primarily interested in securing this acreage for the purpose of conducting a dairy business.

As to the charge that plaintiff falsely represented that the buildings on said premises had water-proof roofs thereon, defendants testified that Bowan had told them that the buildings did not leak and that plaintiff told them that whatever Bowan said was a fact. They also testified that when they moved on the place the roofs leaked badly in the little house, the big house and the barn, and Eskilsen estimated it would cost $430 to repair them. Nearly a year expired between the time Eskilsen bought the place and the time he took possession. Neither Karschner, who occupied the little house, or any one else, testified that the small house or the barn leaked at the time of sale. If these buildings did leak at that time, certainly Karschner would have known it and defendants, who called him on other matters, would have had his testimony on this point. Defendants inspected the property before they bought it. Eskilsen admitted that at that time he saw some spots on the paper in the house. Mrs. Eskilsen said when they moved in the big house it was

badly water-spotted in the dining-room and kitchen where it had leaked through the roof and that the paper was loose in the front room as well; that the paper in the living-room and dining-room was also loose the first time they were there, and that the place was practically in the same condition, only possibly a little more paper loose, when they moved in. The big house had a shingle roof on it with roofing material placed over it, and when defendants moved in part of this roofing had blown off. How much this contributed to the leaky condition is not shown. Both defendants having inspected the property before the purchase was made and having then seen evidence of a leaky roof, we do not think they had a right to rely on these representations, even if false.

It is also charged that plaintiff falsely represented that said place was in first-class condition and was worth $16,000 at the time of the sale. The improvements consisted of a ten-room house, a four-room house, a barn, a lean-to, a three-car garage, a double corn crib, a granary, two chicken houses, a good-sized hog house, a building constituting a combination pump house and granary, another small building, seven brooder houses and two caves. The value of these improvements was fixed by the various witnesses at the time of sale at from $5,000 to $10,000. The property joins Calhoun on the south and is on a public highway which is now paved. Several former neighbors fix the value of the property at the time of sale at not to exceed $8,000. On the other hand, it is in evidence without objection that plaintiff gave $16,200 for the place two years previous and that prior thereto it sold on exchange, subject to a $15,000 mortgage; that Musgrove carried $11,500 insurance on the buildings, and that defendants sold about six-tenths of an acre to the county and state for road purposes for $250.

The record discloses that Eskilsen was a man of mature years; that, in addition to conducting a dairy on his own account, he had worked at carpentering, trucking, as a railroad and dairy employee, and that he had farmed two

years in Colorado. It is already shown that he sought the opportunity to examine the place in question as he desired a larger place for his dairy business and that he made two trips there for that purpose. Both he and his wife visited the premises and inspected the buildings and he went into the fields and into the orchard. He might have visited every foot of it had he been willing to take the time, and the only reason which he assigns for not giving more time to the inspection of the property is that he was too busy with his dairy work. We think the excuse, under the circumstances, is without merit. He was an experienced dairyman, had done some farming and wanted to buy a place for the purpose of carrying on his dairy business. It appears that other tracts of land were shown him by the plaintiff's agent and the tract purchased was the one in which he was particularly interested. He was under no sort of restraint or disability and lived in close proximity to the property purchased. He took time to consider the purchase after he had made the inspections and before he signed the papers. He could, had he chosen to do so, have examined it further and have secured full information in regard to its value.

As a general rule a mere misrepresentation of value when made by the owner of land in an effort to sell it is not actionable. *Dresher v. Becker,* 88 Neb. 619; *McKnight v. Thompson,* 39 Neb. 752. See, also, *McKibbin v. Day,* 71 Neb. 280. Such representation being generally regarded as a mere expression of opinion involving a matter of judgment and estimation, as to which men may differ. 26 C. J. 1215.

This court has also held that, in defending a suit on a note given in part payment for the purchase of land on the ground that said note was procured by fraudulent representations concerning said land, it was not only necessary to prove that the representations were made, that they were false, and that the maker of the note believed them and relied upon them, but it is equally essential to show, in some manner, the existence of circum-

stances entitling him to rely on them. *Runge v. Brown,* 23 Neb. 817; *Realty Investment Co. v. Shafer,* 91 Neb. 798. We think the rule announced is applicable to the case at bar and, in our opinion, defendants in this case did not, under the circumstances, have a right to rely upon the representations made as to the value of said property or as to its general condition.

Concerning the water plant, it appears that plaintiff and his agent represented in substance and led defendants to believe that the water supply was ample for such stock as defendants contemplated running on the place; that they would have water in the house for toilet, bath and domestic purposes, and that the plant was in good condition and would automatically furnish such water as was needed. The plant consisted of an automatic electric pump with pressure tank, the power being supplied by a small motor. There was also another big pump run by a gasoline engine which could be used in case of an emergency. It appears that Karschner, who took possession of the premises after plaintiff left, lived in the small house, and that he had sufficient water for his use and for four head of stock, some chickens and pigs, but he said he did not use much water and he only used the electric pump a part of the time. The plant was designed to automatically maintain a desired pressure, but Karschner testified that sufficient pressure could not be maintained; that the plant was in poor condition; that it would not work satisfactorily; that it required constant attention; that when the defendants moved in he tried to help them operate it, but that they did not have any success; and the defendants testified that they were unable to get sufficient water for their stock and that they never were able to get any water into the house. In the record is also the evidence of a well-digger that he had examined the plant and well and that they were out of order and would not produce sufficient water to supply defendants' stock, and that an expenditure of $1,000 would be required before the plant could be put in good condition. While this amount seems rather large, it is not denied.

Whether representations as to the condition of a water plant are actionable, if false, or amount merely to an expression of opinion depends upon the facts of each particular case. In the instant case the statements made were in the nature of positive representations of an existing fact, the truth of which defendants were unable to ascertain even by an examination of the plant, first, because the evidence shows that when defendants inspected the premises the water had been disconnected from the large house, and, second, because it also appears that they had no knowledge of the plant mechanism. Defendants purchased the place for a dairy, which fact was known to plaintiff. A good water plant was essential to their needs and also that they might enjoy the conveniences which it was represented they would have in their home. We think, under the circumstances, that defendants were entitled to rely upon such representations. The evidence as to the damages they have sustained by means of said misrepresentation is rather meagre; however, considering all the evidence we feel warranted in fixing it at the sum of $1,000.

Plaintiff contends that, defendants' cross-demand being one for unliquidated damages, same cannot be set off in an action for the foreclosure of a mortgage. The cases which he cites are not in point.

We think the rule is that, in an action to foreclose a purchase-money mortgage, mortgagor may properly recoup damages for false representations made by plaintiff concerning said real estate in diminution of plaintiff's claim, where such representations were the means employed to bring about the contract of sale and the execution of the notes and mortgage. See *Rollins v. Hopkins,* 103 Neb. 830; *Larabee v. Given,* 65 Neb. 701; *Dwinell v. Watkins,* 86 Neb. 740; *Realty Investment Co. v. Shafer, supra; Stephens v. Doxey,* 58 Utah, 196; *Northern Trust Co. v. Sanford,* 308 Ill. 381; Pomeroy's Code Remedies (5th ed.) 1083, and cases cited; 42 C. J. 32, 96, and cases cited; 57 C. J. 407, and cases cited.

The trial court also found that the defendants were entitled to recoup the amount of $132 because of certain fencing, building material and other personal property which it was found were embraced in defendants' contract with plaintiff, and which said personal property plaintiff retained and failed to deliver. At the time of sale the articles in question were on the premises purchased, which premises were then occupied by a tenant of the plaintiff. Defendants did not have the right of possession thereof until the following spring. The articles for which recoupment was allowed were removed by the plaintiff and never did pass into defendants' possession. The evidence is conflicting as to whether or not this property was included in the sale. Defendants testify that it was, and if their evidence is believed, it is sufficient to support the findings made in that regard. The trial court had the advantage of seeing the witnesses and of observing them while testifying. We ought not, therefore, disturb its findings in this respect.

That portion of defendants' cross-bill in which recoupment is asked for personal property appears to be drawn on the theory of a conversion occurring after the sale; however, it was not attacked by motion, special demurrer or otherwise, and defendants' evidence as to said claim was received without objection. Since the notes secured by the mortgage in foreclosure were given in part as a payment for the personal property which plaintiff contracted to but failed to deliver, there arises, therefore, a cause of action for damages in favor of the defendants and against the plaintiff, which we think, under the record and the authorities already cited, is a proper subject of recoupment.

The amount allowed by the trial court in diminution of plaintiff's claim is reduced to $1,132, leaving a balance due of $6,868 together with interest at 6 per cent. from April 19, 1930, or a total of $8,687. As thus modified, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

SWIFT LUMBER & FUEL COMPANY, APPELLEE, V. CLEMMA HUNT ELWANGER, APPELLANT.

FILED OCTOBER 26, 1934. No. 28822.

1. **Fixtures.** Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact.
2. ———. Articles, such as boiler, burner, tank and Frigidaire equipment, which may or may not become attached to the freehold, according to the circumstances, will retain their character of personalty where sold under contract in which title is retained in vendor until purchase price is paid, when the rights of innocent third persons are not adversely affected thereby.
3. ———. Where the removal of a boiler, burner and tank will not materially injure the premises, the right thereto of the vendor who retained title under conditional sale contract, *held* superior to that of prior real estate vendor of said premises under executory contract of sale who has not made any advances or lost any rights by reason of the annexation of such articles. *Held* otherwise as to Frigidaire equipment permanently affixed where vendor made advancements for improvements and alterations without notice of the conditional character of their sale and relying upon the value of the annexed articles as a part of her security.

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

Beghtol, Foe & Rankin, for appellant.

Burkett, Wilson, Brown & Van Kirk, contra.

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

MEYER, District Judge.

This is an action in replevin brought by the plaintiff, Swift Lumber & Fuel Company, a corporation, vendor under contracts of conditional sale, against the defendants, Arnold C. Koenig, vendee in default, and Clemma Hunt Elwanger, to recover one Frigidaire compressor, seven cabinets and coils, pipes, tubes, brackets and fittings; one triple service boiler, oil burner, thermostat, pipes, tubes and fittings; and one 600-gallon oil tank; the defendant

Elwanger being the record owner of the property in which same were installed. No bond was executed. The property was not reduced to possession and the action proceeded under the statute as one for damages. The defendant Koenig made default. During the trial, by agreement of the parties, the jury were dismissed and hearing proceeded to the court. There was judgment for the plaintiff against both defendants for $1,644.40. Defendant Elwanger has appealed.

There is little dispute in the evidence. In July, 1931, a written contract was made between the defendant Clemma Hunt Elwanger and one Maud Koenig, wife of the defendant Arnold C. Koenig, in which the former agreed, upon the latter making the payments and performing the covenants therein contained, to convey to her a certain residence property in the city of Lincoln. As part of the consideration the grantee assumed a $6,000 mortgage on the real estate and gave the grantor her note with interest for the balance. The contract empowered the grantee to take possession of the property and remodel it according to certain plans and specifications and the grantor advanced $4,000 for this purpose on grantee's note with interest therefor, receipt of which advancement is acknowledged in the contract. If additional funds were needed, grantor had the option of furnishing same, or, if secured elsewhere and grantee had then faithfully performed her contract, grantor agreed that a second mortgage covering said loan, but not to exceed $2,000, could be placed on the property, which would take precedence over her rights in the premises. It was also provided that grantee should pay all taxes assessed against said property; that she should not permit any mechanics' liens to be filed against it and that the remodeling would be completed before October 1, 1931, at which time grantee agreed to refinance the premises and pay the grantor the amount then due her, with interest. The contract also stated that, upon failure to complete the improvements or otherwise perform its

conditions, the grantor might declare a forfeiture and reenter.

The negotiations leading up to said contract were conducted with the defendant Koenig, and it is conceded by all parties that he was the real purchaser, the contract running to his wife because of a judgment outstanding against him. The contract was never filed or recorded, but Koenig immediately took possession of the premises, changing partitions and stairways, and otherwise made alterations and improvements therein, according to plans, converting the residence into an apartment house with seven apartments, and superintending the work himself. During the course of the remodeling he purchased from the plaintiff for installation in said building the articles in dispute, under two contracts of conditional sale, which provided that title should remain in the plaintiff until payment was made in full. Payments of approximately 10 per cent. of the purchase price were made upon signing the contracts. No other payments were made. Installation was made by plaintiff and was completed November 25, 1931.

November 9, 1931, the defendant Koenig solicited and the defendant Elwanger advanced $500 additional under said contract, and on November 18, 1931, she made another advance of $300. Shortly thereafter several mechanics' liens were filed against the property by parties from whom Koenig had purchased materials used therein and for which he had failed to make payment. Whereupon, after some negotiations, Mrs. Elwanger declared a forfeiture of the contract, and on December 30, 1931, a written cancelation and rescission thereof were entered into between the parties; the grantee's notes were returned and possession was restored to the grantor. Apparently all the money advanced was expended in making the improvements except $1,000, which it later developed Koenig had retained for his own services. After the contract was canceled, an instalment on the articles now in dispute being past due, plaintiff made demand of each defendant

for payment, and demand for possession of said articles, all of which demands were refused. Thereafter, on January 29, 1932, its conditional sale contracts were filed.

In its petition, plaintiff claims, among other things, that the defendant fraudulently obtained the articles in dispute by pretending and representing to it that Koenig was the owner of the building in which they were installed and that the defendants later fraudulently canceled the muniments of title. It is also alleged that, in making the alterations and contracting for such articles, Koenig was acting as Mrs. Elwanger's agent.

The articles in question were sold to Koenig with full knowledge of the location of the property in which same were to be installed and without any investigation by plaintiff of the record title thereto. Koenig did not represent himself to plaintiff as acting for Mrs. Elwanger; neither did she hold him out as such. In fact, plaintiff never even talked with Mrs. Elwanger about these articles until after Koenig had defaulted under both contracts. We have carefully examined the evidence and it wholly fails to establish either agency or fraud and connivance. The principal question presented by the record has to do with the plaintiff's right to recover in replevin from the defendant Mrs. Elwanger, the vendor under an executory contract of sale of the real estate in which the articles were installed, who, upon default by the vendee under said real estate contract, has enforced cancelation thereof and has reentered. Mrs. Elwanger contends that, so far as she is concerned, the articles became a part of the real estate when they were installed and that, therefore, replevin does not lie.

Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. *President and Directors of Ins. Co. v. Buckstaff*, 3 Neb. (Unof.) 632; *Brownell & Co. v. Fuller*, 60 Neb. 558. In determining this question, the following tests, while not all inclusive, have received general approval, viz.: "1st. Actual annexation to the realty, or something appurtenant

thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." *Freeman v. Lynch,* 8 Neb. 192; *Frost v. Schinkel,* 121 Neb. 784. The third test, namely that of "intention," appears by the clear weight of modern authority to be the controlling consideration. See Ewell, Fixtures (2d ed.) *22; 11 R. C. L. 1062, sec. 6; 26 C. J. 654; *Edwards & Bradford Lumber Co. v. Rank,* 57 Neb. 323.

Moreover, under the view that intention constitutes the chief criterion, it is now generally held that unless the articles are of such a nature as to lose their identity by incorporation in the real estate, such as nails, lath, plaster, etc., or unless there is a complete merger with the realty by incorporation of the chattels so as to prevent removal without material injury to the realty, the parties may agree that such articles shall retain their personal character and be removable, and such contract is binding between the parties. It is also held that such an agreement may be and is implied where articles of an ambiguous nature, such as the articles involved in this case, are sold with the reservation that title shall not pass until they are paid for, or where a mortgage is given on articles before their annexation. In such case their annexation to the realty of the purchaser does not render them a part of the realty and irremovable as between the parties. 26 C. J. 676, 678, 679, and cases cited; 11 R. C. L. 1064, sec. 8; *Edwards & Bradford Lumber Co. v. Rank, supra; Arlington Mill & Elevator Co. v. Yates,* 57 Neb. 286; *Frost v. Schinkel, supra.*

A more difficult question arises when the interest of third persons is involved. When the rights of such persons, without notice, relying on the apparent character of

the articles annexed, are adversely affected thereby, the intention of the parties as inferred from the nature of the articles affixed, the structure and mode of annexation, and the apparent purpose or use for which the annexation has been made, is held to control over an intention expressed in a secret contract of conditional sale. To this general effect is *Geer Co. v. Wolcott,* 124 Neb. 306, cited by defendant, in which it was held that trade fixtures permanently affixed to the realty became a part thereof and subject to the liens of those who had furnished material and labor for the housing and installation thereof, unaffected by such conditional sales contract. However, unless otherwise controlled by statute, the courts generally have sought to uphold the manifest intention as it appears from the contract and permit removal when the rights of third persons are not adversely affected thereby.

In *Arlington Mill & Elevator Co. v. Yates, supra,* this court held: "Articles, such as machinery, of an ambiguous character, and which may or may not become attached to the freehold according to the circumstances, will retain their character of personalty by virtue of a contract between vendor and vendee to that effect, when the rights of innocent purchasers relying on their apparent character are not involved."

In *Edwards & Bradford Lumber Co. v. Rank, supra,* an engine was purchased and placed in a flouring mill to propel the machinery therein. It was placed upon a suitable brick foundation embedded in the ground, being securely attached to the foundation by bolts. The tank was set upon a similar foundation and 40 feet of gas pipe was buried in the ground. Purchaser executed a chattel mortgage on the engine to secure the payment of purchase price. The court held that the giving of the mortgage evinced an intention that the engine should retain its status as personalty, even though physically attached to the freehold by the owner. The court further found that it could be removed without substantial injury to the

realty and that the mortgagee should prevail over the lienors thereof.

In *Holland Furnace Co. v. Bird,* 45 Wyo. 471, the court said: "By the weight of authority, * * * the intention manifested by the conditional sale agreement to retain title in the vendor and to preserve the character of the chattel as personalty after annexation to the real property (so as ordinarily to constitute a fixture) prevails against the prior mortgagee of the realty, so that the chattel can be removed by the seller for the vendee's failure to perform the contract, unless its severance will so injure the freehold as substantially to diminish the creditor's original security. The reason is that, as the mortgage is merely security, the mortgagee has advanced nothing in reliance on the value of the subsequently annexed chattels, and he should not be permitted to acquire them as a part of his security, contrary to the intention of the party making the annexation and to the injury of the seller. 26 C. J. 684, sec. 49, and cases cited; 13 A. L. R. 461, note; 23 A. L. R. 806, note; *Industrial Bank of Richmond v. Holland Furnace Co.,* 109 W. Va. 176; * * * *Holt v. Henley,* 232 U. S. 637." See, also, *Frost v. Schinkel, supra; People's Savings & Trust Co. v. Sheboygan Machine Co.,* 212 Wis. 449; *North Shore Co. v. Broman,* 188 Minn. 433; *General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n,* 227 Mo. App. 832.

The same reasoning and rule is held to apply to a vendor of land under an executory contract of sale. In *Harris v. Hackley,* 127 Mich. 46, machines sold under a contract of conditional sale were placed by the vendee in a building which he had purchased of defendant under a contract providing that, in the event of failure to pay the purchase price, defendant was entitled to a surrender of the property with all improvements. The court held that the conditional vendor of the machines was entitled to same as against the vendor of the land, stating that the defendant stood in the position of an equitable mortgagee of the real estate, being a contract vendor. The court said:

"But he was a prior mortgagee, and did not take his security upon the faith of any appearance that this property was a part of the real estate."

In *Hendy v. Dinkerhoff*, 57 Cal. 3, plaintiff leased to L. an engine and boiler with privilege of purchase. L. affixed them in permanent manner to the land of the defendant in the possession of L. under a contract for purchase. The contract provided that if L. failed to perform, all the tools and machinery put on the land by him should belong to defendant. The court held that the plaintiff could recover the engine and boiler or their value from the defendant.

In *Davis v. Bliss*, 187 N. Y. 77, 10 L. R. A. n. s. 458, the vendor of machinery under a conditional sale contract brought an action in conversion against the vendor of the real estate to which said machinery had been attached by the purchaser, which said purchaser was also the vendee under and had made default on the real estate contract. The real estate contract provided for instalment payments and also provided for payment of $1,000 by improvement of said property, by labor and repairs and new machinery, unencumbered by mechanic's lien, mortgage or purchase price. Another provision provided that all improvements, repairs and machinery should become a part of the realty, not to be removed without the consent of the vendor. The machinery was permanently annexed. The court said: "We shall assume that under ordinary circumstances the engine would have become a part of the realty." And say further that no more favorable rule should apply to the vendor of real estate than to a mortgagee, and the reason assigned for the court's holding is that the defendant did not in any manner part with value or lose any rights on account of the engine attached. The court also say that stress is laid upon the fact that, when the purchaser installed the engine, the old engine was removed and appropriated to his use, and then state that, if the vendor of the real estate has been wronged thereby, she has a right of action against the wrong-doer.

The following texts and authorities likewise support this view. 26 C. J. 688, and cases cited; *Miller v. Wilson,* 71 Ia. 610.

These authorities also state a well-established exception to the rule set out, where the vendor, relying upon their apparent character and without notice otherwise, has made advances by reason of the annexation. To the same effect is *Dauch v. Ginsburg,* 214 Cal. 540. In that case a construction loan was secured from a loan association which took a mortgage on the property, advances under said loan to be made from time to time as the work progressed. At the time the loan was contracted, it was agreed between the parties that security for said loan should be the real estate, together with the completed building according to plans and specifications, which included plumbing fixtures. The court held that the vendor of the plumbing fixtures, later installed under a conditional contract of sale made subsequent, could not assert the conditional character of such sale as against the mortgagee, the theory being that the agreed security would otherwise be diminished.

Do the facts in the case at bar bring the parties within this exception?

While assuming that, as to innocent third parties relying on their apparent character, the boiler, burner and tank would be classed as permanent fixtures, yet we think the evidence discloses that they can be removed without material injury to the basic structure in which installed. During the remodeling, the old boiler was removed, leaving a depression in the concrete in the basement floor. The new boiler was set on a cast iron base across this depression, facing in a different direction and resting upon bricks to make it level. Concrete was filled in underneath and up around the edges, possibly three-eighths of an inch, to make it tight, but it was not fastened by bolts or otherwise. It was hooked up with the old radiators and pipes already there. The burner itself is set in the fire box in the boiler and the operating mechanism, including the fan, pump and electric motor, rest on the floor in front

of the boiler. There is a connecting pipe coming out through the lower door to the fan and motor and the supply pipe extends up to the ceiling and over and out through the outer wall to the tank which is buried in the yard at a depth of about six or eight inches. The boiler is about six feet high, five feet long and two and a half feet wide. The ordinary entrance was not sufficiently large to admit it and a section of the basement wall was taken out and it was brought in through this wall. At this opening a permanent door was made. To remove the boiler it would only be necessary to unscrew the fuel pipe from the burner, the motor, fan and tank; disconnect the burner from the steam main, the water line and the domestic hot water system and lift the boiler from its base. It is possible that in removing the base a slight film of cement around the edge would be chipped away, but no damage would be done thereby. There is some dispute as to whether or not the furnace can be taken through the doorway made in the basement wall, but it appears that the most that would be necessary would be to remove the casing. The tank would need to be dug up and the pipe disconnected.

The real estate contract provided that the alterations and improvements should be made in accordance with definite plans. The evidence clearly shows that the heating plant was not included therein. After the construction was nearly completed, Koenig found that the old boiler was not serviceable and he then purchased the heating equipment in question. The contract for it was made October 30, 1931, and it was installed November 25, 1931. The money which Mrs. Elwanger loaned the Koenigs was all advanced prior to the date of such installation. Koenig, who was called as a witness for the plaintiff, testified that he told Mrs. Elwanger about the purchase price and the contract, but is indefinite as to the date on which these conversations took place. At two points in her testimony Mrs. Elwanger says, without fixing the time, that Koenig told her that he had ordered a furnace. At another point

she says she did not know of it until after it was installed.

If prior to the time she made the last advancement she knew these articles were to be installed and that they were being purchased under contract of conditional sale, then no doubt she would be liable for their detention. However, we think she is equally liable under her own statement that she did not even know that the boiler and tank were to be furnished and did not learn of it until they were installed, for without such knowledge, since there was no contractual duty imposed on Koenig to install them, it cannot be said that she made any of the advances on the appearance of these articles as a part of the real estate or in reliance upon the value of such articles annexed as a part of her security. In view of the nature of the articles, the evidence and the authorities cited, we think the plaintiff may assert its right to such articles under its contract of conditional sale as against both defendants as was held by the trial court.

In the installation of the refrigerating system, the compressor was set on concrete blocks on the basement floor and connected with the wiring and water system. Two tubes ran from the compressor to a manifold board which was set in an upright position immediately behind it, said board resting on the floor and being nailed to the joist overhead. From this board two tubes branched to each refrigerating unit, being carried up in the walls and coming out through the plaster at about twenty-four inches above the floor, at which points they were connected to the cabinets, which, together with the coils, were placed in the several apartments. These tubes are one-half and one-fourth inches in diameter and one carries the refrigeration fluid to the units and the other carries gas back to the compressor. In some instances the cabinets, or ice boxes, were placed in recesses built in the kitchenets for the purpose of housing them and the top of each cabinet forms a base for a gas stove.

The plans and specifications covering the alterations and the improvements to be made were not offered in evidence

and the testimony is silent as to whether the refrigerating system was included therein. It is shown, however, that shortly after the real estate contract was made the defendants discussed the installation of such a system and at that time Mrs. Elwanger suggested a certain make that she considered would be more economical than the one Koenig had in mind. The contract for the Frigidaire equipment in question was made shortly thereafter. While the installation was not completed until after Mrs. Elwanger had made the last advancement to Mr. Koenig for improvements, yet the piping was put in before the plastering was done and prior to such advancement. It also appears that Mrs. Elwanger visited the premises frequently during the course of the construction and took an interest in what was being done. There can be little doubt that she knew of the installation of this piping. Mrs. Elwanger denies any knowledge of the conditional character of the sale until after the cancelation of her contract, and while Koenig testified that he told her of its terms, he was unable to fix the date. We think the record, as a whole, clearly discloses that the parties mutually contemplated that the remodeled building would include a refrigerating system, and it not appearing that Mrs. Elwanger then had notice of the conditional character of the sale to Koenig, she had a right to expect when she made the last advancement that such Frigidaire equipment annexed would form a part of her security. In fact, she testifies that when she made the last advances Koenig told her, in effect, that it would cover everything, and this testimony is not denied.

Having failed to place their contract of conditional sale on file prior to the installation or before the last payments were made, or to advise with Mrs. Elwanger in whose name was the record title, thus permitting her to make additional advances totaling almost as much as the complete cost of the Frigidaire, in the belief that such equipment would be a part of her security therefor, they ought not now, having permanently affixed same to the real

estate, to be permitted to assert as to her the personal character of such property under the conditional clause in their sale contract, even though such property may be removed without material injury to the real estate. We think the facts bring the parties within the exception cited as to the refrigerating system. The trial court found that plaintiff was damaged for the unlawful detention of this equipment in the sum of $819.80. The judgment of the trial court against the defendant Elwanger is reduced from $1,644.40 to $824.60.

AFFIRMED AS MODIFIED.

EBERLY, J., dissents in part.

GEORGIANA A. COMSTOCK, APPELLANT, V. ABRAHAM L. REED, TRUSTEE, ET AL., APPELLEES.

FILED OCTOBER 26, 1934. No. 28981.

1. **Evidence** examined and *held* to sustain the decree of the trial court.
2. **Appeal**: TRIAL DE NOVO. On trial *de novo* of equity action, this court in determining the weight of evidence will consider the fact that the trial court observed the witnesses and their manner of testifying.
3. **Bills and Notes.** Under the provisions of the negotiable instruments act, no person is liable on a negotiable promissory note whose signature does not appear thereon.

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

Murdock & Murdock and *Arthur C. Pancoast*, for appellant.

Morsman & Maxwell, William C. Ramsey, Sherman S. Welpton, Jr., Gaines, McGilton, McLaughlin & Gaines, Frank H. Woodland and *Shotwell, Monsky, Grodinsky & Vance, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

RYAN, District Judge.

This is an action brought by plaintiff as the *cestui que trust* of a trust created by the will of Mary D. Stoddard, who died testate on July 23, 1917, and whose will was probated in the county court of Douglas county, Nebraska. This will, after making several specific bequests, provided in the sixth paragraph that deceased's husband, Elijah Stoddard, should take one-half of the estate in kind, so far as possible. The eighth paragraph of the will created the trust in favor of the plaintiff, which included the residue of the estate. It provided:

"I hereby give, devise and bequeath to Abraham L. Reed, trustee, all the rest and residue of my estate, real, personal and mixed, wherever situate (including that bequeathed to my said husband, should he not survive me) in trust for the following purposes, to wit:

"(a) That said estate shall be converted into money within a reasonable time, and that same shall be then kept in good, safe interest bearing securities, and that the income on same be paid quarterly to my niece, Georgiana Comstock, of Providence, Rhode Island, for the term of her natural life.

"(b) On and after the date of the death of my said niece, Georgiana Comstock, the interest and income on all of the residue of my estate, heretofore paid to her, shall be paid quarterly, share and share alike, to the Young Women's Christian Association of Omaha, Nebraska, located at Seventeenth and Howard streets, and to the Old People's Home of Nos. 2214-2218 Wirt street, Omaha, Nebraska."

Elijah Stoddard survived his wife and subsequently died on January 27, 1929. The principal part of the trust estate, and the only part with which we are concerned in this action, was a tract of land containing one hundred acres, near that part of the city of Omaha formerly known as Benson. In this tract of land the trust estate owned an undivided one-half interest and Elijah Stoddard owned the other half interest. In the inventory of the estate of

Mary D. Stoddard this tract was appraised at $300 an acre. In 1919 Elijah Stoddard commenced a partition action in the district court for Douglas county, Nebraska, seeking a partition or sale of the premises. This action was subsequently dismissed. On the 24th of September, 1919, Elijah Stoddard and Abraham L. Reed, trustee, executed a real estate option to the defendant George & Company, giving said company an option for a period of sixty days to sell the premises for the consideration of $75,000. This option was afterward extended for another thirty days. This option appears to have been treated by the parties as an agency contract. On January 2, 1920, defendant George & Company negotiated a sale of the premises for the sum of $735 an acre and was paid a commission of $2,000 for the sale. The sum of $15,000 in cash was paid, from which the commission was deducted and one-half paid to the trustee and one-half to Elijah Stoddard. A deed was executed to Eleanor Peterson, who executed two notes and mortgages, one note to Abraham L. Reed, trustee, for the sum of $29,268, and another for a like amount to Elijah Stoddard. The interest on the Peterson note owned by the trust was paid in full until 1929 and a couple of partial payments were made thereafter. Eleanor Peterson was a clerk in the office of George & Company and had no interest in the premises. It appears from the testimony that the real purchaser was a syndicate made up of members of the Happy Hollow Club, who expected to sell this tract to the Happy Hollow Club for a golf course. This deal did not materialize. When the syndicate failed to make its payments an offer was made to deed the property to the holders of the mortgages. This offer was not accepted.

It also appears from the record that on April 19, 1928, Elijah Stoddard and his second wife, Idelle L. Stoddard, who is the mother of the plaintiff, executed a certain trust agreement with Peters Trust Company. Among the property constituting the principal of this trust was the $29,268 note and mortgage given to Elijah Stoddard by

Eleanor Peterson. On December 10, 1929, Peters Trust Company was adjudicated a bankrupt and the United States National Bank was afterward duly appointed as successor trustee by an order of court. Other charitable institutions appear as defendants in this action because of the fact that the trust agreement provided that the income from the trust property should go to these institutions after the death of the plaintiff and her husband. Plaintiff's petition is divided into two causes of action. In the first cause of action plaintiff sets forth the claim that George & Company was the real purchaser of the property and personally liable for the unpaid purchase price and seeks specific performance of the contract. In her second cause of action plaintiff asks for foreclosure of the mortgage and for a deficiency judgment against George & Company. Before bringing the action the plaintiff made demand upon the defendant Abraham L. Reed, as trustee, to bring the action for her use and benefit, and he refused to do so.

The trial court found in favor of the defendants and against the plaintiff and dismissed the petition of the plaintiff. Upon the cross-petitions of the defendants Abraham L. Reed, trustee, and of the United States National Bank, trustee, the trial court entered a decree foreclosing the mortgages for the amount found due thereon. There were other issues raised by the pleadings, but the court reserved these for further consideration and they were not disposed of in the trial. From the decree entered by the trial court and the order overruling plaintiff's motion for a new trial plaintiff appeals.

It is insisted by the appellant that George & Company purchased the 100-acre tract and should be held liable for the balance of the purchase price. The evidence, however, shows clearly that the transaction concerning the sale of the property was discussed with Elijah Stoddard and with Abraham L. Reed, trustee, and that they understood that George & Company was handling the deal merely as an agent. In fact, George & Company was paid an agent's commission upon the transaction. It further appears that

the sale was an advantageous one for the trust and that no advantage whatever was taken of the *cestui que trust.* On September 24, 1919, Elijah Stoddard brought the option to the office of the defendant Reed and was very insistent that Reed should join with him in executing it. Reed was unwilling to do this and made a great many objections to the deal as proposed. Stoddard persisted and would not consent to any changes in the terms of the instrument. He further stated, according to Mr. Reed's testimony: "Mr. Reed, I have a suit pending against you and my niece in partition; if you make any requirement that will make this sale a matter of greater difficulty or that will defeat the sale, I will proceed with my suit. I will have the land sold to the highest bidder, and it won't be this high a price, and you will be liable for any difference, both to me and my niece." The matter was discussed further and the advantages considered. From the standpoint of the appraised value of the land and from the increased income, the sale was of great benefit to the trust. The cash payment of $15,000, while it was rather small in comparison with the total purchase price, was half of the appraised value of the land and therefore a substantial payment. The defendant Reed testifies that he agreed to submit the option to his attorneys and to communicate with Mrs. Comstock, and if both approved the contract, he would sign it. He attempted to communicate with Mrs. Comstock by telegram. There is some conflict in the testimony as to whether or not these telegrams were received. She denies that they were received by her. The telegrams were sent September 25, 1919. On September 26, 1919, the plaintiff wired defendant Reed: "Will arrive in Omaha next week. Wait." This would seem to indicate that she received the telegrams. Defendant Reed further testifies that he held up this matter until after she arrived and expressed herself as being satisfied with the sale. The learned trial court apparently chose to believe his version of the matter, and, while this is a trial *de novo,* this court, in determining the weight of evidence, will consider the

fact that the trial court observed the witnesses and their manner of testifying. *Yardum v. Evans,* 120 Neb. 699. Moreover, we believe the record substantiates the defendant Reed's testimony rather than that of the plaintiff. The record shows that the partition suit was pending and that the sale of the premises could be forced by Elijah Stoddard at any time. It is also a well-known fact, and is amply supported by the testimony in the record, that an undivided one-half interest in a parcel of real estate will not sell for an amount equal to one-half the value of the entire tract. The trustee was at a disadvantage in the handling of the trust, inasmuch as it consisted of an undivided one-half interest in the real estate in question, and the owner of the other undivided one-half interest was, practically speaking, in a position to dictate to the trustee and had actually commenced a partition suit to compel the trustee to accede to his wishes. It appears that the defendant Reed has acted in good faith throughout and has exerted his best efforts on behalf of the trust estate.

As to the claim that defendant George & Company is liable for the payment of the balance of the sale price of the land in question or for any deficiency that might remain after the foreclosure of the notes and mortgages given by Eleanor Peterson, it clearly appears from the record that all of the parties connected with this transaction, except possibly the plaintiff, knew as soon as the transaction was completed that the notes and mortgages were executed by Eleanor Peterson, and that George & Company was not liable upon them and that it was never intended that George & Company should be liable upon them. As to the plaintiff, the record shows that at least as early as January, 1924, she became acquainted with the fact that George & Company was not the purchaser of the property and the note upon which she was receiving interest was executed by Eleanor Peterson. Section 62-118, Comp. St. 1929, provides: "No person is liable on the instrument whose signature does not appear thereon." The principle enunciated by this statute has

always been the law in this state and was laid down in cases decided prior to the passage of the negotiable instruments act, of which it is a part. *Webster v. Wray*, 19 Neb. 558; *Reeves v. Wilcox*, 35 Neb. 779; *Farrell v. Reed*, 46 Neb. 258; *Thornton v. Farmers & Merchants Nat. Bank*, 117 Neb. 355.

The judgment of the district court was right and is

AFFIRMED.

ALBERT A. LORIMER ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1934. No. 29198.

1. Appeal. Findings of fact by a jury, if supported by competent evidence, will not be disturbed unless clearly wrong.
2. ———. Ordinarily, objections not presented to the trial court are not available on review.
3. ———. Misdirection of a jury not causing a substantial miscarriage of justice does not require that a judgment shall be set aside. Comp. St. 1929, sec. 29-2308.
4. Witnesses. Where a legal foundation is not laid for the reception of character evidence in a criminal case, it is not error for the trial court to deny it. Whether a legal foundation has been laid is largely in the discretion of the trial court.

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

Carrico & Carrico, for plaintiffs in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

GOSS, C. J.

Defendants were convicted on count three of an information charging the possession of liquor manufactured by them for the purposes of sale.

The evidence shows that the sheriff, the chief of police

of McCook and a deputy sheriff, armed with a search warrant, on November 8, 1933, found in a room under the dominion of both defendants a twelve-gallon jar or crock nearly full of liquid. They found near it a piece of rubber hose (spoken of as a siphon), a pitcher and a round quart bottle containing some of a similar liquid. They seized the articles, put portions of the liquid in other containers and had their contents analyzed by a chemist, who testified that the liquid from a jug tested 6.4 per cent. of alcohol by weight and that from the jar tested 8.4 per cent. by weight. He stated that the alcoholic content by volume would be greater than that by weight. On cross-examination he testified that the liquid was commonly called wine, that it looked like fruit pulp, and that such fruit juices could be made into vinegar.

Adolph Onerem, a witness for the state, testified that about 3 o'clock in the morning of November 7, 1933, he went to the place occupied by defendants for the purpose of buying a drink and there dealt with defendant McCullough. She said she had some wine. He was served in the dining-room. She left a moment and returned with a round quart bottle of red liquid, "the same as any grape wine;" he drank it and paid her a dollar for it.

Defendant McCullough, who owns and operates a rooming house called the Travelers Hotel, testified that she had put in the jar some juices left from canning of apples and grapes. At first she put the jar in the kitchen, but it was too warm. After a week or so she put it in defendant Lorimer's room, where it was cooler. She had the pitcher there and used it only to stir the liquid up once in awhile. The siphon was used "to siphon gasoline, or anything you want to siphon." She had never used it to siphon the contents of the jar. It was supposed to be in another room than Lorimer's. She was making vinegar of the fruit juices. She testified that Onerem was there on the morning of the 8th, not the 7th, was drunk and asked the rest to drink out of a bottle he had in his pocket, supposed to contain alcohol. He had two bottles and stayed about

half an hour. She did not sell him any wine or liquor.

Betty Foster, who works for Mrs. McCullough, testified that the witness Onerem was intoxicated, that he pulled out a bottle he said contained alcohol and offered her a drink, which she refused; that she assigned him to a room; he created such a disturbance by rapping on doors up and down the hall that witness called the police, whereupon Onerem said to Mrs. McCullough he was going to tell the officers she had sold him liquor. The witness assisted Mrs. McCullough in canning from which the fruit juices resulted.

The evidence produced conflicts of fact which were peculiarly in the province of the jury to determine. Their finding will not be disturbed unless clearly wrong. *Lee v. State,* 124 Neb. 165.

Defendant Lorimer filed a motion to quash the information on the ground that it did not allege facts sufficient to constitute an offense. This was overruled. Here both defendants assign error in overruling the motion. The assignment is, of course, not good as to defendant McCullough. The point now sought to be made is that the statute, under which the information was laid (Comp. St. 1929, sec. 53-116), denounces the possession of intoxicating liquor manufactured for the purpose of sale, whereas the information charges the possession of liquor "manufactured or distilled" for the purpose of sale. The motion to quash did not direct the attention of the trial court to the precise point now presented, namely, that the information is uncertain or ambiguous. Not having been presented below, it cannot be available here. Further, the words "or distilled" are surplusage. 31 C. J. 747. Moreover, there is no indication that defendant Lorimer was in any way prejudiced by the inclusion of these words.

Error is assigned on a part of one instruction given by the court to the jury in which they were instructed that "A material element of the offense charged in count three of the information in this case is the possession of the intoxicating liquor manufactured by the defendants for the

purpose of sale." It is argued that this told the jury the liquor was manufactured by defendants and that the possession was the only material element for them to consider. Defendants say that it would have allowed no wrong inference by the jury had the court used this instruction, omitting the words "by the defendants." That would have been erroneous. The information charged the possession of liquor manufactured by the defendants for the purposes of sale. While the form of the instruction might have been better devised, we do not think the words used indicate that any other meaning can be derived from the instruction except that the court meant to tell the jury that the "material element" he was discussing had these three points in it: (1) Possession of intoxicating liquor, (2) manufactured by the defendants, (3) for the purposes of sale. So, if it had not been proved to be in their possession, or had been manufactured by others, or was not for purposes of sale, the jury were instructed to acquit. In plainer words, he told them in another instruction that they must find from the evidence beyond a reasonable doubt the exact three points above numbered by us before they could find defendants guilty. We think no substantial miscarriage of justice has actually occurred by reason of this instruction. We are authorized specifically by statute to refuse to reverse the judgment in such circumstances. Comp. St. 1929, sec. 29-2308.

Error is asserted because defendant Lorimer was not permitted to testify to the reputation of the state's witness, Onerem, in the community in which he resides. His reputation for what was not disclosed in the questions and objections to answers were all sustained as incompetent. Without reciting the lack of knowledge on the subject, suffice it to say that it showed very little. Moreover, whether a legal foundation is laid for the reception of such evidence is largely in the discretion of the trial judge. 17 C. J. 242, 243; *Hill v. State,* 116 Neb. 73. It was not erroneous to exclude this testimony.

On the motion for new trial affidavits of defendant

Lorimer and A. C. Hockman were introduced attempting to impeach the qualifications of Harry Elms, who was one of the jurors, by reason of alleged statements by him that his mind was made up before he went on the jury. The court took the evidence of the signers of the affidavits, of juror Harry Elms and of another, and concluded there was no ground for a new trial. We think his discretion was wisely exercised.

Other errors are assigned. We have examined them and conclude they do not call for a reversal nor for a discussion.

The judgment of the district court is

AFFIRMED.

ANNIE BELL, APPELLANT, V. JOHN NIEMANN ET AL., APPELLEES.

FILED NOVEMBER 9, 1934. No. 29028.

1. Appeal. A constitutional question not presented to the district court may be disregarded on appeal to the supreme court.
2. Courts. The supreme court of the United States is the judicial tribunal of last resort to determine whether a moratory law of a state impairing the obligation of mortgage contracts violates that part of the federal Constitution providing that no state shall pass any law impairing the obligation of contracts, and its negative ruling on that question is binding on the supreme court of Nebraska.

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

C. C. Cartney and *G. E. Hager,* for appellant.

McKillip & Barth, contra.

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

ROSE, J.

This is a suit in equity to foreclose a mortgage for

$11,000 on 200 acres of land in Seward county. The district court found the amount due on the mortgage to be $12,257.39 and entered a decree of foreclosure September 10, 1932. Defendants, John Niemann and Mary Niemann, mortgagors, stayed proceedings for nine months pursuant to a statutory right. After the expiration of that period the mortgaged land was sold under the decree. Before the judicial sale was confirmed mortgagors applied for a moratorium staying further judicial action until March 1, 1935, under the Nebraska moratory act. Laws 1933, ch. 65, sec. 1, Comp. St. Supp. 1933, sec. 20-21,159. Plaintiff objected to further delay of confirmation of the judicial sale on the ground that the moratory act is void as impairing obligations of the mortgage contract in violation of the federal Constitution. The application for a moratorium and objections thereto were submitted to the district court on a stipulation of facts not preserved by a bill of exceptions. By judicial order mortgagors were permitted to retain possession of the mortgaged premises until March 1, 1935, on condition of paying rent and complying with other terms imposed by the trial court under the moratory act. Plaintiff appealed.

The principal argument by plaintiff is directed to the proposition that the Nebraska moratory act violates that part of the federal Constitution providing that no state shall pass any law "impairing the obligation of contracts." Const. U. S. art. I, sec. 10. In principle the constitutional question has been determined by the supreme court of the United States. The legislature of Minnesota passed a moratory act similar to that herein assailed as unconstitutional. The supreme court of Minnesota held that the moratory act of that state impaired the obligation of mortgage contracts, but that the state legislature of Minnesota had power to do so in an emergency. *Blaisdell v. Home Building & Loan Ass'n,* 189 Minn. 422. The case was taken to the supreme court of the United States where the judgment of the Minnesota supreme court was affirmed. *Home Building & Loan Ass'n v. Blaisdell,* 290

U. S. 398. Whatever may be thought of that decision, it is binding on the supreme court of Nebraska in the present instance, because the supreme court of the United States is the judicial tribunal of last resort to determine whether a moratory law of a state impairing the obligation of mortgage contracts violates that part of the federal Constitution providing that no state shall pass any law impairing the obligation of contracts.

Whether the Nebraska moratory act violates the Nebraska Constitution is a question not presented to the district court in this case and consequently it is not determinable in the supreme court on an appeal in the same case, but is left open for future consideration.

The order relating to payment of rent and to other terms imposed by the moratory act is also challenged, but the record does not disclose any error in that respect.

AFFIRMED.

ELIZABETH BANTA, APPELLEE, V. MINNIE E. MCCHESNEY ET AL., APPELLANTS.

FILED NOVEMBER 9, 1934. No. 29023.

1. **Appeal.** Where the verdict returned in an action for personal injuries is challenged on appeal solely because excessive, it will not be disturbed by the reviewing court, unless it can say as a matter of law that, upon consideration of all the evidence, the amount of such verdict is excessive.
2. ———. "Affidavits used on the hearing of a motion for a new trial cannot be considered in this court unless preserved in a bill of exceptions." *Schmidt v. Village of Papillion*, 92 Neb. 511.
3. ———: MISCONDUCT OF ATTORNEYS. Charges of misconduct of attorneys of prevailing party examined, and *held* properly determined by the trial court.
4. **Remittitur.** Request that remittitur as directed by trial court be set aside, denied.

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

Lee R. Kenny and *Spittler & Nicholson,* for appellants.

Frost, Hammes & Nimtz, contra.

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

EBERLY, J.

This is an action to recover damages for personal injuries and loss of earnings sustained by Elizabeth Banta, when, through the alleged negligence of the defendants McChesney, she was struck and injured by their automobile. There was a trial to a jury, and a verdict for $2,500 returned in favor of plaintiff. The trial court required the filing of a remittitur for $500, which requirement was complied with by plaintiff. Thereupon defendants' motion for a new trial was overruled.

There are but three errors relied on by appellants in this court, and these we will consider in their order.

The first one is that the verdict is excessive. It may be said that the cause was submitted by the trial court upon instructions which, in the present proceeding, must be deemed concededly correct. Under these circumstances, the rule appears to be that a verdict awarding damages for personal injuries will not be disturbed as being excessive, unless this court can say as a matter of law that the amount thereof is excessive. *Yost v. Nelson,* 124 Neb. 33; *Curran v. Union Stock Yards Co.,* 111 Neb. 251; *Schrage v. Miller,* 123 Neb. 266, 279. In the instant case, in view of the evidence in the record, we are of the opinion that the amount of the judgment, when considered in connection with the fact that a remittitur was made, is amply supported.

The second assignment of error relates to the alleged error of the jury in allowing $1,000, as part of their verdict, for the use and benefit of the husband. This contention was supported in the district court by affidavits of certain jurors filed in support of defendants' motion for a new trial. These affidavits appear only in the transcript

and are not incorporated in the bill of exceptions, as settled and allowed by the trial court. Under these circumstances, the necessary affidavits may not be considered on appeal. The rule is that affidavits used on the hearing of a motion for a new trial cannot be considered in this court unless preserved in a bill of exceptions. *Schmidt v. Village of Papillion,* 92 Neb. 511; *Bartlett State Bank v. Johnston,* 110 Neb. 782; *Hannah v. American Live Stock Ins. Co.,* 111 Neb. 660; *Lee v. State,* 124 Neb. 165.

The third and last assignment of error relates to the alleged misconduct of plaintiff's attorneys. This matter was presented in the first instance to the trial court in the form of an affidavit of a witness who had testified for plaintiff at the trial, which was presented in support of defendants' motion for a new trial. This affiant appeared in person before the trial court prior to the ruling on this motion for a new trial, repudiated the alleged affidavit, and denied the execution thereof. In behalf of plaintiff a number of counter affidavits were also presented, which fully negatived the alleged facts as set forth in the repudiated affidavit. The issue was thus one of fact for determination by the district court. Under all the circumstances we are unable to find that the trial court committed error in overruling defendants' motion for a new trial.

Plaintiff presents the request that this court set aside the remittitur as directed by the trial court. This matter is now properly presented to this court. Comp. St. 1929, sec. 20-1929; *Miller v. Central Taxi Co.,* 110 Neb. 306; *Christoffersen v. Weir,* 110 Neb. 390; *Loy v. Storz Electric Refrigeration Co.,* 122 Neb. 357. Upon careful consideration of the record, however, we are of the opinion that it does not disclose any abuse of discretion on the part of the trial court in making the order here complained of, and its action thereon is approved.

It appearing that the judgment of the trial court is correct, the same is

AFFIRMED.

MERLE P. PARK, APPELLEE, V. SCHOOL DISTRICT NO. 27, RICHARDSON COUNTY, APPELLANT.

FILED NOVEMBER 9, 1934. NO. 29266.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: ACCIDENT: COMPENSABLE INJURY. Evidence examined, and *held* to establish: (1) That the burns inflicted on the body of claimant on April 13, 1932, are embraced within the statutory description of an "accident," viz., "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury;" and that this accident occurred on the date mentioned; (2) that from and after April 13, 1932, claimant was continuously confined to her bed up to and including the date of the trial of the cause in the district court, during which period her ability to pursue her profession or perform labor was wholly destroyed, by at least a total temporary disability, which, though its termination could not be foretold nor the permanent results thereof determined, constituted a compensable injury from the date of the accident; (3) that the judgment is not supported by the proof introduced.
2. **Statutes:** STATUTORY RIGHTS. "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed." *Duhrkopf v. Bennett*, 108 Neb. 142.
3. **Master and Servant:** ACTION FOR COMPENSATION: LIMITATIONS. In the absence of agreement between the parties in interest and of legal disability of the applicant, no proceedings for compensation can be successfully maintained if no claim is made therefor within six months after the occurrence of the injury and a petition filed therefor within one year after the accident from which the injury results.
4. ———: INJURY TO SERVANT: NOTICE. In the event of failure to comply with the formal statutory requirements, with reference to claim for compensation as distinguished from notice of injury, recovery of compensation may be permitted only if the employee's accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where claim for compensation is made within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident.

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

Wiltse & Wiltse and *John C. Mullen*, for appellant.

Jean B. Cain, contra.

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

EBERLY, J.

This is a proceeding for relief under the provisions of our workmen's compensation act. From an award in favor of the applicant in the sum of $10.96 each week after April 13, 1932, and sums aggregating $3,258.95 as and for necessary medical, hospital and surgical expenses incurred, the defendant school district appeals.

At the time of the accident which constitutes the basis of this litigation, Miss Park, the applicant, was the teacher of school district No. 27 of Richardson county. She was regularly employed as such for a term of nine months commencing September 1, 1931. On April 13, 1932, during the noon hour, she was engaged in the construction of a "bird bath" on the schoolhouse grounds. This as planned, when completed, would have consisted of a post set in the ground, on top of which was secured a pan filled with water. A post had been furnished by one of the patrons of the school for this purpose, and an old pan was obtained from another. To make the pan "water tight," Miss Park was, at the time of the accident, engaged in melting some paraffin in the school furnace, intending to use it in covering the bottom of the old pan. In attempting to remove the melted paraffin from the furnace, her clothing caught fire and she was badly burned. She received "third-degree burns" on both thighs extending from her body to below the knees. She was promptly removed to her home and medical assistance was obtained. It may be said that thereafter she was continuously confined to her bed, and at the time of the trial in the district court

she was brought to the courtroom upon a cot. It appears that she was treated for her injuries at her parents' home in Rulo, Nebraska, from April 13, 1932, to July 17, 1932. She was then removed to the Missouri Methodist Hospital, where the treatment was continued until October 27, 1932, at which time she was taken to the University Hospital at Omaha, where she remained under treatment until June 5, 1933. While at this institution her left leg was amputated near the hip on April 1, 1933. On June 5, 1933, she was taken from the University Hospital in Omaha to her home at Rulo, Nebraska, where, up to the date of the trial in the district court, on March 16, 1934, medical treatment of her injuries was still being continued.

As to the nature and cause of her physical injuries there is no question that she has been confined to her bed since April 13, 1932, as the result of what all the medical witnesses agree are third-degree burns suffered by her on such date. These burns were also the direct cause of the amputation of the leg on April 1, 1933. Her physicians testify that the effects of these burns were and are latent and progressive, and at the time of the trial in the district court such physicians were unable to foresee what the ultimate results of plaintiff's injuries might be.

On this subject a reputable authority says: "The character of lesions caused by burns is determined by the intensity of the heat. Clinically, the sequelæ may be classified as first-, second-, or third-degree burns. A first-degree burn is a simple erythema, a second-degree burn causes blistering, while a third-degree burn causes necrosis and sloughing of the superficial tissues and necrotic inflammation or ulceration of the deeper tissues. Burns are often described as heat wounds and are frequently complicated by infection." Kessler, Accidental Injuries, p. 57.

In this court the correctness of the determination of the trial court is challenged for the following reasons: The alleged insufficiency of the evidence; that the accident did not arise out of or in the course of her employment; that she failed to make claim for compensation against the de-

fendant school district within six months from April 13, 1932, and did not establish sufficient cause for such failure; and that she failed to file her petition before the compensation commissioner within one year after the date of her injury, or establish by her evidence a reason for not so doing.

The legal effect, under the circumstances involved in this case, of failure to make claim within six months and to file petition within one year obviates the necessity of determining the other contentions of appellant.

The following provisions of our compensation law are applicable to the issues thus presented:

Section 48-133, Comp. St. 1929, provides: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, * * * or in event of his physical or mental incapacity, within six months after * * * removal of such physical or mental incapacity."

Section 48-138 provides: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (48-139) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment. In the event of legal disability of an injured employee, said limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

Section 48-152 provides: "Throughout this act, the following words and phrases as used therein shall be considered to have the following meaning, respectively, unless

the context shall clearly indicate a different meaning in the construction used: * * * (b) The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form, or any contagious or infectious disease contracted during the course of employment, or death due to natural causes, but occurring while the workman is at work."

Section 48-142 provides: "The amount of any agreement or award payable periodically for more than six months may be modified as follows: (a) At any time by agreement of the parties with the approval of the compensation commissioner. (b) If the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury. * * * In such case, the same procedure shall be followed as in section 3680 (48-139) in case of disputed claim for compensation, except that after the district court has entered order, award or judgment in the case then the application shall be made to that court."

Section 48-132 provides: "If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this article, his guardian or next friend may, in his behalf, claim and exercise such right or privilege."

Section 48-157 provides, as to claims for benefits under the provisions of our compensation act (Comp. St. 1929, secs. 48-101 to 48-161): "Any party at interest may present a claim in person or by an attorney."

This jurisdiction is committed to the view that the workmen's compensation act is "one of general interest,

not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." *Parson v. Murphy*, 101 Neb. 542.

While, as applied to the questions presented by this record, the statutory provisions above quoted are to be liberally construed, yet we must approach the questions so presented, "having full regard for the fact that, under the division of powers found in the Constitution, our duty is not to enact but to expound the law, not to legislate but to construe legislation; to apply the law as we find it, to maintain its integrity as it has been written by a coordinate branch of the state government. If the law as written works hardships in a special class of cases the remedy lies with the branch of the government charged with the duty of enacting laws. If one does not protect himself and his rights under the law as written it is his misfortune, and this court should not, by judicial legislation, for the purpose of relieving that misfortune, write into the statute a provision that the legislature has not seen fit to enact. During the course of an opinion worthy of careful perusal and consideration, it was said by Mr. Justice Marshall, speaking for the supreme court of Wisconsin, in *City of Milwaukee v. Miller*, 154 Wis. 652, a case involving the workmen's compensation law of that state: 'That is his misfortune and, however much it may be regretted, it is far better that the integrity of the law be not invaded than that it be impaired in the slightest degree in the particular instance to avoid the consequence of his not knowing or appreciating its requirements.'" *Cooke v. Holland Furnace Co.*, 200 Mich. 192.

There is an agreement in the evidence offered at the trial as to facts which support the conclusion that the third-degree burns inflicted on the body of Miss Park on April 13, 1932, are strictly embraced within the statutory description of an "accident," as hereinbefore set out, viz.: "An unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing

at the time objective symptoms of an injury." Therefore, the accident must be deemed to have occurred on the date mentioned. It must also be admitted that on that day "violence to the physical structure of the body" occurred, and that "objective symptoms of an injury" were immediately produced, though the theory of the claimant is that those injuries then sustained were at least in part latent, and at the time of the trial in the district court had developed and brought about plaintiff's then deplorable condition. It is also to be observed that the statutory definition quoted embraced not only present "violence to the physical structure of the body," but also "such disease or infection as naturally results therefrom." It is also true that it appears without dispute that continuously from and after April 13, 1932, plaintiff was at least subject to a total temporary disability. She was continuously confined to her bed and her ability to pursue her profession or perform labor was wholly destroyed. While the evidence of the doctors is that as to final results the injuries were latent and progressive, and that the final effects thereof, so far as permanent disability is concerned, could not be foretold, it in no manner tends to disprove the fact of the existence of at least temporary total disability from and after the accident.

This, under our statute, was a compensable injury, for which, after it had continued for six weeks, compensation was to be computed from the date of injury. Comp. St. 1929, sec. 48-119.

Our law also contemplates that these facts constituted a present cause of action, and a prompt award of compensation therefor, if made, would have been without prejudice to subsequent developments as to the final results of the injuries sustained. Comp. St. 1929, sec. 48-142.

The statutory provisions heretofore quoted contain three requirements which are imposed upon the claimant here, viz.: (1) A notice of injury to be given the employer as soon as practicable after the happening thereof; (2) a claim for compensation with respect to such injury to be

made within six months after the occurrence of the same; and (3) a petition to be filed within one year as provided by section 48-138, Comp. St. 1929. However, only the last two requirements above noted are vital in the instant case.

It seems that these requirements are not to be deemed as mere statutes of limitation, but rather as conditions precedent to a right of action. *McRae v. New York, N. H. & H. R. Co.*, 199 Mass. 418; *Morrison v. Baltimore & O. R. Co.*, 40 App. D. C. 391; *Partee v. St. Louis & S. F. R. Co.*, 204 Fed. 970.

In *Duhrkopf v. Bennett*, 108 Neb. 142, the rule is announced in the following language: "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed." See, also, *Samland v. Ford Motor Co.*, 123 Neb. 819.

Again, in *Welton v. Swift & Co.*, 125 Neb. 455, the rule is thus announced: "No proceedings for compensation can be successfully maintained if no claim was made therefor within six months, or petition filed therefor within one year, of the death of the employee."

Appellee seeks to excuse her failure to comply with the statutory requirements on the grounds, viz.: (1) That "plaintiff was not in a physical condition to file her claim or petition prior to about the time such petition was filed;" and (2) that, "because of the fact that plaintiff's injuries, when sustained, were latent and progressive, plaintiff was not required under the workmen's compensation law to file her claim within six months of the date of the accident and to file her petition within one year thereafter."

Under the facts in the record before us, neither of these contentions can be sustained. There is no evidence that plaintiff's mind was affected in any degree, or that her ability to communicate was impaired. The express wording of the statute is: "Any party at interest may present a claim in person or by an attorney." A portion of the

time after her injury was spent in her mother's home, where her friends were calling upon her. There is no evidence that at any time her situation was such as would prevent the transmission of messages or information, unless it may be inferred that such was the case immediately following the amputation of her limb, which occurred some eleven months after the date of the accident and the commencement of total disability.

To sustain the proposition of the latent character of her injuries plaintiff relies on the following cases: *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1; *Stone v. Thomson Co.*, 124 Neb. 181; *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121; *Astuto v. V. Ray Gould Co.*, 123 Neb. 138; *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227; *Marler v. Grainger Bros.*, 123 Neb. 517; *Poast v. Omaha Merchants Express & Transfer Co.*, 107 Neb. 516.

But in the examination of these authorities, to determine their application to the instant case, the controlling fact is that the injuries Miss Park suffered on April 13, 1932, immediately culminated in total disability which has continued without interruption down to the present time. These injuries were in their nature indisputably compensable from the date of their inception, if compensable at all.

The rule relied upon by plaintiff is thus stated in *Travelers Ins. Co. v. Ohler*, 119 Neb. 121: "An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability." This rule is in harmony

with the later decisions of this court. See *Astuto v. V. Ray Gould Co.*, 123 Neb. 138; *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1; *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347. The other cases cited by plaintiff in no manner conflict with the above principle.

In the event of failure to comply with the formal statutory requirements, the substance of the rule, with reference to a claim for compensation as distinguished from a notice of injury, is that recovery of compensation may be permitted only "if employee's accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where notice is given (of claim for compensation) within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident." *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1. As applied to the facts in the instant case, this rule may not be invoked to sustain a recovery. Here, a compensable injury existed, if at all, from and after April 13, 1932, in the form of total disability. Plaintiff knew her condition from day to day, and knew that she had a present total disability. She failed to make claim for compensation as required by section 48-133, Comp. St. 1929, and filed no petition as required by section 48-138. Therefore, by the express terms of the rule set forth above she is barred, and the district court erred in the award of compensation made.

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

REVERSED AND DISMISSED.

STOY SMITH V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1934. No. 29110.

1. **Criminal Law: TRIAL: CONTINUANCE.** It is within the sound discretion of the trial court to determine under all the circumstances of a particular case whether a continuance is required

in the interest of justice. The ruling of the trial court thereon is not reversible error unless an abuse of discretion is shown which is prejudicial to the defendant.

2. Rape: EVIDENCE OF OTHER ACTS: ADMISSIBILITY. In a prosecution for statutory rape, evidence of other criminal acts of the same sort occurring shortly before or after the act charged is admissible to explain the act charged or corroborate the testimony of the prosecutrix.

ERROR to the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Prince & Prince, for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

DAY, J.

Stoy Smith was convicted of statutory rape and prosecuted proceedings in error to this court.

It is alleged that the refusal of the trial court to grant a continuance was error. The identical question was discussed in *Cooper v. State,* 120 Neb. 598, and many previous cases examined. Again, in *Smith v. State,* 123 Neb. 17, the rules relating to continuances in criminal cases were reexamined. These cases are controlling in the instant case. The defendant, plaintiff in error here, was arrested November 25, 1933, and was charged with committing the crime October 11, 1933. The preliminary examination was held December 14 when he was held for trial in the district court. He was arraigned December 21, 1933, and the case was set for trial December 27. It will be noted that the trial was a month after the arrest and nearly three months after the crime was charged. There is no showing in the motion for new trial that there is any evidence which the defendant was not able to procure. The record does not disclose that the rights of the defendant were prejudiced by a denial of the continuance.

It is within the sound discretion of the trial court to

determine under all the circumstances of a particular case whether a continuance is required in the interest of justice. The ruling of the trial court thereon is not reversible error unless an abuse of discretion is shown which is prejudicial to the defendant.

The defendant questions the sufficiency of the corroboration of the prosecutrix to sustain a conviction. We have examined the evidence carefully for the purpose of determining this question, and, without going into the sordid details of the record, it is sufficient to state that the prosecutrix testified in great detail as to the assault. Her testimony is corroborated to the extent that the woman with whom she lived testified that she was called by some man at about 11 o'clock on the night in question and left the house shortly thereafter in a car of the general appearance as that of defendant. There is also the testimony of the cab driver that later he was called to the filling station, which the defendant operated, where prosecutrix entered his cab. In addition, there is medical testimony that a physical examination of the 14-year-old girl indicated that the crime had been committed. This has been held to be sufficient corroboration. *Robbins v. State,* 106 Neb. 423; *Hammond v. State,* 39 Neb. 252; *Whetstone v. State,* 99 Neb. 469; *Noonan v. State,* 117 Neb. 520, 60 A. L. R. 1118. The Nebraska cases are all collected in the annotation 60 A. L. R. 1140e. No good purpose would be served by another extended discussion here.

The crime charged against the defendant in this case is statutory rape committed upon a girl 14 years of age. True, the information alleged that it was forcible rape, but, without the word "forcible," the information charged a crime, and the mere addition of an unnecessary word did not add to the burden placed upon the state. Our statute provides that one who has carnal knowledge of a female child under 15 years of age is guilty of a rape. Comp. St. 1929, sec. 28-408. The defendant emphasizes the word "forcible," because the state introduced evidence of other acts constituting a crime (assault) occurring

shortly after the time of the act charged. The evidence in question was that the defendant went to a picture show with his wife, sister of prosecutrix, and another couple. The prosecutrix and a girl friend attended defendant's two small children. The defendant left the show and returned to the house. He laid his hands upon the girl and pulled her against her will into a bedroom and finally out into his car in the yard. While there was no act of intercourse, his conduct and talk were lewd and vulgar. The other girl present was frightened and testified to the occurrence. The jury might infer the lustful disposition of defendant toward prosecutrix. The presence of the other girl and the return of defendant's wife and others deprived him of the opportunity for further misconduct. The rule stated in 16 C. J. 608, is as follows: "Such other acts are relevant and admissible to show the lustful disposition of the defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged, and to corroborate the testimony of the prosecutrix as to that act." The trial court gave a cautionary instruction closely following this rule.

In a prosecution for statutory rape, evidence of other criminal acts of the same sort occurring shortly before or after the act charged is admissible to explain the act charged or corroborate the testimony of the prosecutrix. So say this court in *Hudson v. State,* 97 Neb. 47; *Leedom v. State,* 81 Neb. 585, and *Woodruff v. State,* 72 Neb. 815.

The defendant urges that the last case cited states a different rule applicable to this case as follows: "Had the intercourse been against her consent, a different question would arise." This statement appears in a quotation from *State v. King,* 117 Ia. 484. It was not the expression of this court and not applicable to that case. Neither is it applicable here, since under the statute "forcible" is a matter of no moment where the prosecutrix is 14 years old.

Another complaint is made to the appointment of an assistant to the county attorney of an interested attorney.

It was claimed that the special prosecutor was the personal attorney of the father of the prosecutrix. This is not established. A present partner of the attorney prior to the organization of the firm had at a remote time represented some relative of prosecutrix. The record shows that neither the spirit nor the letter of the rule announced in *Rogers v. State*, 97 Neb. 180, and *McKay v. State*, 90 Neb. 63, was violated.

We have carefully examined the record. It is true that the conviction rests in a large measure upon the credibility of the prosecutrix. If her testimony is untrue, a grievous injustice has been done. However, her testimony is positive and direct, and it has sufficient legal corroboration. The defense was an alibi which was not as convincing to the jury as the record of the cab driver that he took prosecutrix to defendant's home on the night in question. The evidence is sufficient to support a verdict, and the judgment must stand.

AFFIRMED.

FRED TRUKA, APPELLANT, V. ROY MCDONALD, APPELLEE.

FILED NOVEMBER 9, 1934. No. 29340.

1. **Master and Servant:** ACTION FOR COMPENSATION: BURDEN OF PROOF. In a compensation case, the burden of proof is upon the employee to establish that his disability was caused by an accident arising out of and in the course of his employment.
2. ———: ———: COMPENSABLE INJURY. Upon trial *de novo*, it is determined that claimant's disability was caused by the accident arising in the course of his employment.

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

Hall, Cline & Williams, for appellant.

Arthur J. Denney, contra.

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

DAY, J.

This is a compensation case.

Roy McDonald was employed as a repair man in a garage by Fred Truka. The parties are mentioned as employer and employee to avoid confusion. In the course of his employment, McDonald slipped and fell while lifting a tractor radiator, which fell on his back causing injuries to his spine and sacro-iliac region. Compensation was paid for a period of ten weeks. At that time, all parties were of the opinion that the disability would soon end. Subsequently, the employee filed a petition for additional compensation and medical benefits. This was resisted by the employer on the claim that the present disability is due, not to the accident, but to an infectious disease contracted after recovery from the accident. The compensation commissioner made an award of additional compensation. The employer, dissatisfied with the award, filed his petition on appeal to the district court for Jefferson county, which entered a judgment for the same amount of compensation as the award of the commissioner. The employer then appealed to this court.

The cause of the disability is a question of fact to be determined from the evidence. McDonald was injured March 10, 1933, and settled the compensation claim June 28. He was unable to work at that time, but thought he would soon recover. Until that time, he had been treated exclusively by Dr. D. O. Hughes. Later, August 31, 1933, he consulted Dr. I. N. Morgan, an osteopath. Dr. Hughes treated McDonald for about two weeks after the injury. He called upon Dr. Hughes May 4, May 29, August 8, August 16, and September 15, at which times the doctor retaped him. At no time was the employee able to return to his work as repair man in the garage. From August 31 he was taking regular treatments from Dr. Morgan. About October 15 Dr. Morgan discovered that McDonald had an

infectious disease as well as the injury from the accident. Dr. Hughes examined him about October 30 and found this condition.

As contended by appellant (employer), the burden of proof is upon the employee to establish that his disability was caused by an accident arising out of and in the course of his employment. *Mullen v. City of Hastings,* 125 Neb. 172. Is the disability here the result of the accident? McDonald was injured in the course of his employment and was never able to work thereafter. Unfortunately, he was thereafter found to have an infectious disease. The testimony of the expert witnesses is in conflict. One testifying for the employee states that the infection does not contribute to the disability. The witnesses for the employer testify that McDonald has some disability attributable to the injury and that the arthritis at the place of the injury adds to the disability. The conflict in the evidence arises over the amount of the disability due to the infectious disease. Aside from the expert testimony, the fact is abundantly established that there was a serious injury in an accident arising out of the employment and that the employee has been disabled continuously since. In addition, the tonsils are also now affected, which earlier examinations by medical witnesses did not disclose. It is our conclusion that the employee has established that the disability was caused by the injury and is one compensable under the provisions of the workmen's compensation statutes.

While this court is required to try compensation cases *de novo* (Comp. St. 1929, sec. 48-137; *Travelers Ins. Co. v. Ohler,* 119 Neb. 121), still the finding of the trial judge is entitled to consideration where the finding is based upon the testimony of witnesses orally examined before the court (*Shafer v. Beatrice State Bank,* 99 Neb. 317; *Peterson v. Winkelmann,* 114 Neb. 714).

The trial court did not make an allowance for medical services rendered by Dr. Morgan. None is made here. It is debatable whether the employee was justified in secur-

ing medical services other than those provided by the employer. However, much of the service was for treatment for an infection which was unrelated to the accident.

Finally, the appellant insists that the award is erroneously computed. This court finds, as did the trial judge, that plaintiff's disability was temporary total for 10 weeks and then permanent partial. Computed under subdivision 2, sec. 48-121, Comp. St. 1929, he was entitled to 66 2/3 per centum of the difference between the wages received at the time of the injury ($16) and his earning power thereafter. This would be 66 2/3 per centum of $8, or $5.33 a week for 300 weeks, less the 10 weeks of temporary total disability. The judgment of the trial court followed the award of the compensation commissioner in this erroneous calculation of compensation. Since the employer was entitled to a reduction in the district court, the award of an attorney fee was erroneous. Comp. St. 1929, sec. 48-125. The judgment of the trial court is modified in that the compensation allowed is $5.33 a week for 300 weeks from date of injury, less 10 weeks, during which the employee's disability was temporary total, and no allowance is made for attorney fees, because the employer secured a reduction in the amount of the award. As modified, the judgment is

AFFIRMED.

PAINE, J., dissenting.

The accident sustained by the employee March 10, 1933, consisted of a strained back from lifting a tractor radiator, prior to which time he could perform any kind of labor, and was in good physical condition. It was five days after the accident before he went to Dr. D. O. Hughes, who taped up his back several times, and on May 29 released him to go back to work. On October 30, 1933, he went back to Dr. Hughes, who made a very complete physical examination, found he had lost some 18 pounds in weight, that he had a badly infected throat, one infected tooth, and that he had syphilis, the test showing four-plus Wassermann. Dr. John C. Thompson testified, from an examination made January 17, 1934, that when a syphilitic

infection is grafted onto an injury in the back it is a very definite factor in the production of distress, pain and disability. He estimated the employee's disability at only 25 per cent., which in his opinion would be reduced one-half by proper treatment of focal infection and the syphilis.

The employee claimed that he did not have syphilis at the time he was injured, but he did have it some seven months after the accident, and at the time of the trial he was suffering from a virulent form of it, which had not yielded to treatment. The question at once arises whether an employer should be charged with a disease that was not in any way the result of the accident. This court has held that, when an injury combines with a preexisting heart disease to produce a disability, then the resulting injury is not wholly caused by accident. *Gilkeson v. Northern Gas Engineering Co.*, 127 Neb. 124. See, also, *McCoy v. Michigan Screw Co.*, 180 Mich. 454.

In *Bunge Bros. Coal Co. v. Industrial Commission*, 306 Ill. 582, it was held that an employee could only recover for such disability as was caused solely by the accident, and not for that part caused by gonorrhea, contracted after the accident.

The employee is suffering a disability the larger per cent. of which is due to the disease which he contracted some months after the accident. This is an intervening cause, not due in any way to his accident, and therefore not chargeable to his employer, and in my opinion the recovery is very much in excess of what it should be.

RALPH R. SCHOU, APPELLEE, V. VILLAGE OF HILDRETH, APPELLANT.

FILED NOVEMBER 9, 1934. No. 29348.

1. **Master and Servant: EMPLOYEE: INDEPENDENT CONTRACTOR.** Whether one is an "employee" or an "independent contractor," within the meaning of the workmen's compensation law, must be determined from facts of the particular case.

2. ———: ———. One engaged by a village to care for swimming pool and surrounding park, whose compensation is $20 for three months, plus receipts of pool, in view of general control of village, is an "employee," within workmen's compensation act.

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

Cook & Cook and *B. B. Webber,* for appellant.

Stiner & Boslaugh and *Leon Samuelson, contra.*

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

DAY, J.

This is a compensation case.

One Schou was injured while working at a park and swimming pool belonging to the village of Hildreth. The first question for determination is whether Schou was an employee of the village or an independent contractor.

In 1933 plaintiff submitted the following document to the village board:

"Hildreth, Nebr., April 28, 1933.

"To the Village Board:

"My bid on the park and swimming pool job is: The receipts of the pool and $20 for the 3 months 15 cents per hour for extra work done before June 1st or after Sept. 1st.

"Ralph R. Schou."

The pool closed August 29, 1933. The accident occurred while plaintiff was mowing the park August 31, 1933. The village paid him 15 cents an hour for this work, done after the swimming pool was closed.

The contention of the village is that plaintiff was operating a business in the village park somewhat in the nature of a concession. That, in the operation, he opened and closed it when he wished and was not under the control or orders of the village. In a consideration of the evidence, we conclude that at all times the plaintiff was an employee of the village. The village owned the park and the pool.

They exercised control and domination over it. They required the mowing of the grass and trimming of trees, they approved the charge for swimming, they directed the draining and filling of the pool, they approved the hours for swimming and the opening and closing dates of the pool. The village furnished all the equipment and tools. The contract merely fixed the compensation at $20 for three months, plus the receipts of the pool.

Whether one is an "employee" or an "independent contractor" must be determined from facts of the particular case.

One engaged by a village to care for swimming pool and surrounding park, whose compensation is $20 for three months, plus receipts of pool, in view of general control of village, is an "employee" within workmen's compensation act. Comp. St. 1929, secs. 48-106 to 48-115. The fact that plaintiff was permitted to do the work in large measure in his own way does not change the relation. The right to control is the essential consideration rather than the exercise thereof. See *Cole v. Minnick*, 123 Neb. 871, where the employee had his own shop and his own tools but was subject to the control of the employer. See, also, *Showers v. Lund*, 123 Neb. 56, where the employee was hauling gravel on the highway and was compensated at so much a cubic yard of gravel hauled.

The trial court found the plaintiff had been earning $11 a week. The evidence substantially sustains this finding. The judgment is not erroneous.

AFFIRMED.

ELLANORA BRADY, APPELLANT, V. BEATRICE CREAMERY COMPANY, APPELLEE.

FILED NOVEMBER 9, 1934. No. 29288.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY.** Exposure to the elements, including the heat of summer or the cold of winter, is not compensable if it is the same as that to which the general public is exposed.

2. ———: ———: ———. Death from heart failure, such as occurred in this case, is not an accident or personal injury arising out of the employment of deceased.

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

Reeder & Reeder and *H. D. Hunter,* for appellant.

Kennedy, Holland & De Lacy, contra.

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

PAINE, J.

This is a proceeding brought by the widow to recover compensation for the death of her husband. The claim was dismissed by the compensation commissioner, and upon appeal to the district court the claim was also denied, and the plaintiff's petition was dismissed.

The deceased was 59 years of age, about 5 feet, 5 inches tall, weighed about 200 pounds. He had been working for the defendant company for several years as superintendent, checking cream stations in northwest Nebraska and South Dakota, at a salary of $85 a month. He spent Sunday with his wife at their home near Columbus, Nebraska, and on Monday morning, June 19, 1933, started out on his regular trip. He ate a hearty breakfast, and left before 9 o'clock in a new 1933 Chevrolet coupé, owned by the company, which had been used only three months. He drove from Columbus to O'Neill, a distance of about 136 miles, stopping at Clearwater for lunch, and reaching O'Neill about 3 o'clock in the afternoon. He parked his car on the west side of the Golden Hotel, walked around to the front of the hotel, carrying his bag and brief-case, registered at the desk, stopped for a moment to speak to a friend in the barber shop in the rear, and then the bellboy took him to room No. 6 on the west side of the hotel. It was a hot day, and he said to the bellboy something to the effect that if such weather lasted long he did not see how he would make it. He asked the bellboy to open the win-

dow just a trifle at the bottom, as the air in the room was cooler than the hot air outside, and to turn on the cold-water faucet. He went to the dresser, unbuttoned his shirt-front, and dismissed the bellboy. Five or ten minutes later a maid working upstairs heard him call for help, and she called to the lobby, and Dr. Tipton, of Omaha, who was in O'Neill attending a golf tournament, ran right up to the room. The deceased was lying across the bed, flat on his back. His pulse was very feeble and rapid, and he just gave a couple of gasps and immediately died. Dr. Tipton testified that, as he had walked into the hotel, Mr. Brady, who was a stranger to him, appeared to be a short, fat man, whose face was flushed; he was walking with difficulty, and perspiring. He said that when he went to his room Mr. Brady had a pallor about his face, yet he was cyanotic, with purplish discoloration, especially about his nose and lips, all of which indicated a lack of aeration of the blood, and gave as his opinion that the death was due to failure of his heart; that there was more of a strain on the heart than it could stand, and it simply gave out.

Dr. Rich testified for the plaintiff, and said, in answer to a hypothetical question, that the cause of death in his opinion was due to heat exhaustion. Other medical evidence was given at the trial. No autopsy was held, so that no positive evidence could be given as to the cause of death.

The Nebraska supreme court has had two cases before it recently where compensation was asked on account of heat strokes or heat prostration. In the case of *Uribe v. Woods Bros. Construction Co.*, 124 Neb. 243, it was held that the evidence did not sustain a finding that the cause of the disability was a heat stroke arising out of employment, but disclosed that the unfortunate plaintiff's condition was due to heart disease. He was working with other men on the new bridge being constructed for automobile traffic east of Ashland, and was compelled to lie down at 11 o'clock in the morning, but returned to work

at 2:30, and upon his return to Lincoln in the evening he was treated with digitalis for his weak heart.

In *Herbert v. State,* 124 Neb. 312, a death occurred from heat prostration. Mr. Herbert was compelled to work checking cement in a slight depression. A pile of sand on the east side, about 25 feet high, cut off the breeze there, and on the west side there was a string of box cars, and on the north there was a built-up roadbed, all of which made it difficult for any breeze to strike him, as he weighed bulk cement in 250-pound lots for paving construction near Central City. He was taken ill at 11 o'clock in the morning, taken to a hotel room, and died about 6 o'clock in the evening. It was found that he was subjected to a greater hazard from the heat than that to which the public generally in that locality was subjected, and that the medical testimony supported a judgment finding heat prostration to be the cause of death, and that it arose out of his employment.

Other cases supporting our views are as follows: *Larke v. Hancock Mutual Life Ins. Co.,* 90 Conn. 303; *Young v. Western Furniture & Mfg. Co.,* 101 Neb. 696; *Bartlett v. Eaton,* 123 Neb. 599; *Mullen v. City of Hastings,* 125 Neb. 172; *Townsend v. Loeffelbein,* 123 Neb. 791; *Gilkeson v. Northern Gas Engineering Co.,* 127 Neb. 124.

In the case at bar, the deceased made a very leisurely trip, at less than 25 miles an hour, in a car that was well ventilated, with mats above the floor-board, which prevented any heat coming up from the motor, and while the temperature reached 100 degrees, yet all of the persons traveling this highway were subjected to just the same temperature, and Dr. Tipton went out and played golf immediately after the death of Mr. Brady, and no others in the same locality suffered from the heat, so far as the evidence indicates. The weight of the evidence shows that the deceased was suffering no ill effects until just before his death, and the weight of the evidence indicates that the death came from a sudden heart attack. Exposure to

the elements, including the heat of summer and the cold of winter, is not compensable if it is the same as the general public is exposed to, and this court is convinced that there is no error in this record, and the judgment of the district court is

AFFIRMED.

GREAT WESTERN SUGAR COMPANY, APPELLANT, V. LAWRENCE L. HEWITT, APPELLEE.

FILED NOVEMBER 9, 1934. No. 29296.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY.** Malingering, as applied to compensation cases, may be defined as a deception, practiced by a dishonest employee, by feigning, inducing, or prolonging either sickness or injury, for the purpose of securing illegal or fraudulent payments therefor under the workmen's compensation law.
2. ———: ———: **APPEAL: TRIAL DE NOVO.** This court tries a compensation case *de novo* (Comp. St. 1929, sec. 48-137) by reading the bill of exceptions, examining the X-ray photographs and other exhibits, studying the briefs, and discussing the case among the members of this court. However, in arriving at a conclusion it cannot be overlooked that the trial judge had a distinct advantage, in that he could see the injured man move about the courtroom, observe his demeanor while under examination, detect his reaction, if any, to the charge that he was a malingerer, as well as weigh the credibility of the neighbors and relatives as they testified to his every-day conduct in respect to his alleged injury; and that, after deliberation, the trial court rejected the opinion of the medical experts that he was a malingerer and entered judgment in his favor.

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

Mothersead & York, for appellant.

Frank P. Johnson and *Raymond & Raymond, contra.*

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

PAINE, J.

This is a compensation case, in which the claimant recovered judgment in the district court for total disability for permanent injuries sustained in an accident December 4, 1931, while employed by the Great Western Sugar Company at its factory at Lyman, Nebraska. Said judgment included attorney's fees in the sum of $150.

The bill of exceptions discloses that the claimant was 42 years of age, the father of six children, and had been employed at common labor by the defendant since the beginning of the sugar-beet campaign on October 7, 1931. At the time of the accident he was assisting in unloading frozen beets from a railroad car, being on top of about eight or nine feet of beets, distributing hot water through pipes to thaw out the beets so they would go out through the dump in the bottom of the car. He did not know that the trapdoors at the bottom of the car had been opened. The beets suddenly started through without warning, and the claimant fell with them, and landed astride an iron beam in the bottom of the car, with his right leg caught and doubled back in sort of a jack-knife position, and his body bent forward. There were about four feet of beets, weighing several tons, on top of him. To release him they dug out the beets from the top down, and it took a half to three-quarters of an hour before he was released, in a semiconscious condition, by getting a rope under his arms and holding his body while the remainder of the beets went down into the chute. He was paid compensation for some 60 weeks, and then it was stopped. His principal injury consisted of two broken vertebræ. After remaining in the Methodist Hospital at Scottsbluff several weeks, he was sent to the Presbyterian Hospital at Denver for three weeks, and was then fitted out with a steel brace and belts from his shoulders to his hips, which held his spine rigid. He wore this brace continuously for about ten months. After it was removed, he went to his home, where he remained in bed for about a month, and then began getting

about on crutches, which he still used at the time of the trial.

Dr. N. H. Rasmussen, a physician and surgeon of Scottsbluff, testified that the claimant was malingering, and that in his opinion the claimant could discard his crutches and walk right off without the aid of them; that he came to this conclusion from his own sense of sight and hearing and feeling, and from a study of the X-ray pictures.

Dr. Frank J. Evans, of Denver, testified that there is no foundation for the complaint of pain made by claimant, and he has no disability in his back as a result of the accident, and that claimant could go right back to work if he would.

Dr. Edward F. Dean, of Denver, also testified that he could find nothing wrong with him at the time of the trial, and that he was a malingerer. He gave as his reasons that the claimant had a bright eye, a healthy-looking skin, red cheeks, and the appearance of a man who had not lost sleep, or had much pain; otherwise, he would be pale and his skin dry. There was other evidence to the same effect.

The claimant testified that, when he tried to get his muscles to act in the lower part of the back below the shoulder-blades, the pain was very severe, and that if his crutches did not rest on level ground he would get a twist in his back that would nearly "knock him out"; that he puts in practically half of his time lying down on the bed; that any twist of the spine, or a sharp jar, aggravates his trouble, and gives him intense pain; that he cannot stand on his feet and stoop forward; that he gets around the house by holding onto the bed or a chair with his arms; that he never had any pain or weakness in his back before this injury.

Dr. F. W. Plehn was called by the claimant, and testified that the X-ray showed a moderate compression fracture of the eleventh and twelfth vertebræ, which was a "mushrooming of the structure" of the vertebræ. He testified that he had examined him carefully two years after the

accident, and that further improvement after such a time had elapsed would be considerably limited. Neighbors who had seen the claimant frequently testified that he always required the crutch, or some article of furniture to rest his hands on, to enable him to get about the house.

The appellant insists that the burden was upon the claimant to show with reasonable certainty that the personal injury was caused by an accident arising out of and in the course of employment, and that the proof must be based on sufficient evidence to remove the case beyond the realm of speculation and conjecture, as held by this court in *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, *Bartlett v. Eaton*, 123 Neb. 599, and *Townsend v. Loeffelbein*, 123 Neb. 791.

In addition to these and other Nebraska cases, the appellant cites two cases from other jurisdictions to support his view that the judgment entered should be set aside. The first of these is *Standard Oil Co. v. Industrial Commission*, 339 Ill. 252, in which case it was claimed that a riveting machine "kicked back" and hurt employee's leg, producing a swelling there. The tumor mass was about 4 inches by 2½ inches, and after the employee had been laid off by reduction of forces, he had this tumor removed, but thrombosis of the artery followed, and the leg had to be amputated. There was little or no support of any accident or injury, while all the medical testimony indicated that this form of tumor was never caused by trauma, but was of gradual growth. In this case, it was properly held that liability for compensation must be based upon facts established by a preponderance of the evidence showing that the claimant has incurred a disability arising out of and in the course of his employment.

The appellant also calls our attention to the case of *Ginsberg v. Burroughs Adding Machine Co.*, 204 Mich. 130. In this case, it was established that a box of steel grated on the little toe of an employee, merely making the surface of the skin red. However, up in the thigh on the same day a large, red swelling appeared, which no evidence dis-

closed had been injured, and an operation followed, and employee died of thrombosis in that leg. There was no evidence of any connection between the pinched toe and the serious difficulty in the thigh, and compensation was rightly refused.

However, these cases have little application to the case at bar, for the wedging of this man under the flow of beets was clearly an accident, and his injury as clearly follows the fracture of the two vertebræ.

In this case, the appellant vigorously contends that the claimant is a malingerer. The exhaustive new Oxford dictionary says that this term was first defined in 1785 in Grose's dictionary as a military term for one who under pretense of sickness evades duty. In recent years it has been very frequently used in compensation cases, and has come to have a distinct meaning when so used.

The term "malinger" means to feign or induce sickness, and a malingerer is one who feigns or induces illness to avoid service or shirk duty, especially a soldier or sailor. *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607.

"Malingering" is a deception practiced by anybody, from which they try to make out that they are sick when they are not sick; and the question to a witness whether a party was malingering or not calls for a conclusion, and is properly excluded. *Brown v. Third Avenue R. Co.*, 43 N. Y. Supp. 1094; *Wells Bros. Construction Co. v. Industrial Commission*, 306 Ill. 191; *Madison Coal Corporation v. Industrial Commission*, 320 Ill. 65.

On a rehearing, "evidence held insufficient to support an award in favor of the claimant; the board's medical expert reporting a malingering element in the employee's claim, which means that he was a 'malingerer,' feigning injury to deceive." *Dunn v. Brooklyn Rapid Transit Co.*, 189 N. Y. Supp. 484.

We may conclude, then, that malingering, as applied to compensation cases, may be defined as a deception practiced by a dishonest employee, by feigning, inducing, or prolonging either sickness or injury, for the purpose of

securing illegal or fraudulent payments therefor under the workmen's compensation law.

In the case at bar, the X-ray photographs clearly show that there was an injury to two vertebræ at the time of the accident. Is it not beyond the power of even modern science to positively disclose either the extent of the original injuries to the nerves, the muscles, and their attachments to these vertebræ, or their present condition? The medical experts called by the appellant blandly charge that this man is a malingerer, and that he is free from any pain. The defendant flatly denies such charge, and since the accident has done no work, and has spent a great deal of time in bed, and is hardly able to hobble about on crutches, and acts as if suffering pain. The trial court had a distinct advantage over this court, in that he could see the injured man move about the courtroom, observe his demeanor while under examination, detect his reaction, if any, to the charge that he was a malingerer, as well as weigh the credibility of the neighbors and relatives as they testified to his every-day conduct in respect to his alleged injury; and, after deliberation, the trial court rejected the opinion of the medical experts that he was a malingerer, and entered judgment in his favor.

The judgment entered by the trial court in the case at bar is not final in the sense that it can never be inquired into again, but section 48-142, Comp. St. 1929, provides that, in a case of this kind, when payments have been ordered to be periodically made for a period longer than six months, at any time after six months an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury, and upon said application being filed the whole question of plaintiff's physical condition can again be inquired into as of that time. *Southern Surety Co. v. Parmely*, 121 Neb. 146; *Updike Grain Co. v. Swanson*, 103 Neb. 872; *Harmon v. J. H. Wiese Co.*, 121 Neb. 137.

This court, taking into consideration all of these facts,

finds no error in the record, and affirms the judgment, with an attorney's fee of $100 in this court.

AFFIRMED.

GOOCH MILLING & ELEVATOR COMPANY ET AL., APPELLEES, V. HARRY WARNER, APPELLANT.

FILED NOVEMBER 9, 1934. NO. 29080.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: SETTLEMENT: ADDITIONAL COMPENSATION. Where compensation has been paid for total partial disability and lump settlement made under the workmen's compensation act, and application is thereafter made for further compensation for total permanent disability resulting from disease claimed to have existed at the time of the accident and thereby lighted up, the same not having been covered by the settlement, the burden of proof is upon the employee to show with reasonable certainty the existence of the disease at that time and that the accident was a causative factor in producing his total disability.
2. **Evidence** examined and found not to sustain the burden of proof required to authorize further compensation.

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

Le Roy G. Stohlman and *George I. Craven,* for appellant.

Hall, Cline & Williams, contra.

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

REDICK, District Judge.

Action for additional award under workmen's compensation act for total disability following an award and lump sum settlement for temporary total and partial disability resulting from an accident suffered by the employee arising out of and in the course of his employment. Notwithstanding the formal designation of the parties on appeal by the employer from an award by the compensation com-

missioner, for the purposes of convenience we will term the employee the plaintiff and the employer and insurance carrier defendants. On June 6, 1930, plaintiff was in the employ of the Gooch Milling & Elevator Company as a common laborer and was injured while employed in using a hand truck for the purpose of transporting a load of flour. Having placed a number of sacks of flour upon the truck while it was in a standing position, plaintiff took hold of the handles for the purpose of bringing the truck to a horizontal position that it might be pushed on its wheels to the place where it was to be unloaded. Plaintiff slipped, fell upon his back and the loaded truck fell upon him, in consequence of which he was injured. A prior injury had been suffered by plaintiff January 16, 1930, resulting in a fracture of a segment of the coccyx, of which a portion was removed by operation, and which resulted in a disability from which plaintiff fully recovered, and returned to his employment April 16, 1930, having received due compensation.

After the second accident X-rays were taken and examinations of plaintiff had by two physicians, members of the medical advisory board, and one at the request of the insurance carrier, and plaintiff was seen and treated or examined by four physicians and one X-ray expert an aggregate of some 40 or 50 times up to December 26, 1930. November 3, 1930, petition for compensation was filed with the commissioner, hearing had December 26, 1930, on which date plaintiff was again X-rayed, and on January 5, 1931, was examined by another member of the advisory board, and on January 23, 1931, an award of compensation was made by the commissioner for a permanent partial disability which had diminished his earning power 15 per cent., at the rate of $2.40 a week not exceeding 300 weeks. On appeal by the employer this award was confirmed, and on March 9, 1931, a lump settlement was made by consent of the parties whereby total compensation was commuted, and by order of the district court employer was finally discharged from any and all liability to plaintiff, Harry

Warner, on account of the accident of June 6, 1930, and proper releases and satisfaction of judgment were executed.

On March 20, 1933, the present or second petition for compensation was filed before the commissioner upon the alleged ground that at the time of the accident plaintiff had traumatic arthritis of the spine and pulmonary tuberculosis in a dormant state, of which plaintiff had no knowledge until after the settlement; that said diseases were latent and progressive and not discoverable by the exercise of reasonable diligence, and did not culminate in compensable disability until December 10, 1932; that on said date plaintiff became totally and permanently disabled, for which he has received no compensation, and that the settlement was made under a mutual mistake of fact. Hearing was had April 24, 1933, and on May 1, 1933, a second award of compensation was made by the commissioner at the rate of $15 a week from December 15, 1932, until plaintiff's temporary total disability shall end, but not to exceed 300 weeks from the date of the accident or until further ordered, and for necessary medical and hospital care. Upon appeal by the defendants to the district court this second award was set aside on the ground that plaintiff had not sustained the burden of proof, and the action was dismissed. Plaintiff appeals to this court.

The claim of the plaintiff is that the first award of compensation was for traumatic neurosis only. Plaintiff claims as the result of the accident he was afflicted with a disease which he terms "traumatic arthritis," or at the time of the accident plaintiff was suffering from the disease of atrophic arthritis, which was lighted up or fanned into activity by the accident and culminated in his total disability on December 10, 1932. Defendants deny that there is any such thing as traumatic arthritis, deny that plaintiff was suffering from atrophic arthritis at the time of the accident, and deny that such disease was lighted up or fanned into activity by the accident, and claim that if it were so lighted up the result would be but temporary and easily

discoverable within a few days or weeks of the time of the accident; that as a matter of fact it was discovered as early as September, 1931, that plaintiff was suffering from atrophic arthritis caused by infected tonsils, and that plaintiff's second application, not having been filed within one year from the discovery of that disease, the claim is barred by the statute of limitations. Defendant further claims that plaintiff's action is barred by the lump sum settlement of March 9, 1931.

Plaintiff's action is based upon the proposition that he was afflicted with the disease known as atrophic arthritis at the time of the accident, which fact was unknown to both of the parties, a disease of insidious onset and not discoverable or discernible before the date of the lump sum settlement, that was not taken into consideration at that time, and that such settlement was made under a mutual mistake of fact and therefore did not cover the total permanent disability from which plaintiff is now suffering.

The first question for our determination is whether or not, at the time of the accident, June 6, 1930, plaintiff was suffering from the disease known as atrophic arthritis. That such disease may not be *caused* by trauma is established by the overwhelming weight of the testimony of the doctors; in fact, that proposition may be looked upon as conceded. All of the expert witnesses agree that atrophic arthritis is an infectious disease caused by the presence of bacteria known as streptococci, in some portion of the soft tissues of the body, particularly the mucous membrane of the throat and associated organs, not discoverable by means of the X-ray until it has progressed to such an extent as to dislocate some portion of the bony structure, as the result of the destruction of the soft tissues in which the germ is present. There are, however, clinical evidences by which the presence of the disease may be discovered at an early period. The symptoms of the disease are stated by Dr. Clayton Andrews as follows:

"Recurrent pains in the various joints, from one to many joints, which are usually present in the mornings

and may only amount to a small amount of stiffness at the onset which disappears later in the day with the use of the joint. As the disease progresses there is more pain and the pain becomes more definite, there becomes more disability. There becomes more swelling. There show up more changes in the soft tissues. The patient becomes weak. He looks sick, that is, he is sallow. He usually has a poor appetite. He loses some weight. He fatigues easily. He has headaches. He runs a low grade leukocytosis, that is a slight increase in the white cells. He may carry a slight amount of fever. There is usually a rapid sedimentation test of the blood cells and then there are certain pathological changes in the joint tissues if removed and examined which, of course, are not found on examination. There is also muscle spasm, definite tenderness, limitation of motion of the affected joint and redness, puffiness and an atrophy of the joint muscles which is exaggerated in appearance because of the swelling of the joint itself."

None of these symptoms were present upon the numerous treatments and examinations of the patient by the doctors upon the 6th day of June, 1930, and September of that year. On the contrary, the examining physicians during that period testify that he had the appearance of a perfectly well man; that he was robust, of good color, and nothing demonstrable except a complaint of pain in his back, lower back, which, in fact, is the only complaint which plaintiff ever made, up to August or September, 1931, having a bearing upon the question of the existence of atrophic arthritis. It appears from the evidence that after the lump sum settlement Warner was able to do heavy work for about three weeks in aiding his cousin in the digging of a cesspool during which he handled the windlass and shoveled dirt into a truck and unloaded the same; that after that he engaged in selling Haller's products, which job he quit because there was not anything in it for him, and in September, 1931, he started to learn the shoe repair business and finished in January,

1932, and that he did no business in that vocation until May, 1932, as he did not have the funds to get started; that his back was hurting him at the time, and that he then opened up and ran his shop continuously until December, 1932. He says he was able to do the cesspool work "with very little pain or disturbance; my back bothered me some but I was able to go ahead and work;" that the pain in his back reached the point where it was most severe December 10, 1932, and since that time has been getting worse.

During all this time he was wearing either a plaster cast from the arm pits to the hips or a brace applied for the purpose of relieving pain in the back of which he complained. In August, 1931, plaintiff consulted Dr. Orr, but the real examination was made by Dr. Teal who saw him for the first time.

Dr. Teal was called and testified for the plaintiff regarding an examination made by him August 6, 1931, consisting chiefly of an inspection of the X-ray plate taken by Dr. Smith on that date and a physical examination consisting of "an inspection of his back and testing him out with various motions of the spine and palpation of the spine and muscles of the spine for muscle spasm tenderness." He testified that he found a visible deformity of the spine and a backward angulation, considerable muscle spasm and limitation of motion because of pain, and that in his opinion these abnormalities had existed for one or two years. He further testified that he made a diagnosis of atrophic arthritis and that he had had it one or two years, but this opinion was not given expression in the evidence until after a second examination of plaintiff by Dr. Teal in May, 1933, after four additional X-rays had been taken by Dr. Smith at which time the existence of atrophic arthritis is conceded by all. Witness gave his opinion that it was possible for him to have had it before the injury, but did not state that at the date of his first examination he was of opinion that such arthritis existed at the time of the accident. He further testified that he

had examined the X-ray taken by Dr. Rowe on May 17, 1933, and that there had been no change since the previous X-rays, and at the time of the trial that in his opinion the accident of June 6, 1930, was the exciting cause of plaintiff's condition. This witness does not claim to have relied upon any clinical findings, present upon his first examination, as indications of the disease except the muscle spasm and stiffness.

Dr. J. E. M. Thomson for plaintiff testified in answer to the question whether or not the accident of June 6, 1930, is the proximate cause of the disability which Mr. Warner now suffers:

"Taking into consideration the history and the ultimate outcome of the case, one would have to assume that at least the injury was a contributing factor." And he further testified: "Q. Assuming that this arthritic condition might have been present at the time of this accident but in a latent form such that it was unknown to Mr. Warner, in your opinion would the accident which he described to you as occurring on June 6, 1930, together with subsequent history and developments, would that accident, in your opinion, acutely aggravate the condition which would be present, which was present? A. It *could* have been the cause. Q. That is, of course, assuming that it was present before in a latent form? A. Yes, sir. Q. What effect does trauma ordinarily have on a patient suffering from arthritis? A. Always aggravates it. Q. What effect does trauma ordinarily have in cases where a patient is suffering from atrophic arthritis? A. It may influence it and may not. Now in cases of atrophic arthritis, ordinarily trauma is more likely to aggravate the osteoarthritic type of which he shows slight evidence. Q. But it is entirely possible to aggravate also an atrophic arthritis, is it? A. Oh, yes. Q. Do you have an opinion as to whether or not in this particular case the trauma which this man suffered on June 6 did influence, aggravate or initiate or bring into being any one of those things, the atrophic arthritis of which he now suffers? A. Yes, sir. Q. What is

that opinion? A. That very likely—the accident very likely influenced the arthritis or the aggravation of it, symptoms of it. Q. In your opinion is it probable that that is the thing which has occurred in this case? A. Yes, sir."

He further testified that in his opinion the plaintiff had atrophic arthritis at least as far back as March 9, 1931; that the disease was infectious, but might be aggravated by injury; that it is slow in development, but that objective symptoms always appear before the existence of the disease will be shown by X-rays. Dr. Thomson's examination was made September 26, 1932. He did not write down any notes of the history given him at that time and could not remember it but relied partially on notes given him by the attorneys.

Dr. Rowe did not examine the plaintiff until May, 1933, at which time it is conceded that the plaintiff was permanently disabled by reason of the existence of atrophic arthritis. He testifies that in his opinion the plaintiff had that disease for a number of years and that the injury lit it up; that, when any one who is suffering from atrophic arthritis receives an injury, the disease becomes rapidly worse; that the disease must have existed prior to the injury or at least prior to the first part of 1931, giving as his reason that disease always precedes pain (plaintiff testifies that he had no pain in his back prior to the accident); that they ordinarily have pain in the back, muscle soreness and stiffness; that objective symptoms practically always appear before an X-ray will give evidence of the disease. He further testified that "the injury simply stirred up the trouble which was slumbering in his back and his present condition is the result of injury on top of chronic arthritis which he had at that time;" "that the disease must have existed prior to the injury, at least prior to the first part of 1931, because the disease always precedes the pain and rigidity."

On the other hand, the defendant produced five or six witnesses who testify positively that the disease of

atrophic arthritis is of essentially infectious origin, principally by the presence of bacteria known as streptococcus; that, while in the early stages of the disease the X-ray is of no value diagnostically, clinical evidence is always present in the early stages and can be found; that there is no connection between the injury of June 6, 1930, and the present condition of plaintiff; that, if an existing atrophic arthritis could be affected by trauma, its effect would be localized at the point of infection, would be only temporary and would shortly disappear; that, if the disease existed at the time of the accident and was lighted up thereby, positive evidence of the disease would have appeared in September and October, 1930, when plaintiff was thoroughly examined by several doctors, and that no symptoms of the disease were discovered at that time.

Dr. Teal did not examine plaintiff until August, 1931; had been a practicing physician since 1930; said that it was *possible* for him to have had atrophic arthritis before the injury; and, while he stated that in his opinion the accident was the exciting cause of plaintiff's condition, such conclusion is based upon the mere possibility previously declared.

Dr. Thomson did not examine plaintiff until September, 1932, when there was definite pathology of steptococci infection of the tonsils, and his opinion is based upon an assumption that the injury was a contributing factor, and that pain existed prior to the accident, while plaintiff testified positively that he never had any pain prior to that time. He also said that trauma *"could be"* the cause of atrophic arthritis, contrary to the overwhelming weight of the evidence; also that "very likely" the accident influenced the arthritis; and upon the length of time the disease had existed he qualified his evidence by the statement that in his opinion "plaintiff had atrophic arthritis at least as far back as March 9, 1931."

Dr. Rowe did not examine plaintiff until May, 1933, and bases his opinion that plaintiff's present condition is the result of injury on top of chronic arthritis which he had

at that time or which must have existed at that time, at least prior to the first part of 1931, because disease always precedes the pain and rigidity. The evidence does not show the existence of pain and rigidity at time of the accident, but the contrary.

This evidence is largely speculative, based upon assumption and faulty premises, and when weighed against the evidence for defendants is far from convincing. We think the language of Judge Shepherd in *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, is quite largely applicable here: "The testimony of the experts * * * is full of 'mights,' 'mays,' 'possible,' and 'fear.' 'Quite probable,' 'might be possible,' and 'very probable' recur again and again." But in addition to that it cannot be said to be even probable that the disease existed at the time of the accident, where no pain or other evidence was present.

The record is quite voluminous and we do not feel justified in quoting from it more extensively than we have done, although it has been read and studied with great care, and we have arrived at the conclusion that the testimony offered by the plaintiff is not of that positive and convincing character which would justify a finding that the plaintiff was afflicted with atrophic arthritis at the time of his accident in June, 1930. It would seem beyond argument that, if it had so existed, and plaintiff having been under repeated examinations and treatments, some evidence of that fact would have developed before August, 1931, over a year after the accident. Beyond this, no examination of plaintiff prior to October, 1931, showed any evidence of infection in the tonsils, throat or other parts of the body where such infection would be expected to be found if it existed. In October, 1931, for the first time, the stubs of plaintiff's tonsils, they having been formerly partially removed, were found to be infected with streptococci, and from that time forward the disease grew rapidly worse until December 10, 1932, when the plaintiff had become totally disabled. In the meantime plaintiff pursued several avocations.

It is the settled law of this state that the burden of proof is upon the claimant "to show with reasonable certainty that his or her ailment was caused by the injury sustained; and this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact." *Saxton v. Sinclair Refining Co.*, 125 Neb. 468.

The evidence for plaintiff is far from convincing under that rule and when considered with that of the defendants' witnesses fails to sustain the burden of proof required.

The qualifications of the experts called for the defendants are not attacked except by criticisms, oft repeated, on that ground alone; but in weighing expert testimony offered by both sides we prefer to assume that these professional gentlemen have given their testimony and opinions honestly and with proper respect for their own dignity and that of the profession to which they belong.

We conclude that the evidence for the plaintiff is not sufficient to sustain the burden of proof as to the existence of the disease of atrophic arthritis in the plaintiff at the time of the accident in June, 1930, and therefore it will be unnecessary to discuss the other questions presented by the briefs, such as whether or not the disease could be lighted up by the accident or the question of the statute of limitations.

Judgment of the district court is correct and is

AFFIRMED.

STATE, EX REL. EUGENE D. O'SULLIVAN, RELATOR, V. HARRY R. SWANSON, SECRETARY OF STATE, RESPONDENT.

FILED NOVEMBER 13, 1934. No. 29406.

Elections: CANDIDATES. As to the office of United States senator, "No candidate defeated at the primary election shall be permitted to file by petition in the general election next following." Comp. St. 1929, sec. 32-1125. This statute interpreted to apply

to a candidate defeated at the primary election for nomination for the office of governor.

Original proceeding in mandamus by relator to compel respondent to accept and file a petition to place the name of relator on the official ballot as a candidate at the general election for the office of United States senator. *Writ denied.*

Eugene D. O'Sullivan, pro se.

Paul F. Good, Attorney General, and *Daniel Stubbs, contra.*

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

GOSS, C. J.

This is a mandamus action to compel the secretary of state to accept a petition of nomination bearing the proper number of qualified signers and the relator's acceptance of the nomination, and to compel the secretary of state to cause relator's name to be placed on the official ballot for the 1934 general election as a candidate "by petition" for the office of United States senator from this state. The respective pleadings stated the facts, about which there was no dispute, leaving only questions of law to be decided. The petition was filed October 6, 1934. The answer and all briefs were filed by October 13, 1934, on which day oral argument was heard by the court. As Tuesday, October 16, 1934, was the last day for the secretary of state to certify the names of candidates to the county clerks, the judgment of this court was entered on Monday, October 15, 1934. That judgment denied the writ. It is the purpose of this opinion to record briefly the reasons for the judgment.

The relator filed under the primary laws as a candidate for governor and the secretary of state caused his name to be printed on the ballots as a candidate for that office at the statewide primary held August 14, 1934. Relator was

defeated. At that primary candidates for United States senator were nominated. The secretary of state refused to place relator's name on the ballot as a nominee because of the statute which says: "No candidate defeated at the primary election shall be permitted to file by petition in the general election next following." Comp. St. 1929, sec. 32-1125.

We recently held that the section above quoted prevented one who was an unsuccessful candidate at the 1934 primaries for secretary of state from having his name placed on the ballot for the general election as a candidate for the office of state auditor. *State, ex rel. Driscoll, v. Swanson, ante,* p. 715, in which the judgment was entered October 6, 1934, and the opinion was filed October 19, 1934. However, much that was said in the opinion is applicable here and will not need to be repeated. The reasoning of the opinion there is adopted here as far as it goes. The issue here is whether the relator is entitled to have his name printed on the ballot as a candidate nominated by petition, regardless of the *Driscoll* decision, because the office relator seeks is a federal office rather than a state office. The question is not whether he may be a candidate, but whether he may be nominated by petition and have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected.

Section 3, art. I of the Constitution of the United States, provides for the qualifications of a senator: "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen."

Section 4, art. I of the Constitution, provides: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The seventeenth amendment provides that senators from each state may be elected by the qualified people thereof. The supreme court has held that this gives no new meaning to sections 3 and 4, art. I of the Constitution. *Newberry v. United States,* 256 U. S. 232.

There is no act of congress regulating the nomination of candidates to be voted for at a general election. But relator urges that the state primary law here involved is in conflict with sections 3 and 4, art. I of the federal Constitution.

The supreme court of the United States has held that the control of primary elections and nominations is exclusively within the power of the state. *United States v. Gradwell,* 243 U. S. 476. In *Newberry v. United States,* 256 U. S. 232, it was held that the congress has no power to regulate the nominations of candidates for United States senator. The court said:

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people.

"It should not be forgotten that, exercising inherent police power, the state may suppress whatever evils may be incident to primary or convention."

The legislature considered it an evil for one who had unsuccessfully submitted his candidacy at the primary to be allowed to be nominated later as a candidate for the same or for another office, and again to be permitted to have his name printed upon official ballots at the expense of the public.

Relator has all the qualifications for the office of senator. The state statute in no manner seeks to add other qualifi-

cations. It does not prevent him from being a candidate. It is not unconstitutional, as clearly appears from the decisions of the supreme court of the United States.

The refusal of the secretary of state to accept the nominating petition and relator's acceptance thereof is fully justified. The writ is therefore denied.

WRIT DENIED.

IN RE ESTATE OF LEWIS R. BARLOW.
CORA D. LOOFE, APPELLANT, V. FERMON J. GRANT, ADMINISTRATOR, APPELLEE.

FILED NOVEMBER 13, 1934. No. 29034.

1. **Executors and Administrators.** In a litigable controversy between the administrator of an estate and the heirs, he does not represent them.
2. **Appeal: PARTIES.** "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf*, 110 Neb. 223; *Reilly v. Merten*, 125 Neb. 558.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Appeal dismissed.*

C. S. Wortman and *Dwyer & Dwyer*, for appellant.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

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

ROSE, J.

In a proceeding in the county court of Cheyenne county, Fermon J. Grant was appointed administrator to settle the estate of Lewis R. Barlow, deceased, who left surviving him his widow, Cora D. Barlow, now Cora D. Loofe, George W. Barlow and Floyd D. Barlow, sons, and the following named daughters: Fern L. Grant, Florence I.

Barlow and Marian Ruth Barlow, the latter being the only minor.

In the course of the proceedings, a controversy arose between Cora D. Loofe and the administrator who contested delayed claims presented by her as follows: Unpaid widow's allowance, $500; necessary expenditures for the support of herself and the minor daughter, $353.44. She sought also for other relief. December 12, 1932, on motion of the administrator, the county court dismissed the petition for the allowance of these items on the ground that the controverted issue raised by them had been determined by a decree pronounced October 19, 1931, after due notice and a full hearing, but not entered on the journal. January 4, 1933, the county court signed the formal decree which had been pronounced October 19, 1931, and caused it to be journalized as of that date. As entered *nunc pro tunc,* the decree of October 19, 1931, ordered distribution of decedent's estate in the hands of the administrator among the heirs, and provided further:

"It is therefore ordered that said administrator, Fermon Grant, pay said Cora D. Barlow the sum of $20.72 in full settlement of the amounts due her by reason of any promissory note held by her against said estate, and in settlement of any widow's allowance or other claim which she may have against said estate at this time."

The decree of January 4, 1933, approved the final report of the administrator, discharged him as such and released his bondsmen. From that decree of the county court Cora D. Loofe and some of the other heirs appealed to the district court.

On motion of the administrator the appeal from the county court was dismissed as presenting no issue for decision, since, in the opinion of the district court, the controversy was determined in the county court December 12, 1932, by an order from which no appeal was taken and consequently was not open for consideration on appeal

from the judgment of January 4, 1933. From the district court's dismissal of the appeal from the county court, Cora D. Loofe alone appealed to the supreme court.

A motion to dismiss the appeal for want of necessary parties in the supreme court was submitted with arguments on the merits of the principal controversy. On the appeal from the district court Cora D. Loofe, formerly Cora D. Barlow, is the only appellant and Fermon J. Grant, administrator, is the only appellee. On the appeal from the county court Cora D. Loofe, Marian Ruth Barlow, Fern L. Grant and Florence I. Barlow were appellants and parties in the district court, but only one of them is a party to the appeal from the district court to the supreme court. All are interested in the estate of decedent and their rights would be affected by a judgment of reversal herein. It is argued by the only appellant that the other heirs are not necessary parties, because the administrator, who is a party, represents them. The heirs who are not parties to this appeal were in a litigable controversy with the administrator and in that situation he does not represent them. *In re Estate of Rhea,* 126 Neb. 571. The record presents a typical case for the application of the following rule:

"All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223; *Reilly v. Merten,* 125 Neb. 558.

APPEAL DISMISSED.

STATE, EX REL. JOSEPH F. KASPAR, RELATOR, V. FRANK LEHMKUHL, COUNTY CLERK, RESPONDENT.

FILED NOVEMBER 13, 1934. No. 29391.

1. **Statutes:** AMENDMENT. The constitutional provisions relating to the amendment of statutes should receive a reasonable and liberal construction, with a view to upholding legislative acts

and not unnecessarily hampering the work of legislation. Const. art. III, sec. 14.

2. ———: ———. A legislative act complete in itself is not within the mischief to be remedied by the constitutional provisions relating to the amendment of statutes.
3. ———: REPEAL. Legislative acts, sections and severable parts of sections may be eliminated by a later independent repealing act covering the entire subject of the new enactment.
4. ———: LEGISLATIVE ACT: TITLE. The title of a legislative bill may be broader than the body of the act without making the legislation unconstitutional.
5. ———: REPEAL. An independent legislative act covering the entire subject of legislation may change or repeal former enactments in conflict with new provisions.
6. Elections: STATUTES: CONSTITUTIONALITY. The legislative act of 1933, abolishing party circles on election ballots, *held* not invalid as having been passed in violation of the constitutional provisions that "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." Const. art. III, sec. 14.

Original proceeding in mandamus by relator to compel respondent to include party circles in the ballots for the general election. *Writ denied.*

Harvey M. Johnsen and *Schiefelbein & Donato,* for relator.

Paul F. Good, Attorney General, George W. Ayres and *Clyde R. Worrall,* for respondent.

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

ROSE, J.

This is an application by Joseph F. Kaspar, relator, for a peremptory writ of mandamus commanding Frank Lehmkuhl, as county clerk of Saunders county, respondent, to include in the printed forms of ballots for the election to be held November 6, 1934, party circles in which any elector may vote a straight party ticket by making a cross in a circle.

Relator is a candidate for state senator and is also an

elector who desires to vote a straight party ticket by making a cross in the party circle. His demand for the writ is based on the ground that the legislative act of 1933, purporting to abolish the party circle, is unconstitutional and void, leaving in full force and effect former election laws, requiring party-circle ballots. Respondent refused to furnish them on the asserted ground that the legislature of 1933 repealed the statutory provisions for party-circle machinery at elections.

The question presented for determination is the alleged invalidity of the repealing act, a copy of which, including the title, follows:

"An act relating to elections; to abolish the party circle; and to repeal all acts and parts of acts in conflict therewith.

"Be it Enacted by the People of the State of Nebraska:

"Section 1. Notwithstanding any more general law respecting elections, all official ballots cast in election for public officers within this state shall not contain thereon any party circle or provision for voting a straight party ticket by the making of a cross or mark.

"Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed.

"Approved February 18, 1933." Laws 1933, ch. 54, Comp. St. Supp. 1933, sec. 32-526.

The position of relator is that this act was passed in violation of the following provisions of the Constitution:

"No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." Const. art. III, sec. 14.

Was this provision of the Constitution violated by the act of 1933, purporting to abolish the party circle? The affirmative was vigorously presented in printed briefs and orally at the bar. It was argued that the new act was amendatory, without so stating in the title, and did not contain the sections amended nor repeal the original sec-

tions. The sections pointed out by relator as amended, but not contained in the new act nor repealed, are 32-503, 32-504, and 32-514, Comp. St. 1929. Section 32-503 directs how official ballots shall be prepared and what they shall contain, giving details in regard to paper, ink, type, candidates, party names, proposals, measures and other features, including party circles for voting a straight ticket. Section 32-504 provides:

"The form of the official ballot shall as near as possible conform to schedule 'A' hereof. Each division containing the names of the office and a list of the candidates nominated for such office shall be separated from other groups by a distinct and heavy line."

Schedule "A," to which reference is made in section 32-504, is a printed form for official ballots. In a space or group between two black lines preceding the names of candidates and party names, the party circles appear thus:

To Vote a Straight Ticket Make a Cross Within Your Party Circle

O ..... Democrat
O ..... Progressive
O ..... Republican
O ..... Socialist
O ..... Prohibition
O ..... People's Independent

Section 32-514 requires the printing and posting of cards of instructions to electors according to schedule "B" which directs voters how to mark ballots for straight party tickets, for individual candidates, for proposed constitutional amendments and for measures submitted by initiative or referendum.

Relator contends that the legislature attempted to change the three sections enumerated by repealing a part of each, thus leaving the other provisions in force, and that the legislation was a mere void amendment, because the new act did not contain the sections amended nor re-

peal the old sections. There was a formidable argument on the following proposition:

"A legislative act which has no subject or object of its own, except to change or modify the provisions of an existing statute or statutes, and no reason for enactment except to effect such an amendment, is within the prohibition of section 14, article III of the Constitution."

In support of this doctrine the following language from an early opinion is invoked:

"That an act, complete in itself, may so operate on prior acts as to materially change or modify them, without being within the mischief designed to be remedied by, or repugnant to, this provision of the Constitution, is doubtless true. * * * But where, as in the case before us, the act is not complete in itself, but in its effect is simply and clearly amendatory of a former statute, it falls directly within the constitutional inhibition, and is void. Nor will it make any difference, in this respect, whether the new statute by its title, or in the body of the act, assume to be amendatory or not; it is enough if it clearly have that effect." *Smails v. White,* 4 Neb. 353.

On the same point other early cases are cited, but a more liberal interpretation of the constitutional provision relating to amendments has been favored in later cases. In a current text on the entire body of the law it is said:

"These constitutional provisions have never, in construction, been given a rigid effect, but have been held applicable only to such statutes as come within their terms, when construed according to the spirit of such restrictions, and in the light of the evils to be suppressed. They should receive a reasonable and liberal construction, with the view of upholding the acts of the legislature, and not unnecessarily hampering or embarrassing it in its work; and the courts will not extend the construction of the prohibition beyond the mischief it was designed to prevent. On the other hand, the provisions will not be given so loose a construction as will virtually nullify them." 59 C. J. 866.

The mischief which the Constitution was designed to

prevent was considered by Judge Cooley, an outstanding author on constitutional law, who said:

"The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent." *People v. Mahaney,* 13 Mich. 481.

Judge Letton once called attention to this Michigan case and remarked that it had been repeatedly cited and approved by the supreme court of Nebraska. *State v. Ure,* 91 Neb. 31, 37. An eminent authority on statutory construction stated the modern rule as follows:

"Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof." 1 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 239.

The same writer noted the tendency of the Nebraska supreme court to depart from strict to liberal construction and cited cases, saying:

"It has been held in Nebraska that if a statute is intended to be amendatory, and is clearly so, it is within this provision of the Constitution, though framed as an independent act and complete in itself; that being amenda-

tory, it should be expressly so; that the law as amended should be given in full with such reference to the old law as will clearly show for what the new law is substituted. But the later cases fully establish the law of that state in harmony with the current of authority. A statute which merely furnishes a rule of construction for prior statutes, and is not in terms an amendment, is not within the meaning of this constitutional regulation; it need not set forth the statutes affected. Nor is a statute amendatory which repeals in general terms all acts and parts of acts which are inconsistent with its provisions." 1 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 239.

The Constitution itself recognizes legislative power to amend or repeal existing statutes. Legislation may be changed by either method. Acts, sections and severable parts of sections may be eliminated by independent repealing acts covering the entire subject of the new enactment. The party circle act is clearly not within the mischief to which the constitutional provision is directed. A concealed or surreptitious purpose is not even inferable. What was in the minds of the lawmakers was disclosed by both the title and the body of the act. The legislation assailed by relator is entirely negative. It does not enact anything new. It strikes out of existing law by repeal the right of electors to use party-circle ballots—a legislative privilege formerly granted. What is eliminated is severable matter relating to the party circle—a subject well understood and a voting device publicly challenged in advance as a questionable part of election machinery. The part repealed is definite and certain. What remains is free from doubt or confusion. The repeal does not require the services of an expert to determine what was taken out of the old sections and what the new law left in them. Old and new provisions are not mingled by the abolishment of the party circle.

The title of the act refers to "elections," but the real subject is abolishment of the party circle. The enactment itself is limited thereto and covers that entire subject. It

is well-settled law that the title of a legislative bill may be broader than the body of the act without making the legislation unconstitutional. Though the repeal makes changes in old sections, it is limited to the abolishment of the party circle—severable matter in former legislation. It is a familiar rule of interpretation that an independent act covering the entire subject of legislation may change or repeal former enactments in conflict with new provisions.

In support of relator's position, the recent case of *State v. Bauman,* 126 Neb. 566, was cited, but the opinion therein does not seem to control the decision herein. In that case the court held the act assailed was strictly amendatory, containing nothing of an independent nature, but evincing a legislative intent to mingle new changes with old provisions—an inhibited evil.

Relator's grounds of invalidity would apply to many other enactments, as shown by the history of recent legislation. A notable example is the nonpartisan judiciary law of 1913, an act passed under the following title:

"An act providing for the nonpartisan nomination, and the nonpartisan election, of judicial officers and to repeal all acts and parts of acts in conflict with the provisions of this act." Laws 1913, ch. 96.

That legislation materially changed provisions of the Australian ballot law and of the primary election law without making any specific reference in the title or body of the new act to the sections changed. Old provisions were made inapplicable to candidates for judicial offices and retained as to candidates for executive and legislative offices. The new act did not contain the changed sections nor repeal them by direct reference thereto. The nonpartisan judiciary act has been considered a statute complete in itself and one relating to an independent subject. *State v. Penrod,* 102 Neb. 734. That act has been observed by all three departments of government. Many other acts involving the same legislative practice may be found in the statute books and their invalidity should not be implied by

a strict or technical construction of the constitutional provisions relating to amendments, when not required by the purpose or import of the Constitution.

The question at bar is not whether the lawmakers adopted the best method of changing the law, but is whether the legislation itself was enacted in a manner inhibited by the Constitution. The better view of the act in question seems to be that it is not within the mischief inhibited by the constitutional provisions relating to amendments, that it is a repeal as distinguished from an amendment, and that it is independent legislation covering the entire subject of abolishing the party circle and leaving unrepealed parts of the old law with clear and definite meanings.

In reaching this conclusion nothing in the briefs and arguments of the parties nor in numerous briefs of *amici curiæ* has been overlooked.

WRIT DENIED.

FRANCISCO VALENCIA, APPELLANT, V. CONTINENTAL CASUALTY COMPANY, APPELLEE.

FILED NOVEMBER 13, 1934. No. 28978.

1. **Insurance: POLICY: CONSTRUCTION.** Provision in policy indemnifying insured "against loss of time resulting solely from bodily sickness which is contracted and begins not less than fifteen days after the date of this policy" covers disease or sickness first manifesting itself after such period, although medical cause may have antedated issuance of the policy.
2. **Evidence** examined, and *held* error to sustain motion on behalf of defendant for directed verdict.

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

Chambers & Holland and *Walton B. Roberts*, for appellant.

Baylor & Tou Velle and *George Healey, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

LESLIE, District Judge.

This action is brought by appellant, Francisco Valencia, against the Continental Casualty Company, appellee, upon an accident policy, containing a health provision, issued by the defendant company to the plaintiff on the 10th day of October, 1928. The provision of the policy involved is as follows:

"The insurance given by this policy is * * * against loss of time resulting solely from bodily sickness which is contracted and begins not less than fifteen days after the date of this policy."

At the time of issuance of the policy, plaintiff was employed by the Union Pacific Railroad Company as a track laborer, had been so employed over a period of years, and was so engaged up to August 2, 1929. On this date, and while at his usual employment, he was stricken with partial blindness and numbness in his fingers. He reported his condition to the medical department of the company, and was removed to a hospital in Omaha. His condition became worse until at the time of the commencement of this action he was suffering from extensive paralysis and blindness. At the conclusion of the evidence defendant's counsel moved for a directed verdict and the trial court sustained the motion. From this ruling plaintiff brought the case here on appeal.

The only question for our consideration is whether there was sufficient evidence to warrant submission of the case to the jury. This is determined largely, at least, by the medical testimony.

Doctor Smith, in behalf of plaintiff, gives it as his opinion that plaintiff is suffering from locomotor ataxia. Doctor Hohlen, in behalf of defendant, positively testifies that his condition is due to an intracranial injury which produced a cerebral spinal pressure. Upon this evidence should the case have been submitted to the jury? Had the

motion for a directed verdict been overruled and the case submitted to the jury, the primary question for its determination would have been whether plaintiff's sickness was contracted and had its beginning more than 15 days after the date of the policy.

The burden was upon the plaintiff, in the first instance, to prove that his claim was within the terms of the policy. This was established *prima facie* by evidence that plaintiff had no illness between the date of the policy and August 2, 1929, nor any prior to the issuance of the policy, except for an injury from being struck on the head by a piece of coal in 1917; that he worked regularly at his occupation as a track employee from 1917 to 1929 without interruption. It was then incumbent upon defendant to establish facts which would exempt it from liability. This it sought to do by showing that plaintiff had a head injury prior to the manifestation of his present ailment, which caused a cerebral spinal pressure, finally producing atrophy of the optic nerve.

Had the case gone to the jury, they might have accepted the view of either of the medical experts, or they might have disregarded the medical testimony. Had they disregarded the medical testimony, their verdict should have been for the plaintiff. Had they found in accordance with the views of plaintiff's medical expert as to the cause of plaintiff's sickness, their duty would still have been to determine when the illness first manifested itself, whether prior or subsequent to the expiration of the nonliability period.

A policy of insurance providing indemnity for disability resulting solely from bodily disease or sickness which is contracted and begins not less than 15 days after the date of the policy covers a disease first manifesting itself after such period, even though the medical cause may have antedated the issuance of the policy. *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507; *Smith v. Benefit Ass'n of Railway Employees*, 187 Minn. 202; *Turner v. Columbia Nat. Life Ins. Co.*, 100 S. Car. 121; *Provident Accident & Life Ins. Co. v. Jemison*, 153 Miss. 53.

The defendant company having formulated the policy, the usual rule of construction must be adhered to in construing its meaning and the intention of the parties. In *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, the court said:

"The insurer intended to give and the insured expected to get indemnity if illness or sickness came after the policy had been in force for thirty days. They were not concerned with the latent or the remote cause of it. The cause of the disease insured against is not mentioned in the policy as a condition of liability. * * * The parties had in mind, as the subject of indemnity, disability from illness or sickness or disease first manifesting itself or becoming active after the thirty-day period. For this the policy promised indemnity. It did not exempt the company from liability because the medical cause of the disease causing disability antedated the expiration of the period. * * * As we construe it the defendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So the ordinary man wanting health protection would understand it."

We think this correctly states the law. An insurance company issuing a policy indemnifying an insured from loss of time on account of sickness may exempt itself from liability to the extent it may think desirable, and the insured is bound by the terms of the contract when stated with sufficient definiteness and understood by the parties, even though it may limit insured's right to protection due to only one disease; but where the language of the policy is "against loss of time resulting solely from bodily sickness which is contracted and begins not less than fifteen days after the date of this policy," such provision will be construed to mean a disease first manifesting itself after such period of exemption from liability, although the medical cause antedated it.

The motion of defendant for a directed verdict should have been overruled, and the cause submitted to the jury

under appropriate instructions.

The judgment of the district court is therefore reversed, and cause remanded for retrial.

REVERSED.

ARTHUR A. FOREMAN V. STATE OF NEBRASKA.

FILED NOVEMBER 13, 1934. NO. 28851.

1. **Criminal Law**: FALSIFYING BANK STATEMENTS: INSTRUCTIONS. Upon trial of a criminal case where defendant is charged with making a false statement of the financial condition of a bank with intent to deceive the banking department, and evidence is received of other transactions which defendant contends were *bona fide* loans for the purpose of increasing the reserve, it is error to refuse an instruction requested by defendant to the effect that such transactions if *bona fide* were not illegal or criminal.
2. ———: INSTRUCTIONS. In a criminal case it is the duty of the court to instruct the jury as to the nature of the defense and the law applicable thereto, whether requested or not.
3. **Former opinion** reported in this case, 126 Neb. 619, withdrawn and set aside as to the two points above; otherwise adhered to.
4. **Criminal Law**: FALSIFYING BANK STATEMENTS: INTENT: EVIDENCE OF OTHER CRIMES. Upon the question of defendant's intent to commit the crime charged, evidence of other similar acts is admissible, where the facts and circumstances in connection with such acts are such that, if the defendant was put to trial thereon, the court would be justified in submitting the case to the jury.

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

Flansburg, Lee & Sheldahl and *Cook & Cook*, for plaintiff in error.

Paul F. Good, Attorney General, and *R. H. Beatty, contra.*

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

REDICK, District Judge.

Plaintiff in error, who will be hereinafter referred to as

the defendant, was president of the Farmers State Bank of Overton, Nebraska, and in the district court for Dawson county, upon trial by jury, was convicted of a violation of the banking laws on counts 9, 13, and 14 of the information charging such violations, and has filed his petition in error in this court to review the judgment of conviction. The case was heard here upon the record and exhaustive briefs on behalf of defendant and state, and on April 10, 1934, an opinion of this court was filed affirming the judgment of the district court as to count 9, and reversing same as to counts 13 and 14. Thereafter a rehearing was allowed, argument had, and the case is now before us for decision. The statute under which the information was drawn substantially provides that any person who shall wilfully and knowingly make any false statement or entry in the books of any banking corporation, or shall knowingly subscribe to false papers with intent to deceive any person authorized to examine into the affairs of such corporation, or make or publish any false statement of the amount of the assets or liabilities of such corporation, shall be deemed guilty of a felony. The specific charge in count 9 of the information is that defendant made a false report to the department of trade and commerce that the Overton bank, on July 1, 1929, had a balance due it from the South Omaha State Bank in the sum of $27,798.69, whereas in truth and in fact the amount so due was only $17,798.69. Upon the trial the district court, over objections of defendant, received evidence of three prior transactions between the two banks, similar to the one under investigation, of dates, June 25, 1927, $10,000, September 27, 1927, $10,000, and March 10, 1929, $30,000, for the purpose of showing the intent of defendant in making the false statement of July 1, 1929. The former opinion of this court is reported in *Foreman v. State*, 126 Neb. 619, to which reference is made for a further statement of the facts.

The defendant presents nine grounds for rehearing, the first three of which assail the opinion of this court as erroneous in approving the ruling of the trial court over-

ruling defendant's objections to evidence tending to establish other similar offenses alleged to have been committed by defendant prior to the one charged. It is not contended but that in some cases such evidence is competent as bearing upon the intent of the defendant in doing the acts charged as infractions of the law, where the intent with which such acts were done is of the substance of the crime charged; but it is contended that before such evidence may be received it must be of such a positive and convincing character as to warrant the conclusion by reasonable minds that a crime had in fact been previously committed. It was stated by the prosecution that the only object of the testimony offered was to prove the intent with which the crime charged was committed, and the court, by its instructions, restricted the jury in their consideration of such evidence to the purpose stated. It was the contention of the state that these previous transactions were a mere sham entered into for the purpose of deceiving the banking department as to the true condition of the Overton bank, while the defendant insists that they were loans procured in good faith by the Overton bank from the South Omaha State Bank for the purpose of increasing the reserves of the Overton bank. With reference to these transactions we said in our former opinion: "Defendant contends that in each instance he had sent a note to the South Omaha State Bank for the amount for which he had taken credit on the books of the Overton bank, and that the amount shown by the report was, in fact, in the account of the Overton bank in South Omaha. There was evidence of alteration of the books of the Overton bank, indicating that changes had been made to show a deposit to defendant's account, and to show a credit of the Overton bank in the South Omaha State Bank on these occasions; and there was evidence on behalf of the state which would indicate that these credits were fictitious and that the reports, showing the credits in the South Omaha bank, were false. It is true that the evidence on behalf of defendant tends to show that each of the transactions was

bona fide and that the changes in the books of the Overton bank were made only for the purpose of having them reflect the true state of facts." It may be added that it also appeared from the evidence that the transactions referred to were all entered into in anticipation of calls from the banking department for statements of the financial condition of the bank, which were the subject of contemporaneous correspondence between defendant and one McGurk, president of the South Omaha State Bank, McGurk and defendant being brothers-in-law; that in each instance credit was taken a few days before the call was anticipated, and charged out by the South Omaha State Bank a few days after the call had been completed; that the credit was never drawn upon by the borrowing bank; that in one instance credit was not given upon the books of the South Omaha bank until after the date for which the call had been made, and that the records of the South Omaha bank had been changed so as to show the credit prior to such date. It also appeared that interest was paid by the Overton bank on these credits, and defendant stresses the point that Hoagland, an auditor called by the state, testified that the entries showed actual loans by South Omaha bank to Overton bank; but Hoagland had no personal knowledge of the facts, and was simply stating the effect of the book entries. The true nature of these transactions was for determination of the jury. On this point defendant contends that before evidence of other crimes may be admitted the evidence thereof must be clear and convincing, that proof of mere suspicious circumstances is not sufficient, and that his motion to strike out the evidence of this character should have been sustained. If the court can say as a matter of law that the evidence merely casts suspicion upon the previous transactions, no doubt the motion should have been sustained. But in this case the circumstances surrounding the prior transactions were of such a nature that if defendant were put upon trial the evidence would have presented a jury question; and so we think in this case the evidence was properly received, and

it was for the jury to determine whether or not it tended to prove that a previous crime had been committed with unlawful intent, as bearing upon the question of defendant's intent relative to the crime charged. In fact we held in *Koenigstein v. State*, 101 Neb. 229, that the fact that defendant had been tried and acquitted of the former offense did not exclude evidence of that offense upon a subsequent trial of defendant for a similar offense. And in *State v. Sparks*, 79 Neb. 511, it was held that evidence of previous similar acts was properly received upon the question of knowledge or intent, although it was claimed that the evidence was insufficient to establish that defendant was guilty of the other crimes. Without intending to express any opinion as to the weight or sufficiency of this evidence, we are of the opinion that it lends support to the contention of the state, and was sufficient to justify its reception for the consideration of the jury upon the question of the intent of defendant when he executed the report which is the basis of the charge under count 9 of the information. We, therefore, adhere to our former opinion on this point.

The fourth ground urged for rehearing refers to the refusal of the trial court to give instruction No. 3 requested by defendant to the effect that the mere borrowing of money by the bank with the intent of raising the reserve was not an offense, and that the intent to do so was not the criminal intent referred to in count 9. This point was not disposed of by our former opinion. We think the instruction stated the law and should have been given, or one like it in substance in the language of the court, but we do not determine at this time whether or not the refusal of the court to so instruct was of such a prejudicial character as to require reversal.

The fifth and sixth grounds relate to the refusal of the trial court to give instruction No. 1-a requested by defendant in the following terms:

"You are instructed that if you should find that the defendant did, as he testified, sign the report mentioned in

count 9, before July 5th and while the credit from the South Omaha State Bank of $10,000 appeared on the books of the Farmers State Bank of Overton, and if you find that he also then believed that he was entitled to the credit and that the report was true, and if you find that the report did not come to his attention again and he assumed it had been sent in to the department of trade and commerce before he learned on July 5th that the South Omaha State Bank had refused the credit, and if you further find that the report was later taken, without his knowledge, to the notary who subscribed it and placed his seal on it on the 9th day of July, or at whatever time you find it to have been done, then you are instructed that defendant finished making his statement before July 5th and without intent to deceive and your verdict on count 9 should in such event be for the defendant."

The contention of defendant on this point was dismissed in our former opinion with the remark that "The requested instruction was subject to criticism as pointing out and emphasizing particular testimony." The criticism is just, but after hearing argument and reconsidering the instruction we are of the opinion that the instruction was not given that consideration to which it was entitled and the assignment of error with relation thereto has not been adequately disposed of. The claim of the state was that the defendant executed the report in question with intent to deceive the banking department. The defendant admitted that the report in fact was false, but claimed that at the time it was made he believed it to be true and that the making of the report was the result of an innocent mistake on his part. He claimed, and the evidence tended to show, that on several previous occasions he had pursued the same course as he did here, namely, sent his note to the South Omaha bank for credit, and that in every instance the credit had been allowed, and that he had no reason to believe that it would not be allowed in this instance; that he signed the report on July 3 and did not know that the credit had been disallowed by the South

Omaha bank until July 5, which was after the date he supposed the report had gone forward. This was the only defense that the defendant had against the charge of intent to deceive; but this defense was not covered or referred to by any instruction given by the court. Under the information proof of the mere making of a false report was not sufficient, but in addition it must be charged and proved that the defendant thereby intended to deceive. If the execution of the report was made with the honest belief at the time that it was true, and was in fact attributable to an innocent mistake, it cannot be claimed that an intent to deceive is established. We must not be understood as giving our approval to the precise form or language of the requested instruction, but it contained the kernel of the prisoner's defense which he had a right to have submitted to the jury.

The law is well established in this state that it is the duty of the court to instruct the jury upon all the issues of the case presented by the pleadings and the evidence. In civil cases the issues are presented in writing and no other issues need be stated, but in criminal cases plea of not guilty not only puts in issue all of the material allegations of the information but lets in any other matter of defense, such as justifiable homicide, self-defense, insanity, alibi, mistake and so forth; and if there is any sufficient evidence upon any of those matters to go to the jury, it is the duty of the court to instruct as to the law applicable, whether the defendant requests such instruction or not. *Troboughv. State,* 120 Neb. 453; *Blue Valley State Bank v. Milburn,* 120 Neb. 421. If a requested instruction cannot be given in its exact language, the point should be covered nevertheless by an instruction couched in proper terms by the court. *Pospisil v. Acton,* 118 Neb. 200. We think that in any of the cases above supposed, if the court had failed in its instructions to call the attention of the jury to the defense offered and supported by evidence, prejudicial error would have been shown. Although no error may be shown by the refusal of the requested in-

struction on account of its phraseology, nevertheless we think the court should have instructed the jury of the nature of defendant's claim, and to the effect that, if they believed from the evidence that defendant signed the report under an innocent mistake and without any intent to deceive, they should acquit.

We are reluctant to reverse a case where defendant has been twice convicted by a jury, and thus put the state to the expense of another trial, but the defendant is entitled to a fair trial, and this he cannot have unless the matters which he claims constitute his defense are in some way presented to the jury as one of the issues for their decision; and it is our duty to secure the defendant in his right by requiring that the jury, who are the ultimate judges of the facts, be properly instructed as to the issues and applicable law that they may be led to a correct verdict. We are clearly of the opinion that the refusal to give the requested instruction, or at least to explain to the jury by some instruction the nature of the defendant's defense, was error prejudicial to the defendant, and requires a reversal of the judgment of the district court.

The case of *Flannigan v. State*, 124 Neb. 748, cited by the state on this point, is not applicable or controlling, for the reason that the evidence upon what, in the language of the court, "defendant terms his defense" was insufficient to present that question to the jury, it appearing practically without dispute that the note which defendant claimed as an asset and the liability of the First National Bank thereon as indorser had been included in a settlement between the banks.

The seventh ground for rehearing attacks instructions Nos. 7 and 8 given by the trial court to the effect that the jury must determine the matter of intent from the facts and circumstances shown in the evidence. The point made is that the instructions withdrew from the consideration of the jury the testimony of the defendant himself that when he executed the report in question he believed it to be true and had no intention to deceive. In view of the

other instructions given by the court, we held in our former opinion that this instruction was not prejudicial error, and we adhere to that holding. We think it proper to suggest, however, that the court should have instructed that the matter of intent was to be determined from the facts and circumstances and evidence of the witnesses.

The eighth ground charges that the evidence received on counts 13 and 14 of the information was of such a character as to prejudice the defendant in his trial upon count 9. Inasmuch as in our former opinion, to which we adhere, counts 13 and 14 were dismissed, and evidence upon matters referred to in said counts will not be offered upon another trial, we need not determine the point.

The ninth ground urged is that the evidence is insufficient to prove the defendant guilty beyond a reasonable doubt. After a careful study and review of the evidence, we are of the opinion that the evidence is sufficient to submit the question of defendant's guilt to the jury.

It follows that the previous opinion of this court is adhered to except as to points five and six, as to which it is set aside and withdrawn, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEBRASKA STATE SAVINGS BANK, APPELLEE: CTTO H. ANDERSON, INTERVENER, APPELLANT.

FILED NOVEMBER 13, 1934. No. 29015.

1. **Banks and Banking: INSOLVENCY: PREFERRED CLAIMS: TRUST FUNDS.** Before a trust fund may be established as a prior claim against the general assets of an insolvent bank, it must be made to appear that such fund operated to augment the assets of the bank.
2. ———: ———: ———. Mere bookkeeping entries, made to bolster up the reserve of one bank and purporting to show a

deposit in a second bank and redeposit in the first bank on the same day, have no tendency to prove that the assets of the second bank were thereby augmented, to support a claim of preference upon the general mass of assets of the latter.

3. ———: ———: ———. A claim for preference as a trust fund against the assets of an insolvent bank cannot be allowed in the absence of proof of assets in the hands of the receiver upon which the trust may be impressed.

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

H. A. Bryant and *Charles H. Hood,* for appellant.

F. C. Radke, Barlow Nye, W. A. Crossland, J. J. Thomas and *J. F. Berggren, contra.*

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

REDICK, District Judge.

April 15, 1930, the Saunders County National Bank and Nebraska State Savings Bank, both of Wahoo, Nebraska, had failed and were in the hands of a receiver for liquidation. Otto H. Anderson intervened in the receivership proceedings for the purpose of having declared as a trust fund payable before all other claims the sum of $4,000 which he claims was deposited in the State Savings Bank for the special purpose of paying off a note and mortgage which Anderson had theretofore given to the Mutual Benefit Life Insurance Company of Newark, New Jersey. Upon trial the district court for Saunders county found that the amount in question did not constitute a trust fund nor augment the assets of the Nebraska State Savings Bank, and dismissed the petition of intervention, and intervener appeals.

The question presented arises out of the following facts which are undisputed: The original loan by Anderson was procured from the Bank of Weston and assigned to the insurance company. On February 24, 1930, Anderson gave his check on the Weston Bank, where he had an account, payable to the Saunders County National Bank, and

delivered it to the cashier of the Weston Bank with instructions to pay off the mortgage and secure a release. The Weston Bank sent the check to the National Bank with instructions to pay the Anderson loan and send release of the mortgage.

The National Bank and Savings Bank, while separate corporations, were conducted by the same officers, F. J. Kirchman being the president and general manager of both banks. Separate sets of books were kept for each bank under the direction of Kirchman.

The Anderson check was received by the National Bank, in the sum of $4,220 and held as a cash item until March 10, 1930; $220 was remitted to the insurance company for interest, and the balance of $4,000 placed to the credit of Anderson on the books of the Savings Bank. On the same day a deposit of the same item was entered to the credit of the Savings Bank on the books of the National Bank. Anderson had no knowledge of these book entries or the transactions they purported to show. Kirchman, president of the National Bank, testified that at the time of these entries the reserve of the National Bank was greatly depleted, and that the purpose of the entries was to hold up the reserve until he could remit, and that he had no authority from Anderson to make a deposit to his account in the Savings Bank. He further testified that the Savings Bank had no account with anybody except the National Bank, and that every transaction of the Savings Bank was indicated on the National Bank's books. The Savings Bank did not receive actual money, but it got a credit. The Savings Bank was a sort of vehicle to shift back and forth various transactions in order to bolster up the condition of the National Bank. There was no actual transfer of funds between the two banks. The most that can be said of the transaction is that the Savings Bank was credited with $4,000 on the books of the National Bank and debited in a like sum on its own books to Anderson.

Before a trust fund may be established as a prior claim against the general assets of an insolvent bank, it must

appear that such fund operated to augment the assets of the bank (*State v. Farmers State Bank,* 121 Neb. 532), and it is the claim of the intervener that the assets of the Savings Bank were so augmented by the transactions above recited. We are unable to assent to this proposition. In our view, the transaction consisted of mere bookkeeping entries made for the purpose of bolstering up the reserve of the National Bank, and that the assets of the Savings Bank were not thereby augmented. The credit on the books of the National Bank was offset or balanced by the debit to Anderson on the books of the Savings Bank and the creditors of the latter were in no better position than they were before. Suppose the credit had been given to the National Bank on the books of the Savings Bank instead of to Anderson, and a corresponding debit upon the books of the National Bank, could it be contended that the assets of the Savings Bank were thereby augmented? By augmentation of assets is surely meant an increased amount in possession of the debtor bank for the satisfaction of its creditors. Where the total amount due its creditors is increased to the same extent as its assets, no augmentation of the latter is apparent. The mere fact that the amount in question constituted a trust fund in the hands of the National Bank to the knowledge of the Savings Bank did not of itself impress a trust upon the fund, even if it had been actually received by the Savings Bank, any more than funds deposited by an executor or trustee in a bank are so impressed. The bank is not substituted as executor or administrator, nor as trustee, of such funds, although it may be charged as trustee *ex maleficio* if it knowingly or negligently permits the executor, administrator or trustee to divert the funds. For example, if in such case the bank accepts payment from the fund or applies it to the personal debt of the executor or administrator (*Allen v. Puritan Trust Co.,* 211 Mass. 409) it will be held as trustee on the above principle. But it has no duty to see to it that the funds are properly applied by the executor in the management of the estate

(*State v. Farmers & Merchants Bank*, 112 Neb. 840). It is conceded that Anderson does not stand in the relation of a depositor of the Savings Bank because the deposit was made without his knowledge or consent, and such relationship arises only upon contract, express or implied. *State v. Citizens State Bank*, 117 Neb. 358.

An attempt was made to show that the deposit in question credited to the Savings Bank was used by it in the usual course of business, but the evidence fails to show that this fund was so used, and the presumption is that the bank used its own funds rather than the trust fund if such existed. *State v. Bank of Commerce*, 54 Neb. 725; *City of Lincoln v. Morrison*, 64 Neb. 822.

But there is another reason preventing the allowance of the sum in question as a trust fund, viz., the evidence fails to establish that assets came into the hands of the receiver sufficient to pay the claim, and therefore it is not shown that there is any mass of assets upon which the trust can be impressed.

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

AFFIRMED.

CHARLES P. BRATT, APPELLANT, V. JOSEPH S. WISHART, ADMINISTRATOR, ET AL., APPELLEES.

FILED NOVEMBER 16, 1934. NO. 29007.

1. **Witnesses: COMPETENCY.** In a suit by her husband against an estate, to recover money alleged to be a trust and praying a lien against the specific real estate upon which the trust fund was expended, plaintiff's wife has no direct legal interest in the result, and therefore section 20-1202, Comp. St. 1929, does not make her an incompetent witness as to transactions or conversations with the deceased.
2. ———: ———. In such circumstances, plaintiff is incompetent to testify as to the transactions or conversations with the deceased.

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

Hall, Cline & Williams, Wilmer B. Comstock and *John H. Comstock,* for appellant.

Paul F. Good and *Joseph S. Wishart, contra.*

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

GOSS, C. J.

Plaintiff appeals from the refusal of the district court to declare a trust against a farm, left by John P. Bratt, now deceased, upon which plaintiff had made improvements. He asked a lien for their value.

John P. Bratt owned in Lancaster county a 240-acre farm without any buildings on it, but upon which plaintiff had erected buildings and made other improvements. He died intestate on April 25, 1930, leaving as his sole heirs his widow, Mary E. Bratt, and his daughter, Lourene Wishart. Joseph S. Wishart, husband of the daughter, was duly appointed administrator. These three are the only defendants.

Plaintiff was a nephew of deceased. The petition alleged that in 1919 he desired to engage in farming and to acquire and own a farm; that deceased desired to assist him in that purpose and so they mutually and orally agreed that plaintiff should occupy the farm and should construct thereon such improvements as were convenient and necessary, it being agreed that the occupancy should continue until the oral agreement should be terminated by mutual consent or until plaintiff became convinced that he could make a success of the business of farming and could buy the real estate; that plaintiff entered into possession under the oral agreement and on or about 1919 built a house, barn, corn crib, hog house, chicken house and fences, dug wells and planted nursery stock, all of which were paid for by plaintiff at a total cost, itemized in the petition, of $10,261.79; that it was further originally

agreed that, if for any reason it was later mutually agreed that plaintiff should vacate, John P. Bratt would take over the improvements and pay plaintiff the cost thereof with lawful interest, the same to be paid when deceased should sell the land; that in 1922 it was further orally and mutually agreed that plaintiff would surrender possession and that John P. Bratt would take possession and use the improvements until such time as he should sell the real estate, when he would pay plaintiff the sum of $10,261.79, together with a reasonable rental for the use of the improvements from 1922 until the sale should be made; that the reasonable rental value of the improvements was $400 a year; that on May 8, 1928, John P. Bratt made and executed a memorandum as follows:

"The 240 acres in sec. 9-8-8, should never be sold for less than $150 per acre, plus $5,000 or $6,000 for the improvements and should bring $200 or more per acre before many years.

"When this land is sold I want it sold plus the improvements and the amt the improvements bring to be paid to Charles P. Bratt, who built them.

"May 8-26. John P. Bratt,
"1501 C St."

Plaintiff alleges that the quoted memorandum was written by the hand of John P. Bratt and was found among his papers after his death; that from July, 1922, to April 14, 1930, plaintiff carried insurance in his own name upon the improvements, but on said date John P. Bratt, or some one in his name, caused the insurance to be canceled, insured the buildings in the name of John P. Bratt, asserted absolute title in John P. Bratt, converted the use and sought to deprive plaintiff of all ownership and interest therein; that the facts of the cancelation of the insurance, the conversion of the improvements and assertion of title were not discovered by plaintiff until about January 8, 1931. Plaintiff alleges, by reason of the facts, the relationship of trustee and *cestui que trust* between John P. Bratt and plaintiff.

Plaintiff prays that the trust be declared against the widow and daughter of John P. Bratt, personally, for all improvements placed upon the real estate by plaintiff; and that the court decree the value of the improvements and the reasonable value of the rental for the use thereof since 1922 to be a lien upon the real estate.

Defendants pleaded the four years' statute of limitations, referring to sections 20-206 and 20-207, Comp. St. 1929; pleaded that, under the statute of frauds, to wit, under sections 36-103 and 36-105, Comp. St. 1929, the claim of plaintiff is not enforceable for the reason that the claim is not in writing nor claimed to be based upon any instrument in writing; pleaded that the purported restraint upon alienation created by the memorandum of May 8, 1926, heretofore quoted, is wholly void; pleaded that the instrument was not executed in accordance with the statute relating to wills (Comp. St. 1929, sec. 30-205), is not entitled to probate, has not been offered for probate, and is wholly void and of no effect.

The evidence shows that in 1919 and 1920 plaintiff went into possession of the farm and erected thereon and paid for improvements substantially of the character and cost alleged in his petition; and that in 1922 he surrendered possession of the farm to John P. Bratt, who at all times held the record title and who died intestate on April 25, 1930, leaving his wife and daughter as his only heirs. Whatever agreement or agreements there were between them at the inception of their dealings in the matter, at the time plaintiff left the farm or at any other time, were oral. Out of this situation arise the main elements and difficulties of this unhappy controversy.

Plaintiff was not allowed to testify that he went on the land with an understanding that, if he could handle the proposition, John P. Bratt would enter into a written agreement, selling the land to him at $175 an acre; was not permitted to testify that in 1922, when he gave up possession, and subsequently on other occasions, John P. Bratt orally agreed that plaintiff had spent more than

$10,000 in the improvements and would be paid when the land was sold. This testimony was excluded under section 20-1202, Comp. St. 1929, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless" (specifying exceptions). No exception named in the rest of the statute is present. Plaintiff's testimony on this subject was properly excluded.

Likewise, Loretta Bratt, wife of plaintiff, was not allowed to present her duly offered testimony as to conversations with John P. Bratt. She was permitted to state that, before her husband began the erection of the buildings, she was present with him at John P. Bratt's home in Lincoln, when plaintiff and John P. Bratt had a conversation in reference to "erection of buildings on this land" and also "in reference to Charles and his family purchasing this land;" but she was not allowed to state the conversation, the court sustaining an objection by defendants that the witness had a direct legal interest in the outcome of the suit and the adverse parties are the legal representatives of the deceased. So, also, questions asked Loretta Bratt, involving several later conversations with John P. Bratt, relating to payment for the improvements, one as late as Thanksgiving time in 1929, were not permitted to be answered by her on similar objections. These rulings are assigned as erroneous.

The purpose of the questions asked Loretta Bratt was not to show a right in Charles P. Bratt to any present title resulting from a purchase of the property. All parties seem to agree that he surrendered the real estate in 1922. On no theory of the pleadings or evidence can he be said to claim the title. What he was seeking was to show the whole history out of which he claims John P. Bratt became the trustee of the fund expended for improvements upon the farm and liable to account for it to him as the beneficiary. The avowed purpose of this suit,

as shown by the pleadings and particularly by the prayer, is to have a lien decreed against the land in favor of plaintiff. Nowhere does the evidence show that Loretta Bratt had any financial interest in the expenditure for the improvements. She has no dower interest in any lien that might be found in favor of her husband, which is evidently the theory upon which defendants objected and the court thought she had a "direct legal interest" in the result of the action. No title to real estate, homestead or otherwise, was involved. The fruits of the suit, if any, would be the separate property of the husband. We are not called upon to decide, and do not decide, whether a wife has such an inchoate interest by dower, or otherwise, in her husband's separate real estate as can be divested only by her conveyance, because that question is not presented by the facts.

We are of the opinion that the court erred in excluding her testimony as to every conversation with John P. Bratt offered relating to the building of the improvements and the manner in which John P. Bratt took them over, held them, and intended to reimburse her husband for them.

But, quite aside from her testimony, we think there is ample evidence to show that John P. Bratt held, and intended to hold, the improvements from the time Charles P. Bratt surrendered the farm in 1922 in trust for Charles P. Bratt. There is in evidence his own written memorandum (quoted in the statement of the pleadings) that Charles had built the improvements, that he wanted the land sold for a certain minimum price an acre "plus $5,000 or $6,000 for the improvements" and the amount paid to Charles P. Bratt. In view of all the circumstances in evidence, this memorandum seems to indicate that he considered himself as holding the improvements in trust for Charles P. Bratt and that he intended that Charles P. Bratt should be paid $5,000 or $6,000 for them out of the proceeds of the sale of the land. It was a voluntary declaration on his part that they were worth that much or

that there was that much of their original cost or agreed value unpaid for.

Among the circumstances in evidence corroborative of the trust theory are the following: (1) O. M. York testified that he rented the land after Charles P. Bratt left it in 1922. He wanted a lease for more than a year, but John P. Bratt told him that Charley had put over $10,000 in improvements on the place and he would not lease it for more than a year because "the place was for sale so that Charley could get his money out of the improvements, and he could get his out of the land;" (2) John R. Wood, a farmer, who was engaged in selling land since 1918, testified that, in the fall of 1922, Mr. Bratt asked him to sell the farm for $200 an acre. When the witness said that was too high, Mr. Bratt said he thought he would have to get that much because "Charley has got about $10,000 worth of improvements there;" (3) Reuben Conn, acquainted with John P. Bratt, had two conversations with him in which he said that Charles should have his money back for the buildings.

The funds put into the improvements by Charles P. Bratt augmented the value of the real estate and they are still there. Fair dealing and equity imperatively demand that Charles P. Bratt should be paid for them. We think we might, under such evidence as was permitted to be introduced, find a trust for $5,000 or $6,000—possibly only the smaller amount—by reason of the evidence left in the memorandum of John P. Bratt, aided by other testimony and circumstances. But we think that not only this memorandum but the evidence excluded by the court should be considered in order to give fair recompense to plaintiff for his expenditures upon the land.

For the reasons stated, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

LEE A. BAILEY, APPELLEE, V. CABEL W. BRYANT, APPELLANT.

FILED NOVEMBER 16, 1934. No. 29018.

1. **Automobiles:** RECKLESS DRIVING. Under the Iowa guest law (Iowa Code 1931, sec. 5028) an operator of a motor vehicle is reckless if he drive the automobile heedlessly and with a reckless disregard for the safety and rights of others or of the consequences.
2. ———: INJURY TO GUEST: ASSUMPTION OF RISK. The court cannot say as a matter of law that a guest was barred from recovery for injuries against the owner and driver of automobile on the theory he assumed the risk of the driver's reckless acts, when the evidence failed to show that the guest acquiesced in such acts. *White v. Center*, 254 N. W. (Ia.) 90.
3. **Appeal.** The admission of evidence that is not prejudicially erroneous does not constitute reversible error.

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

Story & Thomas, for appellant.

Rosewater, Mecham, Burton, Hasselquist & Chew and *Donald S. Krause, contra.*

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

GOSS, C. J.

Defendant appeals from a judgment against him arising from an automobile collision in Iowa and therefore governed by the Iowa laws.

Defendant and his wife had picked up their old friends, plaintiff and his wife, to take them from Omaha to Carter Lake Club, to see a twilight game of baseball. Defendant was driving his car with plaintiff seated at his right and the women were in the back seat. They went east until they reached Thirteenth street, a street paved for 20 feet of its width, and with good dirt shoulders, where they turned north. After driving north about 600 feet defendant's car collided with a car standing still, facing west on

the east side of the intersection of Perkins street, as a result of which plaintiff was injured.

There was evidence the collision occurred about 6:30 p. m. August 10, 1932; after turning north the sun interfered with defendant's vision and he drove with one hand, shading his eyes with the other; the car was not equipped with a sunshield and defendant started a conversation on that subject in which at least his wife engaged; there was evidence he was driving somewhere between 30 and 40 miles an hour at the time of the collision; after the car had turned into Thirteenth street his wife "asked him to slow down a little bit" and as he complained of the sun plaintiff admonished him to be careful if he could not see where he was going; as he approached the intersection defendant had his head turned to the right in conversation with his wife about the purchase of curtains for the car; until the collision he did not see the other car which had entered the intersection and stopped; though the paved street was not arterial, the driver of the other car so treated it, because of high weeds on the east side of Thirteenth street south of Perkins, and stopped 10 or 15 feet short of it, started in low gear, shifted to second and drove his front wheels upon the pavement and stopped when he saw defendant's car coming on the right side of the pavement, 75 or 100 feet away, with its driver looking back; defendant did not slow down, nor change his course, though there was time to stop and ample room to pass on the pavement; the right front of defendant's car struck the left front of the other car, turned it around to the north and over on its side; defendant's car went toward the left, through a fence and into a field about 150 feet from the place of impact; there were no other cars in sight.

Logically and chronologically, the first six assignments of error raise the question as to the sufficiency of the evidence and, corollary thereto, the question of the duty of the court to direct a verdict for defendant, but we think it will save space to take up first the assignment against

the fourth instruction given by the court to the jury, purporting to state the gist of the Iowa guest law which both parties pleaded. Plaintiff proved the statutes and offered in evidence, as likewise did defendant, many decisions of the supreme court of Iowa relating to reckless driving under the Iowa statutes.

The fourth instruction just referred to is as follows:

"You are instructed that the accident in question occurred in the state of Iowa, and the rights of the parties are governed by the laws of that state as set forth in the pleadings. The statute of Iowa provides as follows: 'The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle.' Iowa Code 1931, sec. 5026-b1.

"It is not claimed that the defendant was intoxicated; the only ground of recovery alleged by the plaintiff is that he suffered the injuries of which he complains because of the reckless operation by the defendant of the automobile in which the plaintiff was riding with the defendant as an invited guest at the time of the accident or collision between the two automobiles.

"With regard to the term 'reckless operation' used in the statute, you are instructed that it was the evident intention of the legislature of the state of Iowa to exempt the driver of an automobile from liability for injuries suffered by the guest because of ordinary negligence on the part of the driver, and to permit such guest to recover only when injuries were the result of recklessness as distinguished from mere negligence on the part of the driver. It is therefore necessary to distinguish between negligence and recklessness in the determination of this case.

"Negligence is the doing of some act under the circumstances that an ordinarily prudent person would not do, or the failure to do some act or take some precaution which

a person of ordinary prudence would have done or taken.

"Recklessness is heedlessness or indifference to the rights of others or of the consequences of one's acts; it signifies the driving of an automobile heedlessly and in a reckless disregard of the rights of others or of the consequences.

"For mere negligence the defendant would not be liable. For recklessness, that is to say if you find the defendant was operating his car in disregard of the safety and rights of others or of the consequences, he would be liable to invited guests if the injuries were proximately caused by defendant's recklessness."

An examination of the transcript in *Jennings v. Biurvall,* 122 Neb. 551, shows that the instruction there and here are almost identical. In the opinion in the *Jennings* case the instruction as there quoted omitted the last paragraph of the instruction actually given as shown by the transcript. The instruction seems a perfect model in Iowa guest cases in which the facts justify instructions and so we have quoted it in full. The instruction seems to accord with Iowa decisions on its guest law. *Siesseger v. Puth,* 213 Ia. 164; *Neessen v. Armstrong,* 213 Ia. 378; *Siesseger v. Puth,* 216 Ia. 916.

Defendant complains of the refusal to give his fourth requested instruction in which he presented substantially the same definition of the word "reckless" as was given by the court and then added these words: "You are instructed that the term 'reckless' does not mean momentary thoughtlessness, inadvertence of judgment or mere negligence." The court's instruction fairly covered the last two thoughts. He was justified in refusing the negatively phrased "momentary thoughtlessness" idea because that was one of the real circumstances submitted to the jury in general and affirmative terms. To single out the circumstance of his looking back while engineering a most dangerous machine and driving into inevitable disaster and to instruct the jury that it did not matter would have invaded the province of the jury. It is an evidence of

negligence and is frequently the essence of recklessness for one driving a motor car forward ever to look backward. There was no error in leaving this to the jury, as the court did, rather than to take it away from them as the defendant requested.

In a recent opinion (April 3, 1934), announced after the briefs were filed herein, the Iowa court held that a gratuitous guest has a right to have the facts submitted to a jury when there is evidence that the owner and operator of the car was traveling at an excessive rate of speed without a proper lookout or control of his automobile. *White v. Center,* 254 N. W. (Ia.) 90. There was testimony that the defendant's car ran into a load of corn traveling on its own side of the road. The trial court directed a verdict for the defendant. The supreme court reversed the judgment, saying: "Under the evidence presented in this case, we think a jury might reasonably infer that, if the driver of the automobile used any care whatever in keeping a lookout ahead, he must have seen the wagon when he was a sufficient distance away from it that he could have easily slowed down or turned out and thus have avoided hitting it. If he did not see this wagon, which the evidence shows was visible for at least a quarter of a mile, he was certainly guilty of recklessness in using no care whatever."

Under the facts and applicable Iowa decisions, we think that it was proper to submit this controversy to the jury.

Here defendant complains the court erred in refusing to give a requested instruction that the defendant assumed the risk. In the Iowa case just quoted the court said: "The evidence in the case before us does not show that appellant had any knowledge of or acquiesced in the acts of the driver which it is claimed caused the accident, and we cannot say, as a matter of law, that the appellant is debarred from recovery because he assumed the risk of the reckless acts of appellee upon which he seeks to recover." The evidence here is very similar. We do not think the court erred in refusing the instruction.

Defendant says the court erred in receiving in evidence the speed ordinance of the town of Carter Lake, fixing maximum speed at 30 miles an hour. On the trial the only objection defendant made to the ordinance was that it was incompetent and irrelevant to any issue in the case. He explained that by saying his objection was based upon a belief that the ordinance had been superseded by statute. In his motion for new trial he said the ordinance was improperly received "as no proof was offered that the accident occurred in Carter Lake." In his amended answer he pleads that the collision occurred in the suburban district of the village and pleads the statute, which says that the speed in a suburban district shall be the same as "that provided by law for vehicles on highways outside of cities and towns." The same statute was offered by plaintiff and received in evidence. We do not find any maximum speed statute in Iowa. After this fact developed on the trial the defendant did not move to strike the ordinance from the evidence, did not request any instruction, and the court made no reference to the ordinance. The whole theory upon which the case was tried was that defendant was reckless in his inattention to the road and so failed to see the other car until he drove into it. If he had been going 25 miles an hour the collision would probably have occurred. We do not think admitting the ordinance was, in the circumstances, prejudicially erroneous.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. PAUL SUTTON, APPELLEE, V. ROY N. TOWL ET AL., APPELLANTS.

FILED NOVEMBER 16, 1934. No. 29046.

1. **Mandamus.** The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.
2. ———: REMEDY AT LAW. Facts examined, and *held*: (1) That relator was legally suspended by the city council from his office of detective sergeant; (2) that it was a matter for de-

termination of the city council in the first instance as to whether he was entitled to pay while suspended; and (3) that, upon the refusal of the council to provide pay in the suspended period, relator had a plain and adequate remedy at law by appeal.

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

Seymour L. Smith, A. C. R. Swenson and *Harold C. Linahan,* for appellants.

Dorsey & Baldrige and *Benjamin S. Baker, contra.*

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

GOSS, C. J.

The respondents appeal from a judgment granting a peremptory writ of mandamus providing for the payment to relator of $2,485 unpaid salary as a member of the Omaha police department for a period during which he was suspended.

From July 16, 1928, to March 2, 1932, Paul Sutton, the relator, was a detective sergeant. On the last named date a written communication was served on him from John Hopkins, a member of the city council and superintendent of the police department, notifying him that he had been indicted by the federal grand jury for conspiracy to violate the national prohibition act and suspending him as such police officer until the indictment should be dismissed or until he should be acquitted. A copy of the communication was sent to the chief of police, who on March 8, 1932, in a communication to the city council, preferred charges against Sutton, calling attention to his indictment, saying that the charge impaired the detective's usefulness as a member of the police department, and that it was "necessary for the proper management of the police department, and the effective working and service thereof, that the said Paul Sutton be suspended from his office until the determination of the charge set forth in said indict-

ment." Hearings on the charges were duly postponed until March 19, 1932, when Sutton filed an answer alleging that the charges were insufficient, that the chief of police had no authority to hear the matter and to make the order of suspension, and that the council had no authority or jurisdiction to hear and determine the charges, and no power or authority to make an order of suspension on or under the terms of the charges filed. It was stipulated that relator admitted on the hearing that he was the Paul Sutton named in the indictment and that there was no further evidence on either side, but that at the conclusion of the hearing a motion was duly carried sustaining the charges against the relator.

On May 9, 1933, Sutton presented to the city council a written communication that on March 19, 1932, he had been suspended because indicted for conspiracy. It recited that later he had again been indicted for the same offense. This communication was accompanied by a certificate from the district court of the United States for the district of Nebraska showing that two indictments against him had been dismissed as to all defendants on April 21, 1933. He asked reinstatement to his old rank in the police department. On May 9, 1933, the city council acted favorably and restored him to the police department and to the rank he held at the time of his suspension.

On August 21, 1933, relator in writing made formal demand upon the mayor, city council and comptroller for his salary from March 2, 1932, to May 9, 1933, reciting that he was illegally suspended without his consent and over his protest, without a trial or hearing upon any charge of official misconduct.

Section 14-609, Comp. St. 1929, makes all members of the police department in metropolitan cities subject to removal by the city council in the same manner as provided for members of the fire department. Section 14-707 makes members of the fire department "subject to removal by the city council under such rules and regulations as may be adopted, and whenever the council shall consider and

declare such removal necessary for the proper management or discipline, or for the more effective working or service of the fire department."

Ordinance 10817 of Omaha provides for trial of a member of the police department by the city council for (1) misconduct, (2) neglect of duty, (3) disobedience of orders, (4) incompetency, or (5) unfitness to be a member of the department. On the ground that none of these things were contained in the charge of the chief of police upon which he was tried, Sutton objected to the jurisdiction and authority of the council, as heretofore recited. But the ordinance failed to contain the additional calls of section 14-707, both of which were in the charges, that the suspension was (1) "necessary for the proper management" and for (2) the "effective working or service" of the department. The statute authorized the ordinance as far as the ordinance went, but these other provisions of the statute also remained in force. The city could not, by failing to include them in the ordinance, repeal them or make them inoperative. Whether a detective sergeant should be suspended as a member of the police department, while under indictment charging him with unfaithfulness in a matter so closely related to his official duties, was a judicial matter for the city council, sitting as a tribunal and peculiarly fitted by law to decide. We are of the opinion the charges were sufficient and that the city council had jurisdiction and authority to hear them.

It is further argued that the suspension was not legally effective because the council did not make or enter any order in respect thereto. It is admitted that the council adopted a motion that the charges be sustained. It was recorded on their minutes or journal of March 19, 1932. It has not the formality of an order of a court of record, but we think it is sufficient. A city council need not to be held to the particularity of a court of record. Sutton knew what the written charges were and what the order was. He took no appeal and indeed took no action until he had served another period after his reinstatement and

then had been dismissed along with other officers as a matter of economy. Of this later dismissal no complaint is made in this action.

We are of the opinion relator was legally suspended. It probably follows that he was not entitled to pay during the period of his suspension. At least there was no clear official duty to pay him as there might be in a case where he had served as an officer and his stated official salary was due him. It was a matter to be determined by the city council. He took no appeal from their decision. For his failure to follow this "plain and adequate remedy in the ordinary course of the law" mandamus is no substitute. The writ ought not to have been issued. Comp. St. 1929, sec. 20-2157; *State v. Fulton*, 118 Neb. 400, and many cases reviewed therein.

The district court erred in granting the writ. Its judgment awarding the writ is reversed, the writ quashed and the proceedings dismissed at relator's costs.

REVERSED AND DISMISSED.

JOSEPH L. FRANEK, APPELLANT, V. BUTLER COUNTY, APPELLEE.

FILED NOVEMBER 16, 1934. No. 28917.

1. **Highways: INJURIES: LIABILITY OF COUNTY.** A county is a political subdivision of the state, having subordinate powers of sovereignty conferred by the legislature for the purposes of local administration, and consequently is not liable at common law for negligence in improving a public highway.
2. ———: ———: ———. Sovereign immunity of a Nebraska county from liability for negligence in failing to keep a public highway in repair was taken away in 1889 by a legislative act applicable to all counties.
3. ———: IMPROVEMENT. A county under township organization has statutory power to improve a highway therein by designating it a "county road," contracting for its improvement and making necessary repairs. Comp. St. 1929, secs. 39-227, 39-228, 39-229, 39-212

4. ———: ———: NEGLIGENCE: LIABILITY OF COUNTY. Liability for negligence in improving roads which "counties are liable to keep in repair" followed counties into township organization.
5. ———: ———: ———: ———. When a county under township organization supersedes townships in authority over a public highway, enters into a contract to improve it and proceeds to do so, the highway becomes one which the county is "liable to keep in repair," within the meaning of the statute creating liability for negligence.
6. ———: ———: ———: ———. A county under township organization, by improving a highway without designating it a "county road," does not thus necessarily escape liability for damages resulting from negligence.
7. **Case Distinguished.** Ruling in *Goes v. Gage County*, 67 Neb. 616, that the duty to keep in repair ordinary roads and resulting liability for negligence do not fall on counties under township organization, distinguished, owing to changes in statutes.
8. **Case Overruled.** Ruling in *Franek v. Butler County*, 126 Neb. 797, that counties under township organization are not liable for damages arising out of defects in a road not designated a "county road," withdrawn upon reconsideration in the same case.

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

J. J. Krajicek, John G. Tomek and *Phillip A. Tomek*, for appellant.

J. C. Hranac, Coufal & Shaw and *Ray E. Sabata, contra.*

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

ROSE, J.

This is an action to recover from Butler county $10,000 in damages for alleged negligence in removing the covering from a culvert approximately eight feet wide and three feet deep across the Loma highway and in leaving the roadway and the channel of the culvert open at night without barricades, lights or other sufficient warning of danger. Plaintiff was injured about 9 o'clock p. m. July

11, 1931, when an automobile in which he was a passenger was driven by Leo Hollinger into an open culvert on the Loma highway. The petition alleged that the driver and plaintiff exercised due care and caution and that the latter's injuries were caused by the negligence of Butler county. The negligence charged by plaintiff was denied in an answer to the petition, but the action was defended principally on the theory that Butler county was under township organization and therefore not liable for any negligent defect in the Loma highway, because not made so by statute, since it was not a state or a federal highway nor a part of the county road system.

The cause was tried to a jury and at the close of plaintiff's evidence the trial court directed a verdict in favor of Butler county. From a dismissal of the action plaintiff appealed. Upon a review of the record the judgment was affirmed, the former rulings on appeal being as follows:

"At common law counties are not liable for damages for injuries arising out of defects in roads or bridges.

"Counties under township organization are not liable for damages for injuries arising out of defects in a road or bridge, unless (1) the particular road has been designated as a county road or (2) the bridge passes over a stream." *Franek v. Butler County*, 126 Neb. 797. A further hearing was granted on motion of plaintiff and the questions presented by the record were reargued and reconsidered.

The Loma highway is on a section line. It had been open to and used by the public generally for more than ten years. It is, therefore, a public highway authorized by statute. Comp. St. 1929, sec. 39-103. It is in Butler county, which let a contract under which the Loma highway was graded and otherwise repaired. The accident occurred in the course of the improvement. On the issue of the county's negligence in leaving the roadway and the culvert open at night without barricades or lights or other sufficient notice or warning of danger, plaintiff made a *prima facie* case for the recovery of damages. The question for reconsideration upon the reargument, therefore, is

whether the statutes of the state authorize a recovery for damages resulting from such negligence.

A county is a political subdivision of the state, having subordinate powers of sovereignty conferred by the legislature for the purposes of local administration, and consequently is not liable at common law for negligence in improving a public highway. The former opinion herein properly so held. *Franek v. Butler County,* 126 Neb. 797. To change the common law in this respect the legislature in 1889 enacted a law containing in part the following provision:

"If special damage happens to any person, his team, carriage, or other property, by means of insufficiency or want of repairs of a highway or bridge which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county." Laws 1889, ch. 7, sec. 4, Comp. St. 1929, sec. 39-832.

This is now the law. When enacted it applied alike to all counties. No distinction in the statute itself was made between counties. Sovereign immunity from liability for negligence in improving public highways was taken away without recognition of different forms of county government.

According to the *prima facie* case made by plaintiff, Butler county entered into a contract for the improvement of the Loma highway and by negligence in leaving the roadway and culvert open at night without sufficient warning caused the injuries for which plaintiff seeks damages. As already shown, sovereign immunity from such liability was removed in 1889. What is now the defense? It is that the Loma highway was never designated a "county road" and therefore is not one which Butler county is "liable to keep in repair," within the meaning of the statute abrogating common-law immunity from negligence. Butler county had statutory power to improve the Loma highway by designating it a "county road," by contracting for the improvement, and by making necessary

repairs. Comp. St. 1929, secs. 39-227, 39-228, 39-229, 39-212. It exercised power to improve the Loma highway. It entered into a contract for that purpose. It superseded the townships in authority. It graded, excavated and made other improvements. After it assumed control under statutory power, responsibility for the public improvement and liability to individuals for negligence resulting in damages did not continue in or shift to townships or oscillate between county and townships. Liability followed the exercise of power and the superseding of the townships. *Goes v. Gage County*, 67 Neb. 616, wherein it was held that the duty to repair ordinary roads and resulting liability for negligence were imposed on townships in counties under township organization, and not on such counties, does not control the present case, owing to changes in statutes. The legislature intended to place duty and liability in a single political body for public purposes. The county was a unit with power to supersede the townships in authority. When the townships were superseded by the county it was the latter's duty to keep the Loma road in repair for public travel. When the county entered into the contract and proceeded thereunder, the Loma highway was one which the county was "liable to keep in repair," within the meaning of the act of 1889, making a county liable in damages for negligence. This seems to be the better interpretation of all the statutes relating to the entire subject. Butler county, by failing to designate the Loma road a "county road" before proceeding to improve it, did not escape responsibility for negligence. Having reached this conclusion, the former syllabus and that part of the opinion containing the ruling that counties under township organization are not liable for damages arising out of defects in a road not designated as a "county road" are withdrawn. The judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED.

GOSS, C. J., and GOOD, J., dissent.

CARLOTTA HENLEY, APPELLANT, V. LIVE STOCK NATIONAL BANK ET AL., APPELLEES.

FILED NOVEMBER 16, 1934. No. 29022.

1. **Trial:** FINDINGS. Section 20-1127, Comp. St. 1929, provides that, where a jury has been waived, either party may request the court to state its conclusions of fact and of law separately. As no time is given in the statute within which such request must be filed, *held*, that such request is effective if made within a reasonable time before action is required thereon.
2. **Gifts.** To make a valid and effective gift *inter vivos*, there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee.
3. ———. A gift *inter vivos* does not differ in its essential elements from a gift *causa mortis*, except that in the latter the survival of the donor may defeat the gift.
4. **Election of Remedies.** If a party has two inconsistent existing remedies on his cause of action, and makes choice of one, he is precluded from thereafter pursuing the other, and this doctrine may be as applicable where the remedies are against different persons as where they are against the same person.
5. ———. The doctrine of election of remedies has no application where the former action was a futile attempt to assert an alleged right which plaintiff never possessed, and in the assertion of which she was defeated.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Reversed, with directions.*

Marcell & Caldwell, for appellant.

Gray & Brumbaugh, contra.

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

PAINE, J.

This is a cause of action arising out of a purported gift to Carlotta Henley, plaintiff and appellant, by Hans Larsen, deceased, of a sum of money, represented by his passbook, No. 10301, issued by the savings account department of the Live Stock National Bank, of Omaha, in the sum of $812 and interest. A jury was waived. The district court entered a judgment finding that the evidence failed

to prove a gift, and that the defendant, Stephen Hansen, administrator and intervener, was entitled to said savings account, and dismissed plaintiff's action.

The motion for a new trial set out three grounds for reversal: First, the refusal of the court to comply with a written motion requesting special findings of the court, setting out separately its conclusions of law and of fact; second, errors of law occurring at the trial; third, that the verdict is not sustained by sufficient evidence and is contrary to law.

It is necessary to give a rather complete statement of the facts, most of which are not disputed. Hans Larsen, at the time of the purported gift, had been employed as an iceman at the Cudahy ice-house, and had lived for some years at the home of Michael C. Kelley, who had been foreman or superintendent of the Cudahy ice-house for 37 years, and had known Hans Larsen for seven years.

In 1925 Hans Larsen was pensioned at $30 a month, and, in addition to that, had an insurance policy of $500 and the savings deposit in suit in this case. The plaintiff, Carlotta Henley, is the daughter of Michael C. Kelley, and was staying with her parents at the time, having just returned home from the hospital. About 8 o'clock on the evening of April 16, 1932, while Mr. and Mrs. Kelley and Mr. Larsen were sitting at the dining-room table in their home, Mr. Larsen referred to having a pension and his insurance, and then said that he had some money in the bank, and said, "I got a will here, * * * I understand I have got to have two signatures," and Mr. Kelley says that Mr. Larsen requested him and his wife to sign it as witnesses, which they did. Exhibit No. 1 reads as follows:

"Dear Carlotta

"I give to you my money in Live Stock Bank.

"Hans Larsen.

"April 16 1932.

"Witness: Michael C. Kelley,

"Mamie V. Kelley."

As soon as this instrument was signed by the witnesses,

Mr. Larsen put it in his bank book and stepped into the parlor, where Carlotta was sitting, and said, "Carlotta, I will give you this," and he handed her the bank book, with exhibit No. 1 folded inside. Mr. Larsen was apparently in good health at the time, and went fishing the next day, but died June 12, 1932, leaving one sister, Anne Christensen, residing in a suburb of Copenhagen, Denmark.

On July 5, 1932, Carlotta Henley filed a petition to probate this instrument, exhibit No. 1, as a will, setting up that the deceased had no real estate, but had personal property. Proof was furnished by Michael C. Kelley and his wife that they saw the deceased sign the instrument, and signed as subscribing witnesses thereto. On November 9, 1932, the county judge, upon the objections filed by Frank V. Lawson, Danish vice-consul, entered an order denying probate and disallowing said instrument as a will, and appointed Stephen Hansen as administrator of the estate.

Thereafter, on December 14, 1932, the plaintiff herein filed this suit against the Live Stock National Bank and Stephen Hansen, administrator, asking for judgment for $812 and interest for money had and received. Each of the defendants filed answer, and trial was had on January 20, 1933, and the county judge entered judgment on the same day for $824.18 in favor of the plaintiff and against the Live Stock National Bank. The cause was appealed to the district court, and by stipulation tried upon the original pleadings. On June 9, 1933, a jury was waived, the cause was tried to the district court, and after the arguments of counsel the cause was taken under advisement. The next day a motion was filed by the plaintiff, requesting that the court furnish its findings of fact and law separately in the above entitled action. On June 21, 1933, the district court entered its order and judgment, finding that the Live Stock National Bank had an account in the name of Hans Larsen, amounting to $834.82, drawing 2½ per cent. interest, which it held subject to the order of the court, and found that the evidence failed to prove the

existence of a gift to the plaintiff, and that the administrator is entitled to the aforesaid deposit, and entered judgment accordingly.

The first assignment of error is based on the refusal of the trial court to comply with the request of plaintiff for separate conclusions of fact and law, in accordance with section 20-1127, Comp. St. 1929, which was first adopted in 1858, and provides generally that where a jury is waived it shall not be necessary for the court to state its finding except generally, unless one of the parties request it, but in such case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

In the case at bar, it is insisted that the day after the cause was submitted, and within 24 hours after the case was taken under advisement, the plaintiff filed a written motion requesting separate findings of law and fact, and that 11 days later, on June 21, the court entered its final judgment and order, but neglected to comply with said motion. In the argument in this court, it was insisted by Attorney Henry J. Beal that the trial court might have found that the plaintiff was estopped from bringing this action because of her former action, attempting to probate the instrument as a will, or the court might have found that the instrument was a forgery, or it might have found that it was *res adjudicata,* and insists that this is exactly the kind of a case that is covered by the statute to enable the reviewing court to determine clearly upon what facts the trial court based its decision in order to see whether the law was correctly applied to the facts.

This statute has been before this court many times, and in its last appearance, in *National Bond & Investment Co. v. Haas,* 124 Neb. 631, it was there held that the trial judge did not need to make separate conclusions as to the facts, because no oral evidence was taken, and there being no disputed question, all of the facts were stipulated by the parties. In the early case of *Haller v. Blaco,* 14 Neb. 195, it was held that there was but a single conclusion of

fact, to wit, that the court found that the complaint was not true. The defendant also cites the case of *Ross v. Barker*, 58 Neb. 402, in which the court held that the request should be made at the time of trial, and not later than at the final submission of the cause, for the judge should not be called upon at the time of the rendition of his decree to then particularize in regard to every conclusion of fact and of law, and that it seems compatible with the true rules of procedure that, if the judge must comply with such a request, the same be made at such a time as will enable him to comply with it conveniently, and cites Elliott, Appellate Procedure, sec. 732, to the effect that, if no time is fixed by law, the request must be made within a reasonable time before action is required upon it. "The trial court should be allowed a reasonable time and opportunity to consider and decide upon the questions involved, and to do what the request requires should be done."

On the other hand, the plaintiff cites several cases supporting her request. In *Wiley v. Shars*, 21 Neb. 712, a request was made for separate findings in regard to questions of fact and law, and it was held that it was error for the court to refuse to make such findings, and that such error was not cured by setting out findings in the journal entry overruling the motion for a new trial. In examining the record in this case filed in this court, we find that the trial was had at Kearney, as shown by the bill of exceptions, before Honorable William H. Morris, who was district judge in the fifth district, on January 26, 1886, and that on the same day a request was filed that the court make findings of fact and law separately, but on the same day the judgment was entered, which did not set out separate findings. On January 29, 1886, in ruling upon the motion for a new trial, the resident district judge, Francis G. Hamer, made several findings of fact, but this court held that such findings came too late, and did not cure the error of failing to make such findings in the original judgment, as requested.

In *Brown v. Firemen's Ins. Co.*, 106 Neb. 615, this court held that, if there was but a single question of fact, determination of which was decisive of the case, the trial court did not commit prejudicial error in denying request for separate findings.

In *Austin v. Diffendaffer*, 96 Neb. 747, it was held that a refusal to make special findings was not error where the request was made after the entry of the judgment.

In *Carl v. Wentz*, 116 Neb. 880, it is stated that the making of findings of fact and conclusions of law is for the protection of both court and parties, the purpose of such findings and conclusions being to dispose of the issues raised by the pleadings, and to make the case easily reviewable by exhibiting the exact grounds upon which the judgment rests.

This statute, section 20-1127, Comp. St. 1929, has been in the law of Nebraska from the earliest times, and is for the benefit of the litigants as well as the reviewing court. We can find but one case, *Ross v. Barker, supra*, which endeavors to supplement the statute by adding what is not there, and stating that the request must be made before the submission of the case. Where, as in the case at bar, the court stated that he would take the case under advisement, and held the case for some ten days after the request was made, it is our opinion that the trial court should have complied with the request.

The appellant's second assignment of error is that the judgment of the trial court is not sustained by sufficient evidence. The pleadings in the case present a simple issue of fact. The plaintiff in her petition alleges a valid gift *inter vivos* of the money in the Live Stock National Bank on deposit in the savings account by the depositor, Hans Larsen, to her. The Live Stock National Bank admits that it held said savings account subject to the order of the court, and Stephen Hansen, administrator, files a general denial.

The requisites of a gift *inter vivos* are clearly stated, as follows: "To make a valid and effective gift *inter vivos*,

there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee." 12 R. C. L. 932, sec. 10.

The essential difference between a gift *inter vivos* and a gift *causa mortis* is stated in *Sharpe v. Sharpe,* 105 S. Car. 459, 3 A. L. R. 891, as follows: "A gift *inter vivos* does not differ, in its essential elements, from a gift *causa mortis,* except that in the latter the survival of the donor may defeat the gift."

In the case at bar, the evidence discloses that the donor departed this life within 60 days from the time of executing the gift. There is no evidence that the donor changed his mind, or in any way recalled the gift; therefore, the donor had done everything he could do to make this gift complete in the plaintiff, and the plaintiff argues, with good reason, that the trial court erred in finding that the evidence of the plaintiff failed to prove the existence of a gift by Hans Larsen to the plaintiff.

Plaintiff contends that, if the law gives but one remedy to a party, she is not precluded from resorting to that because she has attempted to avail herself of another to which she is not entitled. Plaintiff admits that she attempted to probate the instrument as a will, which the court rightly denied, but she is not now prevented from recovering on it as a gift.

The doctrine of election of remedies, stated in its simplest form, means that if a party has two inconsistent existing remedies on his cause of action, and makes choice of one, he is precluded from thereafter pursuing the other, and this doctrine may be applicable as well where the remedies are against different persons as where they are against the same person. The essential elements of the doctrine are: First, the existence of two remedies; second, the inconsistency between the two remedies; third, the choice of one of these remedies. If any one of these three elements is absent, then the doctrine does not apply.

The pursuit of a supposed but nonexistent remedy does not constitute an election. *Henderson Tire & Rubber Co.*

v. Gregory, 16 Fed. (2d) 589, 49 A. L. R. 1503. In this decision there is cited *Bierce v. Hutchins,* 205 U. S. 340: "The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt."

In *Barnsdall v. Waltemeyer,* 73 C. C. A. 515, 142 Fed. 415, the court said: "But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence, is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake."

In *McLaughlin v. Austin,* 104 Mich. 489, the court said: "There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions, upon which recovery could not be had."

"The right to make an election must actually exist, and if it shall appear that it did not then it is quite immaterial, in its bearing upon a subsequent action, that some previous action, looking to a remedy for the plaintiff's loss, had been brought. The plaintiff's previous action was fruitless, because she had no right to maintain it upon her own showing; but that did not preclude her from subsequently bringing an action in which she asserted a right which she possessed. Any step or action taken by her which was fruitless because proceeding upon a misconception of the rights which the law gave her left her unaffected as to any legal remedies which she did possess." *Henry v. Herrington,* 193 N. Y. 218, 20 L. R. A. n. s. 249.

"One is not precluded from resorting to a remedy which the law gives him because he has attempted to avail himself of one to which he was not entitled." *Stone v. Snell,* 86 Neb. 581.

The doctrine of election of remedies has no application where the former action was a futile attempt to assert an alleged right which plaintiff never possessed, and in the

assertion of which he was defeated. 9 R. C. L. 962, sec. 9.

There is no uncertainty in the decisions that, "If in truth there is but one remedy, and not a choice between two, a fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed. * * * The defendants have blocked his recourse to a remedy which he had not. They now say that, because of his mistake, he must be held to have renounced forever the remedy he had. 'There would be no sense or principle in such a rule.'" *Schenck v. State Line Telephone Co.*, 238 N. Y. 308, 35 A. L. R. 1149.

It is a well-established rule that the choice of a fancied remedy that never existed, and the futile pursuit of it, either because the facts turn out to be different from what the plaintiff supposed, or the law applicable to the facts is found to be other than supposed, and though the first action proceeds to judgment, do not preclude the plaintiff from thereafter invoking the proper remedy.

For the reasons stated herein, the court finds that the judgment entered was erroneous, and the cause is hereby remanded to the trial court, with instructions to enter a judgment for the plaintiff, and against the Live Stock National Bank, in the amount of said deposit, interest, and costs.

REVERSED.

AUGUSTA BAUMGART, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED NOVEMBER 20, 1934. No. 29016.

1. **Insurance: POLICY: CONSTRUCTION.** If an insurance policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. The language employed is that of the insurer and it is consistent with both reason and

justice that any fair doubt as to the meaning of its own words should be resolved against it.

2. ———: ———: ———. The written parts of a contract of insurance become the immediate and chosen language of the parties thereto, and, although they should be construed together with the printed clauses, and reconciled if possible therewith, so as to give effect to every part of the contract, yet, if the printed and written clauses are repugnant to each other and cannot be reconciled, the written parts, having been especially chosen for the occasion to express the agreement of the parties, will be given effect over the more general printed ones.

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

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

De E. Bradshaw, J. M. Sturdevant, Rainey T. Wells and *George Yeager,* for appellant.

James Nichols and *Nelson C. Pratt, contra.*

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

EBERLY, J.

Plaintiff brought this action as beneficiary of an "Ordinary-Whole Life Certificate" issued by defendant on the life of plaintiff's husband, Carl Baumgart, now deceased. A trial in the district court for Douglas county to the court, a jury being waived, resulted in findings and judgment for the plaintiff as prayed. From the judgment of the district court defendant appeals.

Appellant is a fraternal benefit society. On January 6, 1913, it issued to Carl Baumgart, beneficiary certificate No. "42802 Nebr.," in the sum of $1,000 if assured should die during the first year of his membership, $1,500 if his death should occur during the second year, and $2,000 if assured's death took place after the completion of two years of membership in the society. Some time after the issuance of this policy, the defendant changed its methods

and commenced the issuance of policies of different terms. One of these forms is a policy which it denominated the "Ordinary-Whole Life Certificate." The plans of the society, as evidenced by their by-laws, contemplated the voluntary transfer by its membership from the form of insurance previously issued by it to the new form, but at an increased rate. Accordingly, on August 9, 1929, Carl Baumgart executed an application, on a blank provided by the defendant, for "exchange of certificate," which set forth that he, as holder of benefit certificate No. 42802, desired to exchange it for an "Ordinary Life Certificate" in the sum of $2,000. This application contained the following stipulations:

"The new certificate is to become effective on the first day of Aug. 1929, and to bear the date of Aug. 1st, 1925, and age of 53. It is understood and agreed that withdrawal values, if any, on the new certificate will be available to me only after I have made payments on said new certificate for three full years from date thereof. First payment on new certificate is for the month of Aug., and I warrant that all the required payments on my present certificate have been paid up to the first of the month for which said first payment is made. * * * I hereby certify that I was born on the 16th day of Dec. 1872. In consideration of such exchange I hereby surrender my said benefit certificate to the Sovereign Camp of the Woodmen of the World, and I hereby, for myself and my beneficiaries, and for any one claiming any right in, through or on account of said certificate, release said Sovereign Camp of the Woodmen of the World from any and all liability thereunder, and I agree to abide by the laws of the Sovereign Camp of the Woodmen of the World as they now are or may hereafter be amended. I certify, warrant and represent that I am in good, sound bodily health, and that there is nothing in my habits or condition that is likely to impair my health or shorten my life. I agree this representation is a strict warranty, and that if the same shall

prove in any respect untrue, or if my death occurs within one year from the date hereof as the result of any disease from which I am now afflicted, none of my beneficiaries shall be entitled to receive benefits on account of the new certificate, but instead will be entitled only to such benefits as may be due under my present certificate."

All dates appearing in this application are in writing.

Thereupon, "in consideration of the warranties and agreements contained in the original application therefor, the application for exchange of certificates, and in further consideration of the payment to the association of the sum of $7.84 for the month in which this certificate is dated," and other payments to be made as therein stipulated, the defendant issued to the insured the "Ordinary-Whole Life Certificate," No. RW-923478-L, which is the policy in suit.

In the upper left-hand corner of the first page of the policy is set forth, "age 53," and upon the first page immediately above the signature appear the words, "The nonforfeiture values shall be computed as if this certificate had been issued on the 1st day of Aug., 1925. Issued at Omaha, Nebraska, this 23d day of Aug. 1929." These two dates are filled in in typewriting.

On page 2 of this policy, it is stated:

"2. Cash Surrender, Loan Value, Paid-Up and Extended Insurance: After thirty-six monthly payments on this certificate shall have been made, should the member fail to pay any subsequent monthly payment, the member, within three months after due date of the monthly payment in default, but not later, upon written application and legal surrender of this certificate, may select one of the following nonforfeiture options: Option (a). The cash surrender value set forth in column 1 of table A on page 3 hereof for the period to the end of which premiums have been paid in full. Option (b). A paid-up certificate for the amount set forth in column 2 of table A on page 3 hereof for the period to the end of which premiums have been paid in full. Option (c). Extended insurance from such due date, for the amount of the death benefit on page

1 hereof, but without total and permanent disability benefits, for the period specified in column 3 of table A on page 3 hereof for the period to the end of which premiums have been paid in full. If there be any indebtedness against this certificate, the cash surrender value set forth in column 1 of table A on page 3 hereof shall be reduced thereby, and the value of the options above named shall be decreased proportionately.

"3. Automatic Premium Loan: After thirty-six monthly payments on this certificate shall have been paid, if any subsequent monthly payment be not paid on or before its due date, and if the member has not, prior to such due date, selected one of the options available under the nonforfeiture provisions of this certificate, the association will, without any action on the part of the member, advance as a loan to the said member the amount of the monthly payments required to maintain this certificate in force from month to month until such time as the accumulated loans, together with compound interest thereon at the rate of five per cent. per annum, and any other indebtedness hereon to the association, equal the cash value hereof at the date of default in the payment of the monthly payments. When the said cash value has been consumed in loans advanced and interest thereon, then this certificate shall become null and void; provided, that while this certificate is continued in force under this provision, the member may resume the payment of monthly payments without furnishing evidence of insurability, and the accumulated loans and interest thereon shall become a lien upon this certificate and shall continue to bear interest at the same rate. Provided further, that such lien may be paid in whole or in part at any time by the member, but if not paid said loan and accumulated interest thereon shall be deducted upon any settlement with the member, or from the amount payable at the death of the member."

The table referred to in these paragraphs quoted, so far as material to the questions presented, is as follows:

"Table A.

End of Certificate Year	Cash Value or Loan Value	Paid-Up Insurance	Extended Insurance Years	Extended Insurance Days
3rd	$ 49.15	$ 91.00	2	199
4th	75.21	136.00	3	221
5th	101.53	179.00	4	183
6th	128.07	221.00	5	91
7th	154.79	262.00	5	317."

All accruing dues upon this policy were paid without question up to and including June, 1931. Whether the dues for July, 1931, were paid in that month is a controverted question. However, we are satisfied that the preponderance of the evidence sustains plaintiff's contention that the July, 1931, dues were paid by the assured on July 13, 1931. It would follow that the suspension of Baumgart in August, following, was wrongful and unjustified. But there were no payments of dues, as they accrued, from August, 1931, to February, 1932, inclusive. The validity of a payment of $64.88 on March 8, 1932, being a payment in full of the dues that accrued between August, 1931, and February, 1932, both inclusive, is challenged. The assured died on the 10th day of March, 1932.

Upon the pleadings and testimony the plaintiff contends that the assured, at the time of his death, was entitled to have the nonforfeiture values set forth in the certificate applied to the payment of the instalments accruing thereon, and they were sufficient to pay all unpaid instalments as they accrued.

On the other hand, the defendant contends, upon the record before this court, that the cash surrender, loan value, and paid-up and extended insurance provisions were only available to the assured after 36 monthly payments had been made on the new certificate, and that the date of issue for the purpose of cash surrender, loan value, paid-up and extended insurance, as well as the "automatic premium loan," was August 23, 1929. Under the state of facts reflected by this record, we believe that plaintiff's

contention is correct, and that there was no error in the judgment.

While the record before us presents a number of questions, we feel that the solution of one question properly disposes of the issues presented for decision, and the others discussed in the brief are not essential to the determination of the case.

The controlling question appears to be: Did the district court commit error in holding in effect that the nonforfeiture values and automatic premium loan value, referred to in the certificate of insurance, were available on and after August 1, 1928 (three years from August 1, 1925), and in refusing to hold that such automatic premium loan value was available only after 36 monthly payments had been made on the new certificate after the date of its issuance at Omaha, Nebraska, to wit, August 23, 1929? We think the interpretation of the trial court was proper.

In Richards, Law of Insurance (4th ed.) 114, sec. 74, the following principle is found: "The assured ordinarily has no part in the preparation of the policy. No rule of interpretation of an insurance contract is more firmly embedded than that which declares that where the language of the policy is without violence susceptible of two interpretations, one of which being that contended for by the insured, it should be most strongly construed against the insurer for the language is that of the insurer."

In *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297, we find: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company. *National Bank v. Insurance Co.*, 95 U. S. 673, 678." See, also, *Allgood v. Insurance Co.*, 186 N. Car. 415, 30 A. L. R. 652.

And again, in *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, we find the following statement: "The rule is settled that in case of ambiguity that construction of the

policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it. *National Bank v. Insurance Co.*, 95 U. S. 673, 678; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462." See, also, *Funke Estate v. Law Union & Crown Ins. Co.*, 97 Neb. 412; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338.

So, too, the following statement appears in 1 Couch, Insurance, 372, sec. 183: "Contracts of insurance are generally recorded on printed forms containing blanks for the insertion of such special provisions and conditions as the parties may agree upon, the printed parts ordinarily being largely general in nature and consisting of stipulations and provisions which apply to most cases, and have obtained a settled judicial construction. Consequently, the written parts become the immediate and chosen language of the parties to a contract, and, although they should be construed together with the printed clauses, and reconciled with them if possible, so as to give effect to every part of the contract, yet, if the printed and written clauses are repugnant to each other and cannot be reconciled, the written parts, having been especially chosen for the occasion to express the agreement of the parties, will be given effect over the more general printed ones." See, also, 1 Joyce, Insurance (2d ed.) sec. 223; *Thomas v. Taggart*, 209 U. S. 385; *Hagan v. Scottish Ins. Co.*, 186 U. S. 423.

When the controlling provisions of the certificate of insurance in suit and the application for an exchange of certificates to which it refers are examined in the light of the foregoing authorities, it would seem quite evident that "withdrawal values" and "nonforfeiture values" are not terms of identical meaning. Had they been identical in definition, but one of the terms would have been employed. The intent of the defendant, whose representatives drafted this application for exchange of certificates of insurance,

is plain. The new policy was to be effective August 1, 1929, to bear date August 1, 1925, and age of 53. The assured, 53 years old on August 1, 1925, was to have an antedated policy of that date, and the conclusion also follows that its language was in all respects to be construed as a policy issued of that date, except and to the extent only that other provisions contained in such application were inconsistent therewith. No provision in this application contemplated that the new certificate should bear any other date than that of August 1, 1925. True, the certificate of insurance to be issued on this application was effective August 1, 1929, but it was in fact a policy paid up until that date. This was not the result of a gratuity on the part of the insurer. The stipulation in the record is that under the policy first issued, and prior to the issuance of the certificate in suit, Carl Baumgart had paid to the association (as premiums) a sum sufficient "such that after paying his equitable share of the death claims every year that a balance remained on hand at the time of transfer, which is August 1st, 1929, which enabled the Woodmen of the World to put up a reserve for him at the end of the transfer year amounting to $207.06." All rights under his old certificate were expressly waived by him when the new one was accepted. While the sum thus waived was in the nature of an accumulated actuarial credit existing for the benefit of the old certificate, it would seem that in good morals he was entitled to have it applied on the new certificate. This is plainly what the transfer as made endeavors to accomplish. The stipulation that all "nonforfeiture values shall be computed as if this certificate had been issued on the 1st day of Aug., 1925," accomplishes this fact. This right thus vested in Baumgart by contract has subsequently been accorded legislative recognition by chapter 85, Laws 1931, providing in part:

"Any member of a beneficiary association or society holding a certificate therein and who desires to surrender such certificate in exchange for any other form of certifi-

cate issued by such association or society, shall, by taking such new certificate, not lose his accumulated actuarial credit in the funds of the association, but he shall be entitled to the transfer of such funds to the amount of such credit to the funds held for the benefit of such new certificate and shall be entitled to a deduction justified by such credit upon the assessments and payments he shall be required to make for such new certificate."

In the instant case by contract the parties in interest have recognized and provided for the rights which the statute, subsequently passed, formally recognized and secured. The effect of the contract, as we understand it, is exactly as if the premiums which would have accrued on a policy issued on August 1, 1925, had been paid in cash up to August 1, 1929.

The only computation of nonforfeiture values set out in this contract, or under its authority, is table "A" above quoted from. It will be noted that this table provides three columns of computation which are called nonforfeiture options. The values are dependent upon the number of the certificate year. It is conceded that if the certificate of insurance in suit had been actually issued on August 1, 1925, and the premiums paid to and including August 1, 1929, the nonforfeiture value would have been such as automatically to extend the insurance to a date beyond the date of assured's death. Does the policy, as issued, have that effect? Such indeed must have been the intention of the parties, and such is the force and effect of its language, taken by itself.

Appellee insists that the application in plain language shows that it means after 36 monthly payments have been made after the issuance of the new certificate. But the application does not state that the monthly payments for three full years shall be made after the issuance of the certificate of insurance, but "after I have made payments on said new certificate for three full years from date thereof," and at the same time fixes "the date thereof" as August 1, 1925. So, too, the automatic premium loans

become effective by the terms of the certificate of insurance after 36 monthly payments shall have been made. This language is identical with that employed by the other nonforfeiture provisions. The language of the policy in this respect is: "The nonforfeiture values shall be computed as if this certificate had been issued on the 1st day of Aug. 1925."

Construing the application for exchange of policies and the policy in suit, in the light of the surrounding circumstances, and in view of the obvious intention of the parties, as fairly expressed, we are of the opinion that in July and August, 1931, the nonforfeiture values were available to the insured in sufficient amount to discharge all premiums thereafter falling due on and prior to the date of the death of assured, and that the association was automatically required, by the terms of the contract, to make the proper application thereof.

In this conclusion we are in accord with the unanimous views of the courts of other jurisdictions that have been called upon to construe the "form of policy" presented in this case.

The terms of the policy here in suit, containing the clause above quoted, were presented to the court of appeals of Missouri in the case of *Daly v. Sovereign Camp, W. O. W.*, 226 Mo. App. 629. In that case the court employed the following language:

"What then is the meaning of the contract? It will be observed that while the new certificate is to become effective on June 1, 1929, it is to bear the date of June 1, 1926, three years earlier. Also that withdrawal values, if any, are to be available to insured after he has made payments for three full years from date of application; while nonforfeiture values shall be computed 'as if this certificate had been issued on the 1st day of June, 1926.' There must be a difference between withdrawal values and nonforfeiture values, else why use different names for them? The first are allowable to insured alone while he is yet alive. The second are of advantage to insured merely in

keeping his insurance alive by having the unpaid instalments taken out of the amount otherwise due on the certificate after he is dead; and of these the beneficiary receives the benefit. So far then as concerns the above clause calling for payment 'for three full years' from date of the application, it would seem to refer merely to the withdrawal privileges available to insured only, and not to the keeping of the insurance alive for a certain period while insured is living or to the rights of the beneficiary after insured's death.

"As to the clauses 'after thirty-six payments,' etc., in the other provisions mentioned, what effect is produced on them by the provision that the certificate, though issued on June 1, 1929, is to be dated June 1, 1926, and the provision that the nonforfeiture values shall be computed as if the certificate had been issued on June 1, 1926? Certainly these unusual provisions perform some function, and what else can they do except to modify and govern the 'full three years' and the 'thirty-six monthly payments' clauses? It is too narrow a construction to hold that the clause saying the nonforfeiture values shall be computed as if the certificate was issued on June 1, 1926, merely refers to the elements or basis of the computation to be made in case there is legally anything to be computed. As we view it, this clause governs not only the basis and elements of the computation of the amount due, but, together with the one in relation to the date of the certificate, also governs and settles the question of whether there is legally anything to be computed. It means that the certificate is to be treated as if it had been issued on June 1, 1926, and this bears not only on the question of how the computation should be made but also on whether any computation whatever should be made. If the clause now under consideration does not include and govern both of these matters, then there is no clause affecting the provision that the policy is to be regarded as issued on June 1, 1926, so as to take away the effect it would otherwise have on the question whether the certificate is to be regarded as alive when insured died."

It may also be said that the identical policy provisions of the certificate of insurance here in suit were considered and determined adversely to the contentions of appellant in the instant case in the following cases: *Jones v. Sovereign Camp, W. O. W.*, 67 S. W. (2d) (Tenn.) 159; *Higgins v. Sovereign Camp, W. O. W.*, 224 Ala. 644; *Sovereign Camp, W. O. W., v. Hardee*, 188 Ark. 542. See, also, as in principle fully sustaining the doctrines of the cases cited, *German Beneficial Union v. Weinfurtner*, 128 Ohio St. 173.

In view of the entire record, in the light of the trend of the authorities cited, we are convinced that the disposition of this case, as made by the trial court, is correct.

The judgment of the district court is, therefore,

AFFIRMED.

JOHN H. MACKPRANG, APPELLEE, V. NATIONAL CASUALTY COMPANY, APPELLANT.

FILED NOVEMBER 20, 1934. No. 29010.

1. Insurance: HEALTH BENEFITS. Where an insured, totally disabled, is taken twice in a car a distance of a few blocks to impart information particularly within his knowledge about a business with which he had been connected, but performs no work, he is not prevented as a matter of law from recovery of benefits under health insurance policy for period which insured is "necessarily, continuously and actually confined within the house."
2. ———: CLAIM: PAYMENT. Claimant's failure to return check tendered in full settlement does not constitute "payment" where claimant indicates his intention not to so receive it.

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

Charles H. Slama, for appellant.

Hendricks & Kokjer, contra.

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

DAY, J.

This is an action on an insurance policy. Jury was waived, and, upon trial to court, judgment was rendered against the insurance company.

The policy provides for payments for loss of time on account of illness. The plaintiff became ill on January 20, 1931, and was confined in a hospital at Rochester, Minnesota, until March 5, 1931. During this time, he had an operation, and a drainage tube was inserted in his abdomen, connected with his bladder. He was brought to his home in Cedar Bluffs in an ambulance where he remained until June 8 when he was taken to Clarkson Hospital in Omaha. On June 15 he was returned home, but, on July 6, he was again taken to Clarkson Hospital where he underwent another operation. He remained in the hospital until August 1, after which he returned to his home.

The plaintiff claims that he was totally disabled and continuously confined within the house or in the hospitals on account of said sickness from January 20, 1931, to December 3, 1931, and during this time was regularly visited by a legally qualified physician. Under the provisions of the policy, the insured was required to be "necessarily, continuously and actually confined within the house, and therein regularly visited by a legally qualified physician," to recover for a confining illness. The defendant contends that from March 26 to June 8, the plaintiff was not so confined within the house. For an illness "necessarily, continuously and actually confined within the house," the policy provided indemnity for a period of 100 weeks. For a nonconfining illness, the company's liability is only for 10 weeks. The insurance company contends that its liability in this case is for a confining illness from January 20 to March 26 and a nonconfining illness from March 26. The defendant sent the plaintiff its check com-

puted upon this basis. The plaintiff did not return the check, but notified the company he would not accept it as full settlement and brought this action to recover the weekly indemnity for the full period upon the claim that he was confined within the house according to the terms of the contract all of the time.

The controversy concerns the nature of the plaintiff's illness from March 26, 1931, until June 8, 1931. If the plaintiff was necessarily, continuously and actually confined within the house during this period, the judgment should be affirmed. There are two occasions upon which the defendant relies principally to establish that plaintiff was nonconfined within the house. The plaintiff had been bookkeeper of the Bank of Cedar Bluffs that failed in January, 1930. His physician was chairman of the depositors' committee. The committee did not understand some things about the books of the bank, and the plaintiff was taken to the bank on March 26, 1931, for the purpose of explaining to and assisting the committee. The plaintiff was also village treasurer and at another time went to the bank to get the bookkeeper to make out his report as such treasurer. These were situations which would make unusual appeal to the plaintiff. These are the only two trips from the home during that time that are supported by positive and direct evidence. Inferences are drawn from the defendant that the plaintiff would make other trips but are not supported by any evidence, and the plaintiff was not asked directly concerning them when he was on the witness-stand. It appears that the plaintiff was upon a few occasions out on the porch in the sunshine. Certain statements made by the plaintiff to the defendant and other insurance companies said that he was not actually confined all of the time. The defendant would create the impression that the plaintiff during this period was convalescing and that his condition was improving every day. This was not the case. When the plaintiff came home from Rochester on March 5, he had a tube inserted through his abdomen into his bladder. A future operation

was necessary when his strength could be increased sufficiently. The plaintiff's disability was one illness lasting from January 20 to December 3 and was not one illness from which he recovered, and then another.

The plaintiff was suffering from a serious illness. He suffered great pain and hypodermics were frequently necessary during all this period. In addition to the operation in Rochester, it was necessary that he had an operation upon his prostate. He was actually within the house all of the time except on the occasions heretofore noted and most of the time he was in bed or on a couch. The seriousness of his illness is important only as throwing light upon the question as to whether or not he was continuously confined. Upon the two occasions when the plaintiff was taken from the house, he performed no services except that of imparting to others information which was peculiarly within his own knowledge. The effort required for either trip was not equal to that required in making the trip from Rochester, Minnesota, to his home, nor that required by him in making the two round trips to the Clarkson Hospital in Omaha.

The insurance company does not contend that the removal of plaintiff to the hospital in Omaha and back to his home upon two occasions broke the continuity of his confinement "within the house," but rests its case upon what transpired from March 26 to June 8 at plaintiff's home in Cedar Bluffs.

In *Breil v. Claus Groth Plattsdutschen Vereen*, 84 Neb. 155, this court held that a member of a mutual fraternal society which provided for sick benefits for members whose sickness was such that he "must remain constantly in the house," and under the care and treatment of a registered physician, could recover, "although at intervals he may occasionally step into his yard, or make visits to his physician, or other short and unusual trips." The basis of this decision was that the insured was unable to resume the ordinary duties and pleasures of life. It was not judicially determined by strict construction of words that

confinement in the house meant confinement within the four walls. At the time the *Breil* case was decided the language used here, "within the house," had not been passed upon by the courts. It has been inserted in insurance policies to limit liability in recent years. While the language of the *Breil* case is similar, yet that case determined that it referred to a degree of disability. Until recently, the language usually used was "confined to the house" and this was construed liberally, and, ordinarily, one was held entitled to recover even though he left the house.

The cases directly in point seem to be in hopeless conflict. *Rocci v. Massachusetts Accident Co.*, 222 Mass. 336, holds that "continuously confined within the house" in its common significance means uninterruptedly, an unbroken sequence, without intermission or cessation, without intervening time; that it should not be given a constricted interpretation as applied to the subject-matter such as to prevent removal of one ill from home to hospital and back again, or from one house to another in case of some exigency. This same case was before the court on a second appeal, *Rocci v. Massachusetts Accident Co.*, 226 Mass. 545, where the court held: "Ordinarily a person confined to the house by sickness is confined to one house. But if an exigency arises one confined to the house by sickness * * * can be carried to another house. Where a person confined * * * to the house by sickness is carried to another house * * * it is a question for the jury whether the fact that he was carried to the other house showed that he was not sick to the degree described on the one hand or on the other hand whether there was an exigency which made it necessary that he should be carried to the other house though he was sick to the required extent." The appellant relies upon this case, but it will be seen by the foregoing quotation that the court uses the words "to the house" when the policy used "within the house." The court was not as careful in its language as the insurance company, which would indicate that degree of illness was

a controlling factor. The majority of courts hold that the words "confined to" do not mean actual confinement within the four walls, but a degree of sickness. See note Ann. Cas. 1915A, 262. But a different view is held by some courts to the effect that the insured must substantially comply with this restriction to recover, as in *Pirscher v. Casualty Co. of America*, 131 Md. 449, in which case the insured visited his physician daily, played golf, and took a trip to Atlantic City. After all, it seems that the only logical distinction between cases must rest upon the facts.

An examination of the few cases where the exact language of the policy here is considered by the court shows a wide divergence. A careful reading of these cases discloses that the decision in each case was justified by the facts. The confusion arises only in an effort to harmonize the general rules announced. In *Garvin v. Union Mutual Casualty Co.*, 207 Ia. 977, 61 A. L. R. 633, it was held that "continuously confined within the house" covered the period insured was in a hospital, and for such time as he was temporarily absent from his house to consult a physician in the town where he lived, and covers journeys made by him under the advice of a physician in quest of his health to distant points where he was confined in a hospital. How much of the time an insured is substantially confined within the house and entitled to recover indemnity under the language of the policy is a question of fact for the jury, say the Iowa court. But recovery was not allowed for a period of convalescence when he was out-of-doors a large part of the day, drove his car several thousand miles, and sought employment elsewhere. This Iowa case reviews many cases on confinement to the house. It also cites *Jentz v. National Casualty Co.*, 52 N. Dak. 688, in which the policy used the clause "continuously and actually confined within the house," and the court approved an instruction to the effect that because a man is able to walk from his home to his doctor's office for treatment or to take a railroad train to a hospital for treatment does not necessarily break the continuity of the confinement to the house.

A recent case, *Massachusetts Protective Ass'n v. Oden*, 186 Ark. 844, indicates the wide diversity of views upon this question. There the insured, who was totally disabled, on advice of physicians, took frequent short automobile rides and a train trip to the seashore, was held not precluded from recovery under the policy for necessary confinement within the house.

It is insisted that the parties have a right to make a contract in any form they desire. There can be no question as to this rule. It is likewise true that the court cannot rewrite or extend the contract. But an insurance contract is never made as a result of negotiation and discussion between the parties. The contract with its restrictions and limitations is not as well understood by the insured as by the insurer. The appellant's attorney in oral argument stated that this was a cheap policy of limited liability ($57 a year). The insured bought what he thought was protection against loss from disability. He was taken from the house on urgent necessity of a quasi-public business, that of a bank of which he had been bookkeeper. He performed no work, nor is it contended that he was able to do so, but imparted information about the bank to a depositors' committee. This served no purpose of his own. Another time he was taken to the bank for a similar purpose relative to the village finances of which he was treasurer. His physician, says the appellant, stated it would not hurt him. It is true he did not die as a result of the exposure. He was not going about freely either for pleasure or for business. But from the date of these unusual trips the insurance company seeks to determine its liability under the policy, although the plaintiff was totally disabled for weeks thereafter. We are impressed by the language of *Garvin v. Union Mutual Casualty Co., supra*: " 'Strictly and continuously confined within the house' in its most literal interpretation would require that the insured stay constantly within the four walls of the house. Such an interpretation would prevent recovery if an emergency, such as a fire, should arise, and

the insured be removed from the house. It would preclude recovery in the event of transportation in an ambulance to a hospital, even for emergency treatment. It would bar recovery if the insured sat upon an uninclosed porch of the house, or slept upon a sleeping porch that was not 'inclosed within the house.' Such narrow and limited construction should not be adopted in the interpretation of contracts of this character." See annotation 61 A. L. R. 642.

Again, let us add that one who is sick is usually optimistic about his condition. The strict interpretation suggested by the defendant would terminate liability if one who had been ill overestimated his strength and left the house with the result that he was forced to return soon. We are disposed to adopt the view expressed in some of the cases against a narrow and constricted interpretation of the policy. Where an insured, totally disabled, is taken twice in a car a distance of a few blocks for a short time to impart information particularly within his knowledge about a business with which he had been connected, but performs no work, he is not prevented from recovery of benefits under a health insurance policy for period which insured is "necessarily, continuously and actually confined within the house."

Under the circumstances in this case, the insured made an unusual trip, not for his own interest or pleasure, but to assist others by imparting information about the bank and about the village treasurer's books. To terminate his insurance under these facts would be to penalize him for making an extraordinary effort. After all, it is a question of fact which was submitted to the trial court instead of a jury. The evidence supports the finding, and it will not be disturbed.

The insurance company sent plaintiff a check in full settlement of its liability under the policy according to its interpretation. The insured did not return the check, although he notified the company that he would not accept it in settlement. This action was subsequently brought to

recover a larger amount. The check was tendered back in court and is an exhibit in the bill of exceptions. The defendant insists that failure to return this check constitutes acceptance. This case comes clearly within the rule announced in *Babson v. Crete Mills*, 123 Neb. 175, and as applied to the facts in this case is: Generally, claimant's failure to return check tendered in full settlement does not constitute "payment" where claimant indicates his intention not to so receive it.

This was a law action, tried to the court without a jury. We find no reversible error in the record.

AFFIRMED.

ETTA ROGERS, APPELLEE, V. J. C. PENNEY COMPANY, APPELLANT.

FILED NOVEMBER 20, 1934. No. 29020.

1. Negligence: CARE REQUIRED OF OWNER OF BUILDING. Storekeeper is not insurer against accident to customers, but must exercise reasonable care to keep premises reasonably safe for them.
2. ———. Storekeeper who places racks of merchandise about a railing around a stairway to basement so as to obstruct the view of customers is negligent.
3. ———. Storekeeper who does not guard a darkened or obscured stairway does not exercise reasonable care required for the safety of his customers.
4. ———. Where the act or omission of a storekeeper creates the dangerous condition in violation of his duty to a customer, knowledge is not a necessary element of negligence.
5. Instructions must be read and construed together to determine if they are prejudicially erroneous.
6. Trial: MISCONDUCT OF COUNSEL: WAIVER. Failure to call back trial judge momentarily absent from bench may amount to waiver of misconduct of opposing counsel.
7. Appeal: MISCONDUCT OF COUNSEL: REVIEW. Where objection is made to argument of counsel and no record is preserved in the bill of exceptions, except conflicting affidavits filed in support of motion for new trial, the ruling of the trial court will be presumed to be correct.

8. ———: ABSENCE OF JUDGE. "It is error for the judge to absent himself from the courtroom, out of the sight and hearing of the parties, during the argument of a case, unless by consent and agreement of the parties." *Powers v. State*, 75 Neb. 226.
9. ———: ———. Where a trial judge is temporarily absent in a room adjacent to the courtroom during argument of counsel to the jury, without objection by the parties, and returns promptly for the purpose of hearing objections and making rulings, a judgment will not be reversed therefor, unless the record affirmatively demonstrates that the error was prejudicial.

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

Deutsch & Young, for appellant.

Cowan & Grady and *Hugh J. Boyle, contra.*

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

DAY, J.

This is an action for damages by a married woman for personal injuries sustained from a fall down a stairway in defendant's store. Upon trial to jury a verdict of $2,500 was returned and judgment entered thereon. The defendant appeals.

The defendant, J. C. Penney Company, incorporated, operates a store at Neligh, Nebraska. On October 6, 1931, the plaintiff, Mrs. Rogers, entered the store as a customer. While looking at some dresses upon a rack, she fell down a stairway, suffering injuries, upon which this action is based. The plaintiff in her petition alleged that the defendant was negligent in a number of particulars, none of which related to the faulty construction or repair of the stairway. The allegation, which there is evidence to support, is that the stairway was hidden from view by dress racks and was dark so that it could not be seen by the plaintiff. The evidence is in conflict upon the questions of alleged negligence. The stairway in question led to the

basement which was not lighted and not used as a salesroom to which customers were invited.

A storekeeper is required to maintain his store in a reasonably safe condition for customers. The customer is an invitee, and the owner of a store must exercise reasonable care to keep the building reasonably safe for his use, but is not an insurer against accident. *Thompson v. Young Men's Christian Ass'n,* 122 Neb. 843; *Shorkey v. Great Atlantic & Pacific Tea Co.,* 259 Mich. 450; *Smith v. The Emporium Mercantile Co., Inc.,* 190 Minn. 294; *Evans v. Orttenburger,* 242 Mich. 57. A stairway is not unusual in a store and must necessarily be maintained to pass from floor to floor. In the instant case, the defendant was negligent in obscuring the stairway by placing racks of merchandise about the railing so that it would be seen only from one direction. The stairway was placed lengthwise of the store against the side wall. It was covered by racks of merchandise from the front and side and only visible from the rear where a view of it was partially obscured by a counter for display of millinery. In this obscurement of the open stairway, the defendant was negligent. A storekeeper who places racks of merchandise about a railing around a stairway to a basement so as to obstruct view of customers is negligent.

The plaintiff also charged that the stairway was dark in addition to the obscurement. The evidence upon this question is in conflict, but is amply sufficient to require submission to the jury. The basement was dark, and the testimony of the plaintiff and another witness is that it was a dark hole. The plaintiff at the time of the accident was walking around a rack, set close to the railing of the stairway, looking at dresses hanging thereto. The absence of light, the shadows cast by the racks of merchandise next to the railing, the darkness of the rear of the store added greatly to the obscurement of the stairway. The defendant relies mostly upon the physical facts as to lights and a skylight to rebut the testimony of plaintiff in this respect. If the jury believed, as the evidence would justify

them in finding, the conditions as described by the plaintiff's witnesses, "It was," as the court said in *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, "a trap or snare of whose existence under the circumstances the rules of ordinary care would require that an invited person be warned." See, also, *Reese v. Abeles*, 100 Kan. 518; *Cheifetz v. Hills*, 148 N. Y. Supp. 103.

The rule is well stated in 45 C. J. 866, as follows: "It is not ordinarily negligence to maintain an open stairway entrance without guarding it where the place is well lighted. However, a stairway may be so located that it may be negligence to fail to guard it, or the opening may be so darkened or obscured as to require a notice or warning." When we apply the rule of the authorities to the facts in the instant case, it is: A storekeeper who does not guard a customer from a darkened or obscured stairway does not exercise reasonable care for the safety of his customers. *Hudson v. F. W. Woolworth Co.*, 275 Mass. 469; *Kiser v. Skelly Oil Co.*, 136 Kan. 812.

As heretofore stated, this case does not involve a defect in construction or a defect caused by use. The negligence in this case involved the use of a properly constructed building in good repair. In such a case, the rule announced by this court in *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, and *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, is not applicable here. The rule relative to the negligence alleged here is stated in 45 C. J. 653: "Knowledge of the defect or danger is not a necessary element of negligence where the act or omission, in and of itself, involves a violation of a duty * * * or where the negligent act or omission of the owner of the premises created the dangerous condition." Where, as here, the act or omission of a storekeeper, who violates a duty to a customer, creates the dangerous condition, knowledge is not a necessary element of negligence.

The instructions of the trial court to the jury will next engage our attention. The appellant challenges the correctness of various instructions. The instruction on the

doctrine of comparative negligence is particularly questioned in view of our opinion in *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525. The briefs in this case were prepared prior to our decision in *Patterson v. Kerr*, 127 Neb. 73, which announces the rule applicable here, that the giving of this instruction is not reversible error. Other instructions are criticized for highly technical reasons, but the instructions taken as a whole are correct statements of the law. Instructions must be read and construed together to determine if they are prejudicially erroneous. *In re Estate of Lyell*, 116 Neb. 827. Further, it does not appear that the defendant was prejudiced by any instruction even if technically incorrect as he contends here.

The appellant contends that the conduct of the appellee's attorney in the argument of the case was such as to require a reversal of the judgment. This feature of the case is presented to this court by affidavits in the bill of exceptions. There was no record made at the time, but after judgment the affidavits were filed in support of the motion for new trial. The trial judge was momentarily absent from the bench in an adjoining room engaged in the preparation of instructions. During the argument of plaintiff's attorney to the jury, attorney for defendant called the trial judge into the courtroom and objection was made to the argument. There is no record in the bill of exceptions either of the argument or the objections or the ruling of the court. Failure to call back the trial judge momentarily absent from the bench may amount to waiver of misconduct, if any, of opposing counsel. *Prairie Life Ins. Co. v. Heptonstall*, 105 Neb. 829. In this case, it seems the trial judge was called back, some objection made to the argument, and overruled by the trial judge. The only presentation here is by affidavits of the attorneys for the parties as to the occurrence offered on the motion for new trial. These affidavits are in conflict as to the essential facts relative to this matter. The issue was one of fact for the trial judge. *Banta v. McChesney, ante*, p. 764. He passed upon the facts therein when he ruled upon the

motion for new trial. He was in a position to know what occurred at the trial as well as the attorneys. Where objection is made to argument of counsel and no record is preserved in the bill of exceptions, except conflicting affidavits filed in support of motion for new trial, the ruling of the trial court will be presumed to be correct. For analogous cases see *Hazelet v. Holt County*, 51 Neb. 724, and *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593.

But the appellant argues that the temporary absence of the trial judge from the bench in an adjoining room during the trial was reversible error. In *Powers v. State*, 75 Neb. 226, we held: "It is error for the judge to absent himself from the courtroom, out of the sight and hearing of the parties, during the argument of a case, unless by consent and agreement of the parties." In this case, it does not appear that the trial judge was out of sight and hearing of the proceedings in the courtroom. He was in an adjoining room and was apparently available when requested. He assumed the bench and overruled objections made to the argument of counsel. It is said he was not absent with the consent of appellant's attorney. However, he left with the knowledge of said attorney who interposed no objection. In the interest of expediting jury trials, judges sometimes retire to an adjacent room to prepare instructions with consent of the parties. This should not be done except upon urgent necessity and when agreeable to counsel. This case was tried by experienced lawyers before a learned trial judge of experience, all of whom were familiar with the practice. It is not assuming a violent presumption to infer that the absence of the trial judge was agreeable to all parties at the time and that their conduct was such as to amount to substantial agreement to the procedure. It is not claimed that any objection was made by any one. No prejudice appears in this respect. Anyhow, where a trial judge is temporarily absent in a room adjacent to the courtroom during argument of counsel to the jury, without objection by the

parties, and returns promptly for the purpose of hearing objections and making rulings, a judgment will not be reversed therefor, unless the record affirmatively demonstrates that the error was prejudicial. *Shaffer v. State,* 124 Neb. 7, 10.

Lastly, the verdict does not seem to be excessive. The plaintiff sustained serious injuries from the fall, and, although no bones were fractured, she was not recovered at the time of the trial 18 months after accident. It did not seem excessive to the trial judge who saw the plaintiff and heard her and her witnesses testify. In this respect, as well as the other numerous assignments of error, we find no prejudicial error requiring reversal of the judgment.

AFFIRMED.

STATE, EX REL. MILDRED BRAYTON TODD, APPELLANT, V. CLAY THOMAS, COUNTY TREASURER, ET AL., APPELLEES.

FILED NOVEMBER 20, 1934. No. 28840.

Municipal Corporations: PAVING ASSESSMENTS: PAYMENT. Section 4283, Comp. St. 1922 (now section 17-432, Comp. St. 1929), and other sections relating thereto, providing for the levy of special assessments for paving by cities of the second class or villages and payment thereof in instalments by the owner, confers upon such property owner an option to pay in instalments as they accrue with interest, but does not require him to do so or prevent the property owner from paying the balance of the assessment at any time by paying the amount thereof and interest to date.

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

Guy A. Hamilton, for appellant.

J. W. Hammond and *Waring & Waring, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CHAPPELL, District Judge.

The sole question for our determination in this case is whether the relator's petition, filed in the district court for Fillmore county, Nebraska, praying for a peremptory writ of mandamus against respondent officers, states a cause of action.

Relator, appellant herein, alleged in the petition in substance that she was at all times the owner and in possession of lot 84 and the west 3 feet of lot 85 in block 5, Geneva, a municipal corporation of the second class, in Fillmore county, Nebraska; that respondents, appellees herein, and each of them were the duly elected, qualified and acting treasurers of said city and county, respectively; that, in pursuance of authority granted by sections 4283 and 4286, Comp. St. 1922, the city of Geneva did on March 6, 1919, by certain ordinances, copies of which are attached to the petition and made a part thereof, create and establish paving district No. 1, and on June 11, 1920, levied an assessment therefor of $1,130.03 upon relator's property above described; that on December 6, 1920, the city authorized the issuance and sale of paving bonds in the sum of $38,000, called district paving bonds of district No. 1, payable serially one-nineteenth on December 1, 1922, to 1940, inclusive, with interest at the rate of 7 per cent. per annum payable semiannually at the office of the county treasurer of Fillmore county, Nebraska, copy of the form of said bonds being attached to the petition and made a part thereof; that said bonds were duly registered as provided by law, and all were sold and are now in the hands of purchasers except those already matured; that none of the bonds contained an option permitting the city to pay the same before they became due and payable; that the proper county and city officers duly certified the unpaid assessments as provided by law, and said taxes have since remained upon the proper tax lists, included therein being the balance against relator's property. No question is raised in the petition as to the legality of any of these proceedings.

Relator further alleges that she has heretofore paid $750.56, with interest at 7 per cent., on all amounts up to June 11, 1932, and there remains unpaid $379.47 which becomes delinquent in the amount of $54.21 June 11, 1933, and June 11 each year thereafter until 1939, inclusive; that for the purpose of paying the balance of such assessment and satisfying and releasing the lien thereof, relator did on January 11, 1933, properly tender to respondents and each of them, the proper authorities, the sum of $379.47, together with $15.50 interest at 7 per cent. per annum from June 11, 1932, to January 11, 1933, and demanded receipt therefor which was refused by respondents and each of them; that relator is now and has been at all times ready, willing and able to pay such sum in discharge thereof, and prays for a peremptory writ of mandamus commanding respondents and each of them to receive and accept said amount in full payment of such assessment, issue receipt therefor and discharge said lien of record against the property.

The question is: Conceding all these facts to be true, can relator pay such paving assessments in full with interest to date of payment at 7 per cent., or must she pay all the assessments with interest at 7 per cent. to maturity of the bonds in 1940?

Section 4283, Comp. St. 1922 (now section 17-432, Comp. St. 1929, as amended by chapter 138, Laws 1923, and chapter 42, Laws 1927), after delegating authority to pave under certain conditions and providing for the levy of assessments for the payment thereof and payment of the same in instalments, provides: "Each of such instalments, except the first, shall draw interest at the rate of not exceeding seven per cent. (6 per cent. as amended in 1927) per annum from the time of the aforesaid levy until the same shall become delinquent: * * * Provided, all of said instalments may be paid at one time on any lot or land within fifty days from the date of the levy without interest, whereby such lot or land shall be exempt from any lien or charge therefor." Section 4286, Comp. St. 1922 (now section 17-435, Comp. St. 1929), provides in part:

"Second. All such assessments shall be known as 'special assessments for improvements,' and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and *collected in like manner* as other city or village taxes." (Italics ours.)

The trial court undoubtedly construed that part of section 4283, Comp. St. 1922, above quoted, as limiting the taxpayer's rights solely to the payment of the whole amount within 50 days without interest, or to payment of all unpaid instalments, with interest in full up to and including 1939. We cannot reach this conclusion.

First, there is no privity in this case between the bondholder and the taxpayer. The bonds are only the general obligation of the city to the bondholder, and the taxpayer has no liability thereon or connection therewith as an obligor. The city cannot complain that it must pay interest upon the bonds until maturity. The city is generally liable for the bonds and interest in any event whether the special assessments are ever paid or not. Neither the statute nor the bonds permit any other construction. *Alexander v. Bailey,* 108 Neb. 717; *Colby v. City of Medford,* 85 Or. 485; *United States v. Fort Scott,* 99 U. S. 152; Abbott, Public Securities, 756, secs. 363-366; Comp. St. 1929, sec. 17-585. See section 17-432, Comp. St. 1929, which authorizes the city treasurer to invest any money in the sinking fund in interest bearing time deposit certificates pending final redemption of the paving bonds and to credit the sinking fund with the interest accruing thereon.

We said in *State v. Rowe,* 108 Neb. 232: "A tax law is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and a tax thus imposed is not founded on contract, and does not establish the relation of debtor and creditor between the taxpayer and the state." See, also, *War Finance Corporation v. Thornton,* 118 Neb. 797. "Taxes are not debts in the ordinary sense of that word, but forced contributions

for the support of the body politic." *Geren v. Gruber,* 26 La. Ann. 694. See *Schied's Appeal,* 7 Pa. Co. Ct. Rep. 282. "Taxes are, in legal contemplation, neither debts nor contractual obligations, but are, in the strictest sense of the word, exactions." *Baker v. City of East Orange,* 95 N. J. Law, 365. "Taxes are not debts, but imposts levied by government for its support, or for some special purpose which the government has recognized, and are due to government in its sovereign capacity." *Liberty Mutual Ins. Co. v. Johnson Shipyards Corporation,* 6 Fed. (2d) 752. See *Stripe v. United States,* 269 U. S. 503. Taxes are not debts. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract. It does not establish the relation of debtor and creditor between the taxpayer and state. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. *Perry v. Washburn,* 20 Cal. 318; *Sonnesyn v. Akin,* 12 N. Dak. 227. The form of the procedure to collect taxes cannot change it into a debt or contract obligation. *Moore v. Mitchell,* 281 U. S. 18; *Village of Charlotte v. Keon,* 207 N. Y. 346. The obligation to pay taxes not being contractual, they do not draw interest like ordinary obligations save when the statute so declares. 61 C. J. 72.

Taxing statutes as to special assessments are strictly construed in favor of the taxpayer and against the taxing authority. *State v. Several Parcels of Land,* 83 Neb. 13. A clause, paragraph or provision in a section should be construed in connection with all other clauses, paragraphs and provisions in the same and other sections of the statute connected therewith or relating thereto. 2 Lewis' Sutherland, Statutory Construction (2d ed.) 659, sec. 344; *War Finance Corporation v. Thornton, supra; Hagenbuck v. Reed,* 3 Neb. 17; *McCann v. McLennan,* 2 Neb. 286; *Follmer v. Nuckolls County,* 6 Neb. 204; *Hendrix v. Rieman,* 6 Neb. 516; *City of Lincoln v. Janesch,* 63 Neb. 707;

State v. Babcock, 21 Neb. 599; *State v. Fink,* 74 Neb. 641; *Gage County v. Wright,* 86 Neb. 347; *State v. City of Lincoln,* 101 Neb. 57; *Chicago, B. & Q. R. Co. v. School District,* 110 Neb. 459; *Lincoln Telephone & Telegraph Co. v. Albers,* 126 Neb. 329; *State v. Swanson, ante,* p. 806. The court will not read into a statute restrictions or exceptions not made by the legislature. *State v. School District,* 99 Neb. 338; *State v. Marsh,* 108 Neb. 267; *State v. Swanson, supra.*

There is no provision in the sections involved which makes it mandatory for the taxpayer to pay within 50 days without interest or to pay in certain instalments with interest to maturity of all instalments. The taxpayer, therefore, is simply given an option to pay all within 50 days without any interest, to pay all the instalments as they accrue with interest, or to pay in instalments a part of the time and all of the balance at any time with interest to date. With reference to payment in instalments, 44 C. J. 808, reads: "Such provisions are generally construed to confer on a property owner an option to pay in instalments, and not to require him to do so or to prevent him from paying the whole assessment at any time by paying the amount thereof and such interest as he is liable for, at the time of payment." This position is ably supported by the courts of other states. *Eaton v. Hanlon,* 193 Cal. 715; *Morgan v. Figg,* 162 Ky. 5; *Clarke v. City of Evansville,* 75 Ind. App. 500; *Barber Asphalt Paving Co. v. Hayward,* 248 Mo. 280.

The court discovers that section 5998, Comp. St. 1922, as amended by chapter 181, Laws 1927 (now appearing as section 77-1903, Comp. St. 1929), provides: "The treasurer shall receive from any taxpayer at any time, the amount due on account of special assessments of any kind." While this provision was not contained in the law until 1927, it is useful to indicate to the court the legislative intent in the matter of the payment of special assessments. *Chicago, B. & Q. R. Co. v. Amack,* 112 Neb. 437; *Reusch v. City of Lincoln,* 78 Neb. 828; *State v. Omaha Elevator Co.,* 75

Neb. 637; *Campbell v. Youngson,* 80 Neb. 322; *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111; *State v. Hevelone,* 92 Neb. 748; *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93. Respondents admit that the legislative intent is the only question in this case.

Clearly, under the statutes as they now exist, relator herein would have the right to pay the whole balance of the assessment at any time by paying the amount thereof and such interest as she was liable for at the time of the payment. *Gage v. City of Chicago,* 216 Ill. 107; *Hubbell Son & Co. v. Hammill,* 187 Ia. 1083; *Blackwell v. Village of Coeur D'Alene,* 13 Idaho, 357. In the absence of the amendment appearing in section 77-1903, Comp. St. 1929, the same rule applies. See *City of Rolla v. Schuman,* 189 Mo. App. 252, wherein the court said: "There is nothing in the tax bill, or in the law authorizing it to be issued payable in instalments upon a written request of the property owner, that prevents its being paid in full any time after it is so issued." The same rule has been applied in the absence of any express prohibition in the city ordinances. See *Heath v. McCrea,* 20 Wash. 342, wherein the court said: "The fact that an assessment is made payable in instalments does not prohibit the property owner from paying the whole amount at one time, when there is no express prohibition in the ordinance providing therefor."

This court said in *Cornell v. Maverick Loan & Trust Co.,* 95 Neb. 9: "The taxes did not become delinquent until May 1 following. During the interval there is an option to the taxpayer which enables him to anticipate the payment should he so desire." Webster defines the word "anticipate" as "To do, take up, or deal with, before another; to preclude or prevent by prior action. * * * To be before (another) in doing." In this connection we believe that the word "delinquent" carries with it the idea of a previous opportunity to pay. This being true, the statute was intended to require the payment of interest until paid or delinquent. We believe that the portion of the statute which provides that "each of such instalments, except the

first, shall draw interest at the rate of not exceeding seven per cent. per annum from the time of the aforesaid levy until the same shall become delinquent" is simply a limitation upon the rate of interest which may be charged until paid or delinquent. Section 17-432, Comp. St. 1929, has by amendment in 1927 (Laws 1927, ch. 42) reduced it to not exceeding 6 per cent.

With these considerations in mind, we hold that, in the absence of any prohibition in the statutes as they existed in 1920, and in view of the provisions as they then existed and the amendment thereto appearing in section 77-1903, Comp. St. 1929, this court cannot require relator to pay all the interest that she would have to pay if she allowed the instalments to run until their final maturity in 1939. We believe that the legislature did not intend to prevent such payment by any person at any time with interest to date of payment. To hold otherwise would be unjust and inequitable, and cannot be tolerated or enforced by this court. It would amount to taking her property without consideration or compensation therefor, and would not leave her on an equal footing with the property owners who did not see fit to anticipate and pay their assessments until they severally matured. If the payment of interest is considered as a penalty for failure to pay within 50 days, then we have the strange anomaly of,—the sooner the compliance thereafter, the greater the penalty. Our court said in *Howard v. Jensen,* 117 Neb. 102: "The consequences that would result from construing the provisions of a statute should be taken into consideration in determining the intention of the legislature."

The conclusion is that the relator's petition states a cause of action and that the trial court erred when it sustained demurrer thereto and dismissed the action. The judgment of the district court is therefore reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

V. J. LEBARRON, APPELLANT, V. CITY OF HARVARD, APPELLEE.

FILED NOVEMBER 20, 1934. No. 29268.

1. **Municipal Corporations**: CONTRACTS. "The city council of a city of the second class cannot incur any expense or enter into any contract on behalf of the city unless an appropriation shall have been previously made concerning such expenditure, except in cases where the proposition has been sanctioned by a majority of the legal voters of the city." *Moore v. City of Central City*, 118 Neb. 326.
2. ———: ———: VALIDITY. Evidence examined and contract upon which suit is brought is held void for want of a previous appropriation to support it.
3. ———: ———: ———. The mere fact that at the date of the contract there was sufficient money in the fund out of which it was payable will not validate the contract when it appears that said fund is exhausted by previous appropriations applicable thereto.

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

Sterling F. Mutz, Cloyd L. Stewart and *Robert S. Stauffer*, for appellant.

D. B. Massie, H. G. Wellensiek and *John M. Paul, contra.*

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

REDICK, District Judge.

This is the second appearance of this case in this court. The former hearing is reported in *Campbell Co. v. City of Harvard*, 123 Neb. 539, the plaintiff, LeBarron, being substituted for Campbell Company. Upon a trial of the issues in that case the district court excused the jury and dismissed the case on the sole ground that the contract was void for want of an appropriation to pay the stipulated compensation. The order of this court was: "The judgment is therefore reversed and the cause remanded, with directions to enter a judgment according to the prayer of the petition." However, that order was changed to read:

"Reversed and remanded for further proceedings." The case is now here on this second appeal by plaintiff from a similar judgment of the district court dismissing the action.

The action is upon a written contract, dated October 22, 1929, entered into between Campbell Company and the city of Harvard for services rendered by that company in auditing the books of the city, the contract price being $495. The answer of the defendant alleges that the contract is void because there was no appropriation made for the purpose of the contract prior to its execution as required by the statutes governing cities of the second class, and also that it was void under the ordinances of the city of Harvard.

The first question was presented on the former appeal, upon the state of facts shown in the former opinion, which may be summarized as follows: On August 13, 1929, the city council passed an appropriation ordinance for the fiscal year ending April 30, 1930, in the total sum of $18,780, divided into various funds, including "General Fund $5,000." This general fund was subdivided into a number of specific items totaling $4,527 and, "For purposes not specifically enumerated $463," making a grand total of $4,990. By section 2 of the same ordinance there was levied upon all the taxable property of the city "For the purpose of raising the amounts set forth above, in addition to the occupation tax and the license money of said city," a total of 21 mills, including 4 mills for general fund. It was, however, stipulated in that case that at the beginning of the fiscal year, May 1, 1929, and ending May 1, 1930, there was in the general fund unexpended from the preceding fiscal year the sum of $1,111.11, and it was stated in the opinion that, "When the items of $1,111.11 and $463 are considered parts of the general fund available for the fiscal year beginning May 1, 1929, the appropriation was sufficient to meet the expense of the audit at the time the contract was executed, if not then reduced below $495 by payment of other claims. If then sufficient

to meet the expenditure, subsequent depletion would not invalidate the contract." The holding was in effect that there was a sufficient appropriation of the general fund to authorize the contract in question.

Upon the second trial the stipulation above referred to was excluded by the court, and such ruling is assigned as error by the appellant on the theory that in the absence of fraud or mistake a stipulation once entered into in a case is binding upon the parties for all time until the case is finally disposed of, but we do not deem it necessary to decide the point, especially as it appears from the evidence that the stipulation was entered into under a mistake of fact, to wit, there had been included in the balance shown on the treasurer's book, as a part of the general fund, the sum of $758.91 of money properly belonging to the water fund, and that unpaid warrants had been drawn against the fund prior to May 1, 1929, so that in truth and in fact the general fund on that date was overdrawn $213.99. It therefore appeared that the factual basis of our former opinion had been swept away.

It further appears in the evidence upon the second trial that the assessed valuation of the city of Harvard for the fiscal year under inquiry was $848,336 upon which a levy of 4 mills for general fund would produce only $3,393.34, to which if we add the balance supposed to be in the general fund May 1, 1929, $1,111.11, and the further sum of $890 shown to be the amounts collected from occupation tax and license tax during the fiscal year, we reach the sum of $5,394.45 as the total amount available for the general fund; or deducting the balance of $1,111.11 we have a total applicable to general fund of $4,283.34. It also appears from the evidence that there was a balance of $2,287.96 in the general fund at the date of the contract, October 22, 1929. A levy of 21 mills upon the assessed valuation would produce but $17,815.05, while the total appropriation was $18,780. It would therefore appear that in making the appropriation the council took into consideration the probable receipts from other sources

during the year, such as occupation and license taxes, the excess over the levy being $965. Under the statute the appropriation could not exceed the amount which the levy would produce, but we think this restriction is applicable only to appropriations payable out of the general levy of taxes, and that the council may anticipate revenues from other sources and include them in the appropriation to the extent thereof. If this view is correct, then the appropriation for $18,780 included the $890 anticipated and actually collected, the proper proportion of which was included in the $463 "for purposes not specifically enumerated." The levy produced $17,815 and the occupation and license taxes, $890, or a total of $18,705. It therefore appears that the appropriation exceeded the total revenues of the city by some $75, and it follows that no more, but something less, than $463 was available as a basis for plaintiff's contract. The contract being for more than the amount appropriated is void.

Upon the former hearing we held: "Unused and unappropriated money in a city treasury in the general fund at the time a contract for a necessary city audit is executed may, for the purposes of the contract, be available for payment of the auditor's stipulated compensation." Under the rule thus announced the plaintiff is not aided for the reason that the total funds available for general fund was $4,283.34 and specific appropriations from that fund amounted to $4,527; thus the balance shown in the general fund at date of the contract ($2,287.96) was used up by the appropriation to specific items, but each item in the fund is reduced proportionately to the amount available to it; and by this process the $463 would suffer, still leaving an amount insufficient to support plaintiff's contract.

We are forced to the conclusion that the contract sued upon is void for want of a previous appropriation to support it. See cases cited in our former opinion, 123 Neb. 539, at page 542.

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4. Indorsee *held* innocent holder of renewal note. *Hammond v. Frost* 702
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6. Erasure of indorsement of payment *held* not a material alteration of note. *Hammond v. Frost* 702
7. Alleged purchaser of realty who did not sign purchase-money note nor mortgage is not liable for a deficiency judgment. *Comstock v. Reed* 752

Bonds.

1. If negotiable bonds are negotiated after theft from the true owner, the purchaser acquires good title if purchased before maturity in good faith for valuable consideration, or under circumstances constituting the purchaser a holder in due course. *State, ex rel. Sorensen, v. Nebraska State Savings Bank* 262
2. Holder of stolen bond *held* not holder in due course. *State, ex rel. Sorensen, v. Nebraska State Savings Bank* 262
3. Ordinarily, no duty rests on the holder of a negotiable bond to notify the maker of such ownership; but it is the maker's duty to seek the holder when making payment. *Knopf v. Perkins* 366
Haskin v. Langdon 535

Bridges.

Construction of bridge across the Missouri river, and issuance of revenue bonds payable from bridge tolls *held* within statutory powers of city of Omaha. *Kirby v. Omaha Bridge Commission* 382

Brokers.

1. A real estate agency agreement with no definite time for performance remains in effect only a reasonable time. *Olston v. Woods Bros. Corporation* 462
2. A real estate sales agent may terminate an agreement to sell lots where his principal fails or is unable to convey to purchaser one of the lots sold and where all the lots are held by the same title. *Olston v. Woods Bros. Corporation* 462

Burglary.

Jug and wine contained therein in owner's residence constitute "property of value," subject to the crime of breaking and entering with intent to steal. *Bulwan v. State* 436

Carriers.

1. Where a motorbus of a common carrier is struck by an automobile, causing injuries to passenger on the bus, the mere fact of collision raises no presumption that the bus driver was negligent. *Knight v. Lincoln Traction Co.* 447
2. Negligence must be determined from the facts resulting in collision between a motorbus and an automobile, and the burden is on passenger suing for injuries to prove negligence of bus driver as basis of recovery. *Knight v. Lincoln Traction Co* 447

Conspiracy.

Whether defendant conspired to defraud plaintiff, as remainderman, of his title *held* question for jury. *Beemer v. Hager* 287

Constitutional Law. SEE STATUTES.

1. The constitutional provisions imposing double liability on bank stockholders, prior to amendment in 1930, were self-executing, and liability thereby created was free from legislative interference. *In re Estate of Wilson* 106
2. The legislature may define words in an act, but not so as to give them an arbitrary and improper meaning. *Moeller, McPherrin & Judd v. Smith* 424
3. The legislature may exercise a reasonable discretion in

selecting the method of securing practical equality in legislative apportionment, but the question whether constitutional requirements have been complied with is for the court. *Rogers v. Morgan* 456
4. Statute providing for apportionment of senatorial and representative districts *held* unconstitutional. *Rogers v. Morgan* 456

Contracts.

1. Rescission is not founded on an absolute right, but rests on equitable principles. *Landgren v. Bolton* 297
2. One dealing with a woman who can neither read nor write, who has never transacted important business without aid, and who made her mark to the instrument, must establish that she fully understood the object and import of the instrument. *In re Estate of Nelson* 563
3. A promise to pay additional compensation for performance by promisee of a contract which promisee is already under obligation to the promisor to perform is without consideration. *In re Estate of Nelson* 563
4. Whether a narcotic addict was incapable of making a valid contract depended on whether, at time of executing the contract, his understanding was so deficient that he had no knowledge of the consequences of his act. *Shotwell v. First Nat. Bank* 676
5. Where a printed contract, when signed by one party, contains blank spaces, and material terms authorized by the signer and agreed to by the other party are not inserted as promised, the writing is inoperative. *Reilley Bros. v. Thompson* 683

Corporations.

1. A receiver of a corporation takes its assets subject to the conditions and legal disabilities with which they were trammeled in the hands of the corporation. *Torgeson v. Department of Trade and Commerce* 38
2. Extension of credit to a corporation is sufficient consideration for indorsement of corporation's note by officer of corporation. *Bliss v. Farmers Grain & Stock Co.* 147
3. Directors of a corporation are trustees and, as such, are charged with the highest degree of responsibility in dealing with the corporation in their own behalf. *Duffy v. Omaha Merchants Express & Transfer Co* 273
4. The accountability of a director of a corporation is determined by strict standards fixed for a fiduciary. *Duffy v. Omaha Merchants Express & Transfer Co* 273

5. Officers occupying a fiduciary relation towards a corporation cannot sell property to the corporation where they act both for the corporation and themselves. *Duffy v. Omaha Merchants Express & Transfer Co*..... 273
6. Sale of property to a corporation by its officers is voidable at option of corporation. *Duffy v. Omaha Merchants Express & Transfer Co*..... 273
7. Sale of corporate stock by officers to the corporation *held* void. *Duffy v. Omaha Merchants Express & Transfer Co.* 273
8. An officer of a corporation must account to the corporation for secret profits made in corporate transaction. *Duffy v. Omaha Merchants Express & Transfer Co*..... 273
9. Minority stockholders *held* not entitled to recover for benefit of corporation alleged excessive salaries paid to officers where one of the minority stockholders was one of such officers. *Duffy v. Omaha Merchants Express & Transfer Co.* 273
10. Application for a receiver for a corporation is addressed to the court's discretion. *Duffy v. Omaha Merchants Express & Transfer Co*..... 273
11. Corporation *held* empowered to indorse notes of another corporation largely indebted to it. *Fremont Nat. Bank v. Ferguson & Co*..... 307
12. Unless expressly or impliedly authorized by its charter, a corporation has no power to execute accommodation paper, but a contract reasonably adapted for protection of its assets is not accommodation paper and may be executed by the corporation. *Fremont Nat. Bank v. Ferguson & Co*..... 307
13. Whether a contract is for the benefit of a corporation is a question for decision of its managing officers, and the plea of *ultra vires* will be unavailing where it does not appear that under no circumstances could it so operate. *Fremont Nat. Bank v. Ferguson & Co*..... 307
14. A charter purporting to give a corporation powers of an individual must be construed as restricting exercise of such powers to the business and purposes of the corporation. *Fremont Nat. Bank v. Ferguson & Co*..... 307
15. A contract executed by the president, vice-president, or general manager of a corporation with reference to the general business of the corporation is presumably authorized, and ordinarily a resolution of the directors is not necessary in such case. *Fremont Nat. Bank v. Ferguson & Co*..... 307
16. Officers of a corporation are proper parties defendant

in an action for fraud based on transactions conducted by such officers. *Paul v. Cameron* 510
17. Legal existence of a corporation could not be collaterally attacked for the purpose of adjudging two of the corporate promoters jointly liable as partners for the negligence of one of them. *Interstate Airlines, Inc., v. Arnold* 665
18. A partnership or corporation owning an airplane is not liable for damage to property of a third person occurring while the airplane is being operated by a partner or a corporate officer exclusively for his individual purposes without knowledge of owner. *Interstate Airlines, Inc., v. Arnold* 665

Counties and County Officers.

1. County commissioners possess only powers which are expressly granted or are incidental thereto. *Ahern v. Richardson County* 659
2. Counties have no authority at common law to issue bonds. *Ahern v. Richardson County* 659
3. Power to issue commercial paper must be conferred upon counties by statute, and must be exercised in the manner prescribed. *Ahern v. Richardson County* 659
4. Taxpayers *held* entitled to enjoin construction of interstate bridge by county. *Ahern v. Richardson County* 659
5. A county is not liable at common law for negligence in improving a public highway. *Franek v. Butler County* 852
6. Act taking away immunity of county from liability for negligence in failing to maintain public highways is applicable to all counties. *Franek v. Butler County* 852
7. A county under township organization is liable for negligence in improving a road which the county is required to keep in repair. *Franek v. Butler County* 852
8. When a county under township organization supersedes township in authority over a public highway, the county becomes liable for negligence in maintenance thereof. *Franek v. Butler County* 852
9. A county under township organization, by improving a highway without designating it a "county road," cannot thereby escape liability for negligence. *Franek v. Butler County* 852

Courts.

1. A rule established by the supreme court and followed for many years by trial courts should not be changed except for reasons of grave importance. *Patterson v. Kerr* 73

2. Giving an instruction approved for many years will not be held reversible error unless prejudicial. *Patterson v. Kerr* 73
3. The supreme court may decline to entertain original jurisdiction to oust an executive state officer from office where the information fails to state a cause of action in *quo warranto*. *State, ex rel. Good, v. Conklin* 417
4. Except in the exercise of appellate jurisdiction, the supreme court is one of limited and enumerated powers. *State, ex rel. Good, v. Conklin* 417
5. Assignment of wages to secure loan made to Iowa resident in Iowa directed to Nebraska employer, where assignment provided for interest in excess of Nebraska small loan legislation, though valid where made, *held* contrary to public policy of Nebraska and unenforceable. *Personal Finance Co. v. Gilinsky Fruit Co* 450
6. Decision of the United States supreme court determining whether a state moratory law impairing obligation of mortgage contracts violates the federal Constitution is binding on state courts. *Bell v. Niemann* 762

Creditors' Suit.

Evidence *held* not to establish a joint adventure between husband and wife. *Bank of Cedar Bluffs v. LeGrand* 183

Criminal Law.

1. Refusal of a change of venue being discretionary with the trial judge, his ruling will not be disturbed unless abuse of discretion is shown. *Carlsen v. State* 11
2. In trial of a criminal case, the attorney general has power to designate an assistant attorney general to appear in his stead; and the assistant need not be a bonded deputy. *Carlsen v. State* 11
3. Generally, one convicted cannot complain that he was convicted on some counts and acquitted on others. *Carlsen v. State* 11
4. A person who procures another to commit an offense may be prosecuted and punished as a principal. *Carlsen v. State* 11
5. A bill of exceptions preserving the evidence introduced on hearing of issues on a plea of abatement is a prerequisite to review of order overruling the plea. *Burnham v. State* 370
6. Matters cannot be presented by plea in abatement which are triable under a plea of not guilty. *Burnham v. State* 370
7. Where the statute authorizes an increased penalty on a

second or subsequent conviction, the record of the former conviction is admissible to establish such conviction. *Burnham v. State* 370
8. Admission of evidence of previous conviction and submission of issue to jury approved. *Burnham v. State* 370
9. Defendant may not permit incompetent evidence to be admitted without objection and thereafter complain of its admission. *Vinciquerra v. State* 541
10. In a criminal prosecution, where the evidence is circumstantial, the court's failure, on request, to give a proper instruction on circumstantial evidence is prejudicial error. *Vinciquerra v. State* 541
11. Proof required to justify conviction on circumstantial evidence. *Vinciquerra v. State* 541
12. Information *held* to charge forgery, to which the three-year statute of limitations does not apply. *Flannigan v. State* 640
13. Refusing accused a continuance is not abuse of discretion, unless it clearly appears that accused suffered prejudice. *Flannigan v. State* 640
14. Question of continuance being discretional, the trial court's ruling thereon is not reversible error, unless prejudicial abuse of discretion is shown. *Smith v. State* 776
15. Evidence of good character is to be considered by the jury with other evidence. *Flannigan v. State* 640
16. Motion for new trial for newly discovered evidence must be filed at term of court in which verdict is rendered. *Flannigan v. State* 644
17. Statutory provisions regulating appeals from inferior courts in misdemeanor cases are mandatory. *Brainard v. State* 723
18. One convicted of a misdemeanor in an inferior court must enter into a recognizance substantially complying with the statute in order to effect an appeal. *Brainard v. State* 723
19. In a prosecution for making false bank statements where evidence is received of other transactions which defendant contends were *bona fide* loans for the purpose of increasing the reserve, refusing requested instruction that such transactions if *bona fide* were not illegal *held* error. *Foreman v. State* 824
20. The court must instruct the jury as to nature of defense and law applicable thereto, whether requested or not. *Foreman v. State* 824
21. On the question of defendant's intent to commit the crime of falsifying bank statements, evidence of other similar acts is admissible where circumstances in connection therewith are such that, if defendant was put

to trial thereon, the court would be justified in submitting the case to the jury. *Foreman v. State* 824

Damages.

1. Damages of $6,500 for personal injuries *held* not excessive. *Patterson v. Kerr* 73
2. Damages of $5,000 for injury to child approved. *Campbell v. Slater* 231
3. Damages for injury to wrist and hand *held* not excessive. *Berg v. Griffiths* 501
4. Only such pain, suffering, and loss of earnings as the evidence shows with reasonable certainty plaintiff will experience in the future may be considered by the jury in fixing damages for personal injury. *Jensen v. Omaha & C. B. Street R. Co* 599
5. An instruction that pain and suffering and loss of earnings which plaintiff will "probably" suffer in the future may be considered in fixing damages for personal injury *held* erroneous. *Jensen v. Omaha & C. B. Street R. Co* 599
6. In suit to foreclose a mechanic's lien, evidence *held* to sustain defendant's claim for damages. *Olson Construction Co. v. Commercial Building & Investment Co* 609

Death.

Ordinarily, a presumption, such as presumption of natural death, has no weight as evidence, but is merely a legal excuse for not offering evidence, and, if met with evidence of probative force, ceases to be a factor in the case. *Aeschleman v. Haschenburger Co* 207

Deeds.

1. Grantor's delivery of deed to one of several named grantees is sufficient delivery as to all. *Perry v. Markle* 29
2. Deed *held* to impose a condition subsequent which had been complied with. *Brooks v. Kimball County* 645

Domicile.

An unemancipated minor child whose father is dead takes the settlement of the mother by derivation. *Miller v. Banner County* 690

Election of Remedies.

1. A party choosing one of two inconsistent existing remedies is precluded from thereafter pursuing the other, and this doctrine may be applicable where the remedies are against different persons. *Henley v. Live Stock Nat. Bank* 857
2. Plaintiff's futile attempt to probate a writing as a will

held not to preclude her recovering on the writing as a gift. *Henley v. Live Stock Nat. Bank* 857

Elections.

1. A candidate defeated at the primary election for nomination for office of governor cannot by petition become a candidate at the following general election for the office of United States senator. *State, ex rel. O'Sullivan, v. Swanson* 806
2. A candidate defeated at the primary election cannot become a candidate by petition in the ensuing general election. *State, ex rel. Driscoll, v. Swanson* 715
3. Act abolishing party circles on election ballots *held* constitutional. *State, ex rel. Kaspar, v. Lehmkuhl* 812

Eminent Domain.

In an action for damages sustained by construction of a highway across land, evidence *held* to sustain finding that landowner had not waived damages. *Chiles v. Custer County* 481

Equity.

1. Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of statute of limitations. *Perry v. Markle* 29
2. Ordinarily, equity will not take cognizance of an action to recover a specific amount of money alleged to have been embezzled. *Dickerson v. Surety National Farm Loan Ass'n* 67

Estoppel.

1. Where a principal entrusted a claim with an agent for collection, a *bona fide* purchaser of the claim from the agent acquired title thereto. *Cavett v. First Nat. Bank of Cozad* 117
2. "Estoppel" defined. *Graham Ice Cream Co. v. Petros* 172
3. Evidence *held* not to establish estoppel. *Graham Ice Cream Co. v. Petros* 172
4. Where one of two parties to transactions must suffer loss through misconduct of a third person, the superior equities will be determined from all material circumstances. *Johnson v. Kindig* 360
   Knopf v. Perkins 366
5. Where one of two parties must lose through misconduct of a third person, the loss will fall where equity places it. *Haskin v. Langdon* 535

Evidence.

1. One with knowledge of time and distance is competent to testify as to rate of speed of automobile; his opportunity for and extent of observation being matters affecting the weight of the testimony. *Patterson v. Kerr* 73
2. Proof concerning an agent's authority may be made by any one who knows the facts. *Powerine Co. v. Grimm Stamp & Badge Co* 165
3. Oral directions by an employer or superior to an agent are not hearsay, but substantive evidence to prove the agent's authority or lack of authority. *Powerine Co. v. Grimm Stamp & Badge Co* 165
4. A self-serving declaration is one made by a party in his own interest out of court, and does not include testimony which he gives as witness at a trial. *Powerine Co. v. Grimm Stamp & Badge Co* 165
5. Parol evidence is inadmissible to vary a written agreement, but evidence is admissible to show that a written obligation has been discharged in accordance with a contemporaneous parol agreement, when such parol agreement was a condition precedent on which the written obligation was executed. *Seminole Bond & Mtg. Co. v. Investors Realty Co* 193
6. In an action by the payee against maker of note, oral testimony is admissible to prove the purpose for which the note was given. *Elmcreek Ditch Co. v. St. John* 253
7. The supreme court takes judicial notice of proceedings of state constitutional conventions and of the journals of the state senate and house. *Moeller, McPherrin & Judd v. Smith* 424
8. In a workmen's compensation case, employer's report of injury to employee is admissible as an admission against interest of employer, and is sufficient to make a *prima facie* case for claimant. *Orchard & Wilhelm Co. v. Petersen* 476
9. Cogent reasons and circumstances which strengthen expert opinion as to a scientific fact in issue may determine the issue. *Sherman v. Great Western Sugar Co* 505
10. In action on fire policy, defense of incendiarism need not be established beyond a reasonable doubt. *Weiner v. Aetna Ins. Co* 572
11. Facts reasonably inferable from facts and circumstances proved may be regarded as established. *Kirkpatrick v. Chocolate Sales Corporation* 604
12. A hypothetical question calling for expert knowledge is sufficient, if so framed as to fairly reflect the facts proved. *Shotwell v. First Nat. Bank* 676

Executors and Administrators.

1. Action to enforce deceased bank stockholder's constitutional liability *held* not barred by failure to file contingent claim against his estate. *In re Estate of Wilson* 106
2. Liability of stockholder in state bank, while it is solvent and a going concern, is not a "contingent claim" and need not be filed against estate of deceased stockholder within period fixed for filing claims. *Brownell v. Sunderlin* 373
3. In a litigable controversy between administrator and heirs, the administrator does not represent the heirs. *In re Estate of Barlow* 810

Fines.

1. Where judgment requires imprisonment of accused until fine is paid, issuance of execution to collect the fine is not prerequisite to imprisonment. *State, ex rel. Marasco, v. Mundell* 673
2. Judgment imposing jail sentence and fine on accused and remanding him to custody of sheriff to carry out the sentence and judgment is equivalent to judgment requiring accused to be confined in jail until fine is paid or satisfied. *State, ex rel. Marasco, v. Mundell* 673

Fixtures.

1. Whether an article annexed to realty has become a part thereof is a mixed question of law and fact. *Swift Lumber & Fuel Co. v. Elwanger* 740
2. Articles which may or may not become attached to the freehold, according to the circumstances, will retain their character of personalty where sold under a conditional sale contract, when rights of innocent third persons are not adversely affected thereby. *Swift Lumber & Fuel Co. v. Elwanger* 740
3. Where removal of a boiler, burner and tank would not materially injure premises, the right thereto of seller under conditional sale contract *held* superior to rights of prior realty vendor under executory contract. *Swift Lumber & Fuel Co. v. Elwanger* 740
4. Rights of seller of electrical refrigeration equipment permanently affixed to realty *held* inferior to rights of prior realty vendor. *Swift Lumber & Fuel Co. v. Elwanger* 740

Forgery.

1. In a prosecution for forgery, it is not necessary to allege or prove an intent to defraud any particular person. *Carlsen v. State* 11

2. A recital in a bond, with interest coupons attached, that the makers caused the coupons to be executed with facsimile signatures does not authorize a third party to make facsimile signatures on extension coupons. *Carlsen v. State* 11
3. Extension coupons purporting to evidence interest to become due on a bond are the subject of forgery. *Carlsen v. State* 11
4. An information charging forgery of extension coupons attached to mortgage bonds *held* sufficient. *Carlsen v. State* 11
5. An information charging forgery of coupons with intent to prejudice "and" defraud, rather than with intent to damage "or" defraud, *held* not subject to demurrer. *Carlsen v. State* 11
6. Variance between name on note and in information for forgery *held* immaterial. *Flannigan v. State* 640

Fraud.

1. A purchaser may rely on representations on the face of a bond as to the security unless he has actual knowledge to the contrary. *Paul v. Cameron* 510
2. In an action for false representations, scienter need not be alleged, proved, nor covered by instructions. *Paul v. Cameron* 510
3. In an action for fraud in the sale of corporate bonds, in ascertaining their value, subsequent events such as history of the corporation, its subsequent insolvency, winding up of its affairs, and all other circumstances throwing light on their value at time of sale may be considered. *Paul v. Cameron* 510

Fraudulent Conveyances.

1. A judgment creditor of seller cannot levy on stock of goods acquired by buyer in substantial compliance with the bulk sales law. *Botsford v. Holcomb* 85
2. Sale of goods in bulk *held* to substantially comply with bulk sales law. *Botsford v. Holcomb* 85

Garnishment.

Provision in liability insurance policy as to suit and notice *held* not binding on judgment creditor of insured. *Glick v. State Automobile Ins. Ass'n* 350

Gifts.

1. To constitute a valid gift *inter vivos*, dominion over and title to the gift must pass to donee by the voluntary, intentional act of donor. *Andersen v. Luikart* 256

2. To make a valid gift *inter vivos*, there must be intention to transfer title to property, delivery by donor, and acceptance by donee. *Henley v. Live Stock Nat. Bank*..... 857
3. The essential difference between a gift *inter vivos* and a gift *causa mortis* is that in the latter the survival of donor may defeat the gift. *Henley v. Live Stock Nat. Bank* 857

Highways. SEE COUNTIES AND COUNTY OFFICERS, 5-9.

Husband and Wife.

1. The state protects married parties from the wrongful intrusion of another. *Baltzly v. Gruenig*..... 520
2. Any one intentionally disturbing the marital relation is liable to the wronged spouse. *Baltzly v. Gruenig*..... 520
3. In a suit for alienation of affections, evidence of defendant's wealth is inadmissible, in absence of evidence tending to show that defendant used her financial status as an inducement to accomplish improper ends. *Baltzly v. Gruenig* 520

Infants.

1. The expressed wish of a dying father regarding custody of minor children should be given great weight, but does not relieve the court of responsibility to determine what is for the best interests of the children. *In re Guardianship of Herten*..... 88
2. Award of custody of minor children by trial court approved. *In re Guardianship of Herten*..... 88

Insurance.

1. Defense of incendiarism to action on fire policy may be established by circumstantial evidence. *Weiner v. Aetna Ins. Co.* 572
2. In action on fire policy, every act and circumstance offerred to prove defense of incendiarism must contribute something to proof of that fact. *Weiner v. Aetna Ins. Co.* 572
3. In an action on fire policy, whether fire was of incendiary origin *held* question for jury. *Weiner v. Aetna Ins. Co.* 572
4. Untrue answers in application for disability insurance, if knowingly made, will void the contract. *Scott v. New England Mutual Life Ins. Co*..... 724
5. Policy indemnifying insured against loss of time resulting solely from bodily sickness contracted not less than fifteen days after date of policy covers sickness first manifesting itself after such period, though medical

cause antedated issuance of policy. *Valencia v. Continental Casualty Co* 820
6. Fair doubt as to meaning of words used in policy should be resolved against insurer. *Baumgart v. Sovereign Camp, W. O. W* 865
7. Written and printed parts of a policy should be construed together and reconciled if possible; but, if printed and written clauses are repugnant, written clauses will control printed ones. *Baumgart v. Sovereign Camp, W. O. W* 865
8. Where exchange certificate of insurance became effective August 1, 1929, and was to bear date August 1, 1925, the latter date *held* applicable in determining when automatic premium loan became available. *Baumgart v. Sovereign Camp, W. O. W* 865
9. Totally disabled insured *held* not prevented from recovering benefits under health policy for period which insured was "necessarily, continuously and actually confined within the house" because he was taken twice to his office. *Mackprang v. National Casualty Co* 877
10. Insured's failure to return check tendered in full settlement of claim under health policy *held* not to constitute "payment" where claimant indicated his intention not to so receive it. *Mackprang v. National Casualty Co* 877

Interest.

1. Where a loan company advanced money to take up interest coupons on loans negotiated by it, such coupons ceased to be current obligations and drew only legal interest. *Tjaden v. Smith* 119
2. Lawful interest, if not fixed by law, is the subject of contract, and is not allowable at a different rate by a court of equity. *Johnson v. Kindig* 360

Intoxicating Liquors.

In a prosecution for unlawful possession of intoxicating liquor, an instruction using the phrase "reasonably necessary" for defendant's personal use, instead of the statutory term "reasonably sufficient," *held* not prejudicially erroneous, where possession was not in defendant's private dwelling-house. *Verbeck v. State* 503

Judgment.

1. State courts must give full faith and credit to judgments of federal courts. *Hayes v. Payne Investment Corporation* 24
2. Recovery and satisfaction of judgment against one of

several joint tort-feasors is a bar to an action against the others for the same cause of action. *Hayes v. Payne Investment Corporation* 24
3. Generally, findings of fact and judgment must conform to and be supported by the pleadings. *Fidelity Finance Co. v. Westfall* 56

Jury.

1. Where a law action was changed by amendment to one in the nature of a creditors' bill, defendant was not entitled to a jury trial as a matter of right. *Bank of Cedar Bluffs v. LeGrand* 183
2. An executive state officer against whom *quo warranto* proceedings are instituted in the supreme court is not entitled to a jury trial as a matter of right. *State, ex rel. Good, v. Conklin* 417

Licenses.

1. Gasoline tax is an excise tax from which county is not exempt. *State v. Cheyenne County* 619
2. Statute imposing gasoline tax on counties *held* constitutional. *State v. Cheyenne County* 619

Limitation of Actions.

1. The statute of limitations does not raise a presumption of payment, but is a statute of repose. *Torgeson v. Department of Trade and Commerce* 49
2. Suit to recover assessments levied against bank to maintain depositors' guaranty fund *held* barred by statute of limitations. *Torgeson v. Department of Trade and Commerce* 49

Mandamus.

The writ of mandamus may not be issued where there is a plain and adequate remedy at law. *State, ex rel. Sutton, v. Towl* 848

Master and Servant.

1. Evidence *held* to establish that employee's death was not due to accidental injury resulting from his employment. *Beatrice Creamery Co. v. Kizer* 34
2. Disability resulting from exertion incident to an employment, which combined with a preexisting disease produced the disability, is not compensable. *Gilkeson v. Northern Gas Engineering Co* 124
3. In a compensation case, accidental death need not be established to a certainty, but only to a reasonable certainty. *Aeschleman v. Haschenburger Co* 207
4. Salesman selling on commission *held* an employee, and

not an independent contractor. *Aeschleman v. Haschenburger Co.* 207
5. Evidence *held* to establish death due to accident. *Aeschleman v. Haschenburger Co.* 207
6. A compensation claimant has the burden of proving that the employee's death was accidental. *Aeschleman v. Haschenburger Co.* 207
7. "Seasonal employment" defined. *Hogsett v. Cinek Coal & Feed Co.* 393
8. "Independent contractor" defined. *Hines v. Martel Telephone Co.* 398
9. "Regular term of office," as applied to government employees under the workmen's compensation law, means a term with definite duration fixed by law. *Shandy v. City of Omaha* 406
10. Captain in city fire department *held* not an "official" but an employee appointed for a regular term, entitled to benefit of compensation law. *Shandy v. City of Omaha* 406
11. Receipt of pension benefits by widow of deceased captain of city fire department *held* not to bar claim under compensation law. *Shandy v. City of Omaha* 406
12. Village marshal, appointed at beginning of municipal year, held "officer" of village appointed for a regular term of office, and not an "employee," within compensation law. *Suverkrubbe v. Village of Fort Calhoun* 472
13. Injury to an employee is not compensable unless it arises out of and in course of employment. *Suverkrubbe v. Village of Fort Calhoun* 472
14. To constitute "joint employment," there must be concert of action with reference to wages, hours of employment, or term of service of the employee. *Suverkrubbe v. Village of Fort Calhoun* 472
15. Where one was engaged as village marshal and by power company as watchman, an injury sustained by him *held* not to arise out of employment by power company. *Suverkrubbe v. Village of Fort Calhoun* 472
16. To recover compensation for employee's death, claimant must establish that employee's death resulted from accidental injury arising out of and in course of employment. *Orchard & Wilhelm Co. v. Petersen* 476
17. In a compensation case, the supreme court, on trial *de novo*, may consider the fact that the trial court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses. *Sherman v. Great Western Sugar Co.* 505

18. In a compensation case, disabling injuries to employee's nerves and spine and resulting industrial disability are subjects of expert testimony. *Sherman v. Great Western Sugar Co.* 505
19. In a compensation case, employee's disability *held* not attributable to an industrial accident. *Sherman v. Great Western Sugar Co.* 505
20. Injury to employee *held* to have arisen out of and in course of employment. *Kirkpatrick v. Chocolate Sales Corporation* 604
21. Compensation cases are tried *de novo* in the supreme court. *Kirkpatrick v. Chocolate Sales Corporation* 604
22. The workmen's compensation law is liberally construed to give effect to its purposes. *Kirkpatrick v. Chocolate Sales Corporation* 604
23. An injury is received in course of employment when sustained in work for which servant was employed or work incidental thereto. *Kirkpatrick v. Chocolate Sales Corporation* 604
24. Dependents of superintendent of a business whose duties required him to travel *held* entitled to compensation where he was fatally injured while starting on a trip in performance of duties of his employment. *Kirkpatrick v. Chocolate Sales Corporation* 604
25. Injury to claimant from burns *held* to be result of "accident." *Park v. School District* 767
26. In absence of agreement or legal disability, claim for compensation must be made within six months after injury and a petition filed therefor within one year after the accident. *Park v. School District* 767
27. Where statutory requirement as to claim for compensation is not complied with, compensation may be allowed only if the employee's injury is latent and claim is made within six months after employee acquires knowledge of disability. *Park v. School District* 767
28. One asking compensation must establish that disability was caused by an accident arising out of and in course of employment. *Truka v. McDonald* 780
29. Whether one is an employee or independent contractor within the workmen's compensation law must be determined from facts of the particular case. *Schou v. Village of Hildreth* 784
30. One engaged by a village to care for swimming pool *held* an "employee," within workmen's compensation law. *Schou v. Village of Hildreth* 784
31. Death caused by exposure to the elements is not com-

pensable if exposure is the same as that to which the general public is subjected. *Brady v. Beatrice Creamery Co.* 786
32. Death from heart failure *held* not result of accident or personal injury arising out of employment. *Brady v. Beatrice Creamery Co.* 786
33. Malingering, as applied to compensation cases, defined. *Great Western Sugar Co. v. Hewitt* 790
34. The supreme court trying a compensation case *de novo* may consider the fact that the trial judge observed the witnesses. *Great Western Sugar Co. v. Hewitt* 790
35. Where, after lump settlement has been made, application is made for further compensation for permanent total disability on the ground that the injury aggravated a dormant disease, the employee must establish with reasonable certainty existence of the disease at time of accident and that the accident was a causative factor in producing total disability. *Gooch Milling & Elevator Co. v. Warner* 796

Mortgages.

1. A mortgagee is bound to take notice of rights of persons in possession of the mortgaged premises. *Perry v. Markle* 29
2. Open, adverse possession of realty by the record owner for more than ten years will bar suit to foreclose an unrecorded mortgage of which owner had no knowledge. *Perry v. Markle* 29
3. Mortgagee *held* guilty of laches precluding foreclosure of mortgage. *Perry v. Markle* 29
4. Bonds of a series secured by mortgage are equal as to priority. *Tjaden v. Smith* 119
5. A foreclosure decree, in so far as it directs sale of the mortgaged property, is not affected by a modification touching the personal liability of defendant. *Prudential Ins. Co. v. Nethaway* 330
6. Modification of foreclosure decree *held* not to entitle mortgage debtors to second stay of sale. *Prudential Ins. Co. v. Nethaway* 330
7. Lien of materialman *held* subordinate to lien of vendor for purchase money. *Larson Real Property Co. v. Norris-Lyddon Produce Co.* 357
8. Payment of a mortgage note to authorized agent extinguishes the debt and entitles mortgagor to cancelation of mortgage. *Shriver v. Sims* 374
9. A mortgage is a mere security. *Shriver v. Sims* 374

10. In suit to foreclose purchase-money mortgage, *held* purchaser could recoup damages for nondelivery of certain personalty, and for damages for false representations concerning a water plant. *Musgrove v. Eskilsen* 730

Municipal Corporations.

1. Special sewerage system bonds issued by a city which omitted provision making them redeemable at option of city after five years cannot be registered by the state auditor. *State, ex rel. City of Columbus, v. Price* 132
2. All bonds issued by cities must be registered by the state auditor. *State, ex rel. City of Columbus, v. Price* 132
3. City council *held* not estopped to question right of utility company to payments under a contract by reason of a former council having made payments thereunder to the company. *City of Scottsbluff v. Western Public Service Co.* 160
4. Where a contract between a city and a utility company is ambiguous and a practical construction is placed thereon by which the city council makes monthly payments to the utility company, a new city administration cannot, months later, recover such payments. *City of Scottsbluff v. Western Public Service Co* 160
5. A pedestrian walking over a traveled way need not go around an obstruction or defect, but he must exercise more than ordinary care. *Pinches v. Village of Dickens* 239
6. A person is not guilty of contributory negligence as a matter of law, in a suit against a village for injuries sustained on account of a defective way, simply because he could have walked at another place, nor because he had been over the same route a short time before. *Pinches v. Village of Dickens* 239
7. Previous notice of defect in a walk does not as a matter of law constitute sufficient contributory negligence to bar recovery for injuries due to the defect. *Pinches v. Village of Dickens* 239
8. Whether village was negligent in failing to remove obstruction from walk *held* question for jury. *Pinches v. Village of Dickens* 239
9. Question whether a way is defective or in an unsafe condition is generally one of fact and not of law. *Pinches v. Village of Dickens* 239
10. Pedestrian *held* not guilty of contributory negligence as a matter of law merely because he attempted to use a walk on which there was an accumulation of débris, if he was walking at a place generally used by pedestrians. *Pinches v. Village of Dickens* 239

11. The fact that an accident did not happen on a side-walk will not bar a recovery by a pedestrian if the place where it did happen was customarily used as a walk to defendant village's knowledge. *Pinches v. Village of Dickens* 239
12. Extension of city water main in a home rule charter city and assessment of realty for benefits are matters controlled by the charter. *Pester v. City of Lincoln*..... 440
13. Objections to assessments of realty for extension of a city water main not made to the city board of equalization within the appointed time *held* waived. *Pester v. City of Lincoln*..... 440
14. Police sergeant *held* legally suspended. *State, ex rel. Sutton, v. Towl*..... 848
15. Whether a police sergeant was legally suspended without pay *held* a matter for determination by the city council in the first instance. *State, ex rel. Sutton, v. Towl*..... 848
16. A property owner may pay a special city assessment for paving in instalments and he may pay the remainder of the assessment at any time by paying the amount thereof and interest to date. *State, ex rel. Todd, v. Thomas* 891
17. The city council of a city of the second class cannot enter into any contract without a previous appropriation, unless the proposition has been sanctioned by the voters. *LeBarron v. City of Harvard*..... 899
18. The fact that at date of contract there was sufficient money in city fund out of which contract was payable to cover the contract will not validate it where the fund is exhausted by previous appropriations. *LeBarron v. City of Harvard*..... 899

Negligence.

1. Questions of negligence and contributory negligence are for the jury. *Patterson v. Kerr*..... 73
2. Failure to submit issue of contributory negligence to jury is reversible error where there is some evidence thereof. *Patterson v. Kerr*..... 73
3. When separate, independent acts of negligence combine to produce a single injury, each negligent party is responsible therefor, though the negligent act of any one alone might not have caused the injury. *Zielinski v. Dolan* 153
4. Negligence is question for jury. *Campbell v. Slater*..... 231
5. The burden of proof of contributory negligence is ordinarily on defendant. *Pinches v. Village of Dickens*..... 239
6. Questions of negligence and contributory negligence are

for the jury. *Pinches v. Village of Dickens* 239
7. In action for injury, telephone lineman, knowing conditions by which injury was occasioned, *held* chargeable with implied assumption of risks arising from those conditions. *Hines v. Martel Telephone Co* 398
8. A storekeeper must maintain his store in reasonably safe condition for customers, but is not an insurer against accidents to customers. *Rogers v. Penney Co* 885
9. A storekeeper who places racks of merchandise around a stairway railing so as to obstruct customers' view is negligent. *Rogers v. Penney Co* 885
10. A storekeeper who does not guard customers from a darkened stairway is negligent. *Rogers v. Penney Co* 885
11. Where the act or omission of a storekeeper creates a dangerous condition in violation of his duty to customers, knowledge is not a necessary element of negligence. *Rogers v. Penney Co* 885

New Trial.

1. A motion for a new trial filed out of time cannot be considered, unless earlier filing was unavoidably prevented, or the motion is based on newly discovered evidence. *Miller v. Banner County* 1
2. Motion for new trial for newly discovered evidence is addressed to the trial court's discretion. *Campbell v. Slater* 231
3. Where defendant's motion for new trial was sustained, former judgment set aside, and dismissal entered, plaintiff *held* the "aggrieved party" with right to present motion for new trial. *Elfers v. Schuff & Sons Hotel Co.* 236
4. A litigant is not entitled to a new trial on the ground that he has been prevented from procuring a bill of exceptions to effect an appeal, unless he has been so prevented without fault on his part. *Green v. Gardner* 349

Nuisance.

Injunctional order against coal yard as nuisance *held* valid; and evidence *held* to sustain finding of contempt. *McFry v. City of Lincoln* 404

Partnership.

To constitute a partnership, there must be an agreement to share profits and losses. *Bank of Cedar Bluffs v. LeGrand* 183

Paupers.

1. A physician *held* not entitled to recover from a county for services rendered to a poor person in an emergency

where the county physician was willing and ready to serve but was not consulted. *Sayre v. Madison County* 200
2. In an emergency requiring an operation to save a pauper's life, the surgeon should communicate with the proper county authorities, but if arbitrary refusal is given, or if the authorities are noncommittal, services may be rendered and the county is liable therefor. *Miller v. Banner County* 690
3. Evidence *held* to establish that minor receiving surgical aid was a pauper within the meaning of the poor laws. *Miller v. Banner County* 690

Physicians and Surgeons.

1. In an action against a dentist for malpractice, the presumption exists that he performed his work with requisite skill and care. *Grandy v. Merchant* 696
2. In an action for malpractice, evidence *held* insufficient to require submission of question of negligence to the jury. *Grandy v. Merchant* 696

Pleading.

1. A fact alleged and admitted is established for the purpose of the case. *Fidelity Finance Co. v. Westfall* 56
2. Permitting defendant to amend answer after plaintiff had rested, by plea of estoppel, *held* within the court's discretion. *State, ex rel. Sorensen, v. Farmers State Bank* 139
3. The fact that a proposed amendment introduces an additional defense or an additional cause of action is not necessarily a fatal objection. *State, ex rel. Sorensen, v. Farmers State Bank* 139
4. A demurrer admits the truth only of facts well pleaded and inferences deducible therefrom. *Van Horn v. Lincoln Sales Outlet Co* 301

Principal and Agent.

1. Principal's affirmance of agent's unauthorized act may be inferred from failure to repudiate it. *State, ex rel. Sorensen, v. Farmers & Merchants Bank* 96
2. A power of attorney must be construed in accordance with rules for interpreting written contracts generally. *Graham Ice Cream Co. v. Petros* 172
3. Where the intention of parties appears from language in power of attorney, such intention should prevail, and where the language will permit, that construction which will support rather than defeat the purpose of the instrument must be adopted. *Graham Ice Cream Co. v. Petros* 172

4. Broker *held* not authorized as agent to receive payment of bonds. *Johnson v. Kindig* 360
5. In a suit to foreclose a mortgage, a mortgagor pleading payment to one not the mortgagee nor assignee has the burden of proving that payment was made to an authorized agent. *Johnson v. Kindig* 360
6. That a loan broker collected interest on bonds and turned it over to the bondholder, although tending to prove agency, does not of itself prove authority to collect the principal. *Johnson v. Kindig* 360
Haskin v. Langdon 535
7. Collection of part of a debt does not necessarily establish agency to collect payment in full. *Johnson v. Kindig* 360
8. One who pays a negotiable bond secured by mortgage to the mortgagee who does not have possession of the bond has the burden of proving the authority of mortgagee to receive payment. *Knopf v. Perkins* 366
9. Mortgagee *held* not authorized agent of indorsee to receive payment. *Knopf v. Perkins* 366
10. Ordinarily, an agent for collection of a mortgage debt is not impliedly limited in the method of collecting the money. *Shriver v. Sims* 374
11. Ordinarily, an agent authorized to collect a debt in money only may bind his principal though the agent accept property other than money, if ultimately the agent receives the face value in money. *Shriver v. Sims* 374
12. A debtor paying an authorized agent need not see that the money reaches the principal, if the debtor is without notice of improper purpose of the collecting agent. *Shriver v. Sims* 374
13. Delegation of authority carries with it implied authority to do acts reasonably necessary to carry out the main authority conferred. *Shriver v. Sims* 374
14. The maker paying a negotiable note to one unable to produce the note assumes the burden of proving that the party to whom he makes payment is the owner, or agent authorized to receive payment. *Haskin v. Langdon* 535
15. A loan broker's habitual collection of principal and interest and payment of same to holder to whom broker has sold securities may give rise to inference that broker was agent of principal. *Haskin v. Langdon* 535
16. The doctrine of agent's ostensible authority can be invoked only by those dealing with the agent on the faith of such authority. *Haskin v. Langdon* 535
17. Mortgagor's leaving with loan broker, who embezzled

funds, money sufficient to pay mortgage bond *held* not payment of mortgage debt, the loan broker not having the bond in his possession nor being authorized by owner to collect. *Haskin v. Langdon* 535

Property.

1. "Indicia of ownership" is synonymous with circumstantial evidence, and denotes facts which give rise to inferences, rather than inferences themselves, and they only show that a thing may be and not that it has been. *Graham Ice Cream Co. v. Petros* 172
2. A lease for more than one year is not real estate save for purposes of conveyancing. *Paul v. Cameron* 510

Quo Warranto.

1. *Quo warranto*, as used in the constitutional provision conferring on the supreme court original jurisdiction, when directed to an executive state officer, is a civil proceeding to try his right or title to office, not to test the legality of his official acts. *State, ex rel. Good, v. Conklin* 417
2. An eligible, duly elected and qualified executive state officer is not removable by *quo warranto* for subsequent alleged felonies of which he has not been convicted. *State, ex rel. Good, v. Conklin* 417

Rape.

1. In a prosecution for rape, prosecutrix need not be corroborated as to the particular act constituting the offense; it being sufficient if she be corroborated as to material circumstances from which, together with her testimony, the inference of guilt may be drawn. *Mayo v. State* 227
2. In a prosecution for rape, corroboration of prosecutrix may consist of circumstantial evidence. *Mayo v. State* 227
3. In the prosecution for rape, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence. *Mayo v. State* 227
4. In a prosecution for statutory rape, evidence of like criminal acts occurring shortly before or after the act charged is admissible to explain the act charged or corroborate prosecutrix' testimony. *Smith v. State* 776

Sales.

1. Evidence in action to recover money due on contract *held* to sustain judgment for defendants. *Smith Co. v. VanAckeren Bros.* 129

2. Generally, a thief cannot acquire title to stolen property and title cannot be acquired through another's theft. *State, ex rel. Sorensen, v. Nebraska State Savings Bank* 262

Schools and School Districts.

1. Unless the school board orders the county treasurer to pay school bonds out of a sinking fund in his hands, the county is not liable for interest accruing on the bonds. *School District v. Harlan County* 4
2. Interest received by a county treasurer from a depository bank on a sinking fund in his custody for the purpose of paying school district bonds is money of the county and must be credited to the county general fund. *School District v. Harlan County* 4

Set-off and Counterclaim.

1. "Set-off" implies demands between same persons in same capacity at the same time. *Bliss v. Farmers Grain & Stock Co.* 147
2. "Set-off" implies demands between the same persons in the same capacity. *Luikart v. Jamieson* 670

Specific Performance.

1. Circumstantial evidence relied on to establish an oral contract to give or devise an interest in property must establish making of contract and its terms clearly, convincingly and satisfactorily. *Goodlett v. Banning* 325
2. Evidence held insufficient to establish existence of an oral contract to give or devise property. *Goodlett v. Banning* 325
3. Specific performance of an obligation not created by the agreement relied on will not be decreed. *Olston v. Woods Bros. Corporation* 462
4. Where the evidence clearly establishes that the minds of contracting parties did not meet on main provision of contract, owing, on one side, to old age, inability to read or write, incapacity to transact business, and absence of independent advice, a court of equity will not enforce performance. *In re Estate of Nelson* 563
5. Specific performance will be denied to applicant who has failed to perform on his part. *In re Estate of Nelson* 563

Statutes. SEE CONSTITUTIONAL LAW.

1. If necessary to give effect to legislative intention, the word "and" in a criminal statute may be substituted for "or" and *vice versa*. *Carlsen v. State* 11
2. Constitutional provision relative to statutory amend-

ment is inapplicable to independent legislation. *State, ex rel. City of Columbus, v. Price* 132
3. Statutes complete as to subject-matter are not amendatory. *State, ex rel. City of Columbus, v. Price* 132
4. If by fair and reasonable construction the title of an act calls attention to the subject-matter thereof, the title is sufficient. *State, ex rel. City of Columbus, v. Price* 132
5. The title of a bill must be specific enough to answer purpose of constitutional requirement. *State, ex rel. City of Columbus, v. Price* 132
6. Title of act authorizing construction of sewers *held* broad enough to include legislation authorizing issuance of mortgage and revenue bonds secured only by property and revenues of sewerage system. *State, ex rel. City of Columbus, v. Price* 132
7. In interpreting a reenacted statute, courts will follow the construction previously placed thereon. *Shandy v. City of Omaha* 406
8. Ch. 156, Laws 1933, pertaining to taxation of corporate stock, intangible property, money in banks, etc., *held* void. *Moeller, McPherrin & Judd v. Smith* 424
9. Where sections constituting inducement to the passage of an act are unconstitutional, the entire act is void. *Moeller, McPherrin & Judd v. Smith* 424
10. The subject-matter of a legislative act must be clearly expressed in the title. *Moeller, McPherrin & Judd v. Smith* 424
11. Amendatory legislation must be germane to the subject of the act amended. *Moeller, McPherrin & Judd v. Smith* 424
12. "Saving clause" defined. *Moeller, McPherrin & Judd v. Smith* 424
13. Where the title states that the subject of an act is to amend one section of a statute, the act cannot amend other sections. *Moeller, McPherrin & Judd v. Smith* 424
14. Where the title states that the subject of an act is to repeal certain sections of a statute, the legislature cannot by such bill amend nor reenact the substance of sections declared repealed in the title. *Moeller, McPherrin & Judd v. Smith* 424
15. Statute adopting common law of England did not include adoption of the statutory law of England, nor common law as modified by statute. *Brooks v. Kimball County* 645
16. Where a statute creates a right, conditions imposed must be fully complied with. *Park v. School District* 767

17. Constitutional provisions relating to amendment of statutes should receive reasonable and liberal construction with a view to upholding legislative acts. *State, ex rel. Kaspar, v. Lehmkuhl* 812
18. A legislative act complete in itself is not within the constitutional provisions relating to amendment of statutes. *State, ex rel. Kaspar, v. Lehmkuhl* 812
19. Legislative acts, sections and severable parts of sections may be eliminated by a later independent repealing act covering the entire subject of the new enactment. *State, ex rel. Kaspar, v. Lehmkuhl* 812
20. The title of a legislative bill may be broader than the body of the act. *State, ex rel. Kaspar, v. Lehmkuhl* 812
21. An independent act covering the entire subject of legislation may change or repeal former enactments in conflict with new provisions. *State, ex rel. Kaspar, v. Lehmkuhl* 812

Subrogation.

Holders of bonds secured by one mortgage, which bonds had been paid to a defaulting agent of such holders, are not entitled to be subrogated to the interests of the agent in bonds secured by another mortgage, as against the trustee in bankruptcy of such agent, but can only share with other creditors. *Tjaden v. Smith* 119

Taxation.

1. Classifications for taxation purposes must be based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. *Moeller, McPherrin & Judd v. Smith* 424
2. A county treasurer accepting payment to redeem land from tax sale to an individual acts as trustee for the holder of the tax sale certificate which evidences former payment of taxes to the county. *Keenan v. McClure* 466
3. Money paid to a county treasurer to redeem land from tax sale to an individual purchaser belongs to the purchaser. *Keenan v. McClure* 466
4. A county treasurer accepting a check to redeem land from a tax sale must exercise reasonable diligence in presenting the check for payment. *Keenan v. McClure* 466
5. Negligence of county treasurer in presenting check received to redeem land from tax sale for payment could not be avoided by reinstatement of tax lien, and reinstatement could be canceled in equity. *Keenan v. McClure* 466

6. Tax provisions of state Constitution are limitations on the taxing power of the state. *State v. Cheyenne County* 619
7. The taxing power vested in the legislature is without limit, except limitations fixed by the Constitution. *State v. Cheyenne County* 619
8. Constitutional limitations on the taxing power cannot be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language. *State v. Cheyenne County* 619
9. Constitutional tax provisions should be given fair, reasonable interpretation to ascertain the true intent as to their scope, and then should be strictly applied. *State v. Cheyenne County* 619

Telegraphs and Telephones.

Telephone company *held* under no duty to warn an experienced lineman of dangers incident to his work. *Hines v. Martel Telephone Co* 398

Trial. SEE APPEAL. CONSTITUTIONAL LAW.

1. Instruction on comparative negligence approved. *Patterson v. Kerr* 73
2. Objection to question is properly overruled unless the objection is good as against the entire question. *Powerine Co. v. Grimm Stamp & Badge Co* 165
3. The trial court need not give instructions in the form requested; it being sufficient if the court correctly instructs the jury on all the issues. *Campbell v. Slater* 231
4. The trial court should refuse an instruction which details and emphasizes evidence of one of the parties. *Campbell v. Slater* 231
5. The trial court should refuse an instruction inapplicable to any issue in the case. *Campbell v. Slater* 231
6. Where there is any testimony which will sustain a finding for the party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *Pinches v. Village of Dickens* 239
Beemer v. Hager 287
7. It is the court's duty to give instructions on issues presented by the pleadings, without request. *Spittler v. Callan* 331
8. Where each party moves for a directed verdict at close of plaintiff's evidence, the court is not required to decide the issues of fact, if in its judgment a full trial will better serve the interests of justice. *Liermann v. Lewerenz* 414
9. Harmless error in instructions *held* not to require re-

versal. *Interstate Airlines, Inc., v. Arnold* 665
10. The trial court must properly submit to the jury issues presented by the pleadings and evidence, though not requested to do so. *Derr v. Gunnell* 708
11. An instruction to which no exception is noted may be reviewed on appeal. *Derr v. Gunnell* 708
12. Request for court to state its conclusions of fact and of law separately is effective if made within a reasonable time before action is required thereon. *Henley v. Live Stock Nat. Bank* 857
13. Failure to call back trial judge momentarily absent from bench may amount to waiver of misconduct of opposing counsel. *Rogers v. Penney Co* 885
14. Instructions must be read and construed together. *Rogers v. Penney Co* 885

Trusts.

In a suit by beneficiary for specific performance and foreclosure of mortgage, evidence held to sustain finding against beneficiary. *Comstock v. Reed* 752

Usuary.

Evidence *held* insufficient to show that plaintiff finance company purchased note in suit with knowledge of alleged usury. *Fidelity Finance Co. v. Westfall* 56

Vendor and Purchaser.

1. Evidence *held* insufficient to sustain judgment for damages for alleged shortage in land purchased. *O'Shea v. Hampton* 60
2. Purchaser *held* not entitled to rescission because of contingent claim against estate of deceased who had devised the property to vendor. *Landgren v. Bolton* 297
3. Misrepresentation of value or condition of realty to be remedial must have been made under such circumstances that the injured party had a right to rely thereon. *Musgrove v. Eskilsen* 730

Waters.

1. Acquisition of right by prescription to divert and use water *held* not to create reciprocal right to compel continuance of such diversion for benefit of lower landowner. *Mitchell Drainage District v. Farmers Irrigation District* 484
2. An irrigation district acquiring right by prescription to divert water from a watercourse *held* not precluded by acquiescence, dedication, or estoppel, from carrying water from such watercourse through its irrigation ditch into

ditch of drainage district. *Mitchell Drainage District v. Farmers Irrigation District* 484
3. Lower landowners improving their property in reliance on artificial condition created by diversion and use of waters by upper owner acquire no reciprocal right to continuance of such diversion. *Mitchell Drainage District v. Farmers Irrigation District* 484
4. Irrigation district may discontinue diversion of waters at any time and restore them to their original course, provided its action was not capricious, wanton, or irrational. *Mitchell Drainage District v. Farmers Irrigation District* 484

Wills.

A written agreement by a hospital inmate to leave all her property to the hospital *held* without consideration, where she had previously paid for her life maintenance in the hospital. *In re Estate of Nelson* 563

Witnesses.

1. Evidence of previous conviction of felony may be considered only as affecting credibility of witness, and record of prior conviction is the only competent proof thereof. *Mortensen v. State* 446
2. Maker's wife *held* competent witness in action on note by administrator of payee against maker. *Wilkins v. Skoglund* 589
3. Evidence showing interest of witness in litigation is admissible. *Interstate Airlines, Inc., v. Arnold* 665
4. In proceeding to establish a claim against an estate, deceased's attorney is incompetent to testify to conversation with deceased. *Tyler v. Estate of McDougal* 681
5. It is within the trial court's discretion to allow or refuse an answer to a question in narrative form. *Young v. State* 719
6. Testimony as to reputation of state's witness is properly excluded where legal foundation has not been laid for its reception. *Lorimer v. State* 758
7. Whether legal foundation has been laid for reception of character evidence is within trial court's discretion. *Lorimer v. State* 758
8. In a suit to establish a trust against an estate, plaintiff's wife *held* competent to testify to transactions and conversations with deceased. *Bratt v. Wishart* 836
9. In a suit against an estate, plaintiff *held* incompetent to testify to transactions or conversations with deceased. *Bratt v. Wishart* 836